Committee for Justice

Report on the Justice Bill (NIA 37/11-15) Volume 3

Together with the Minutes of Proceedings, Minutes of Evidence, Written Submissions and Other Memoranda and Papers relating to the Report

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Mandate 2011/16

Seventh Report - NIA 240/11-16

Powers and Membership

Powers

The Committee for Justice 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 Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Justice 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;
- consider relevant subordinate legislation and take the Committee stage of primary legislation;
- call for persons and papers;
- initiate inquires and make reports; and
- consider and advise on any matters brought to the Committee by the Minister of Justice.

Membership

The Committee has 11 members including a Chairperson and Deputy Chairperson and a quorum of 5.

The membership of the Committee during the current mandate has been as follows:

Mr Alastair Ross (Chairman) [1]
Mr Raymond McCartney (Deputy Chairman)
Mr Stewart Dickson
Mr Sammy Douglas[2,3,4]
Mr Tom Elliott[5]
Mr Paul Frew[6]
Mr Chris Hazzard[7,8]
Mr Séan Lynch
Mr Alban Maginness
Mr Patsy McGlone[9]
Mr Edwin Poots[2,10]

1 With effect from 10 December 2014 Mr Alastair Ross replaced Mr Paul Givan as Chairman.
2 With effect from 1 October 2012 Mr William Humphrey and Mr Alex Easton replaced Mr Peter Weir and Mr Sydney Anderson.
3 With effect from 16 September 2013 Mr Sydney Anderson replaced Mr Alex Easton.
4 With effect from 6 October 2014 Mr Sammy Douglas replaced Mr Sydney Anderson.
5 With effect from 23 April 2012 Mr Tom Elliott replaced Mr Basil McCrea.
6 With effect from 6 October 2014 Mr Paul Frew replaced Mr Jim Wells.
7 With effect from 10 September 2012 Ms Rosaleen McCorley replaced Ms Jennifer McCann.
8 With effect from 6 October 2014 Mr Chris Hazzard replaced Ms Rosaleen McCorley.
9 With effect from 23 April 2012 Mr Patsy McGlone replaced Mr Colum Eastwood.
10 With effect from 6 October 2014 Mr Edwin Poots replaced Mr William Humphrey.

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List of abbreviations and acronyms used in the report

AG	Attorney General
AOABH	Assault Occasioning Actual Bodily Harm
APIL	Association of Personal Injury Lawyers
CLC	Children's Law Centre
CRO	Criminal Records Office
DHSSPS	Department of Health, Social Services and Public Safety
DBS	Disclosure and Barring Service
DE	Department of Education
DoJ	Department of Justice
DPA	Data Protection Act
DVPO	Domestic Violence Prevention Order
ESR	Examiner of Statutory Rules
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EQIA	Equality Impact Assessment
FSNI	Forensic Science Northern Ireland
HSCB	Health and Social Care Board
ICO	Information Commissioner's Office
JJC	Juvenile Justice Centre
LCJ	Lord Chief Justice
LSC	Northern Ireland Legal Services Commission
NDPB	Non Departmental Public Body
NICS	Northern Ireland Civil Service
NIACRO	Northern Ireland Association for the Care and Resettlement of Offenders
NICTS	Northern Ireland Courts and Tribunals Service
NIHRC	Northern Ireland Human Rights Commission
NIO	Northern Ireland Office
NIPB	Northern Ireland Policing Board
NSPCC	National Society for the Protection of Cruelty to Children
PPS	Public Prosecution Service
RPA	Review of Public Administration

RQIA	Regulation and Quality Improvement Authority
SAO	Supervised Activity Order
SCS	Senior Civil Service
SOPO	Sexual Offences Prevention Order
UNCRC	United Nations Convention on the Rights of the Child
VOO	Violent Offences Order
VOPO	Violent Offences Prevention Order

Appendix 5

Correspondence relating to the Attorney General's Proposed Amendment to the Coroners Act (Northern Ireland) 1959

Contents

Correspondence from the Attorney General proposing an amendment to the Legal Aid and Coroners' Courts Bill

Attorney General
for Northern Ireland

Mr Paul Givan MLA
Chairman
Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

Our Ref: 18/05/14/001

Date: March 5 2014

Dear Chairman

Legal Aid and Coroners' Courts Bill

I understand that the Justice Minister intends to introduce the above Bill. This is a fairly short Bill, and only a small part of it deals with amendments to the Coroners Act (Northern Ireland) 1959. As you know, I have a power under this Act to direct an inquest where I consider it 'advisable' to do so. It is in this context that I draw the Committee's attention to a potential amendment to the 1959 Act (to be achieved through amending the above Bill) which could be of considerable benefit to the public.

As the Committee may know, while I can direct an inquest under section 14 (1) of the Coroners Act when I consider it 'advisable' to do so I have no power to obtain papers or information that may be relevant to the exercise of that power.

In recent years, I have had some difficulty in securing access to documents, such as serious adverse incident report forms, which I have needed from Health and Social Care Trusts. As there is no specific legal duty on Trusts to disclose what would otherwise be confidential material, it is understandable that there is some nervousness on the part of the Trusts' lawyers in sharing such materials with me.

An amendment to the 1959 Act could confer a power on the Attorney General to obtain papers. This would provide a clear statutory basis for disclosure. It could be drafted perhaps along the following lines:

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"X(1) The Attorney General may for the purposes of consideration of whether or not to direct an inquest under section 14 (1) require any person who in his opinion is able to provide information or produce documents relevant to his consideration to provide any such information or produce any such documents.

(2) A person may not be compelled for the purposes of subsection (1) to provide any information or produce any document which that person could not be compelled to provide or produce in civil proceedings in the High Court.

(3) Where any information or document required to be provided or produced under this section consists of, or includes, information held by means of a computer or in any other form, the Attorney may require any person having charge of, or otherwise connected with the operation of, the computer or other device holding that information to make the information available, or produce the information, in legible form.

(4)Every person who fails without reasonable excuse to comply with a requirement under subsections (1) or (3) shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

I do hope that you can consider this at the committee stage of the Bill. I am, of course, available to speak to the Committee should that be of assistance.

The focus of my concern is principally with deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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Correspondence from the Attorney General providing an amended text for his proposed amendment

Attorney General for Northern Ireland

Ms Christine Darrah
Clerk to the Justice Committee
Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

Our Ref: 18/05/14/001

Date: 30 April 2014

Dear Christine

Legal Aid and Coroners' Courts Bill

Thank you for your letter of 4 April seeking views on the above Bill and the Attorney's proposed amendment. Having reflected further on the draft amendment, the Attorney would suggest that the Committee, if it is in agreement with the substance of the proposal, adopt an amended text.

The main change, as can be seen from the new text below, is to clearly provide a statutory basis for disclosure to the Attorney of papers relating to deaths, for example, in a hospital over a certain period so that he can then consider whether he should exercise his section 14 (1) power to direct an inquest in any particular case. The text proposed initially could have been interpreted as only applying to papers relating to a specific death of which the Attorney was already aware. The second change is designed to restrict the scope of the power to information or documents which relate to the health or social care provided to the deceased. Finally, this text adopts a more modern drafting approach to information held electronically.

The Attorney's proposed amendment now reads as follows (drafted as an insertion into the Coroners Act (Northern Ireland) 1959:

Provision of information to Attorney General for purposes of section 14

14A.—(1) The Attorney General may, by notice in writing to any person who has provided health care or social care to a deceased person, require that person to produce any document or give any other information which in the opinion of the Attorney General may be

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relevant to the question of whether a direction should be given by the Attorney General under section 14.

2) A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings in the High Court.

(3) In this section—

"document" includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in a legible form;

(4) A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

If the Committee wish to discuss any aspect of this proposed clause or the Bill as a whole with the Attorney then please do not hesitate to contact me.

Yours sincerely

Maura McCallion
Division Head

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Correspondence from the Attorney General in response to the call for evidence on the Justice Bill

Attorney General for Northern Ireland

Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX

Our Ref: 18/05/13/012

Date: September 16 2014

Dear Ms Darrah,

Justice Bill

Thank you for sending me the draft Justice Bill following its initial consideration by the Committee. I offer some comments below but am, of course, happy to deal with any specific issue that the Committee might later wish to raise with me.

Proposed amendment to the Coroners Act (Northern Ireland) 1959

By letter dated 5 March 2014, during the passage of the Legal Aid and Coroners Courts Bill I asked the Committee to give consideration to a potential amendment to the Coroners Act (Northern Ireland) 1959 ('the 1959 Act') which I considered would be of material benefit to the public.

My proposed amendment (drafted as an insertion into the 1959 Act) reads as follows:

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"Provision of information to Attorney General for purposes of section 14

14A.-(1) The Attorney General may, by notice in writing to any person who has provided health care or social care to a deceased person, require that person to produce any document or give any other information which in the opinion of the Attorney General may be relevant to the question of whether a direction should be given by the Attorney General under section 14.

(2)A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings to the High Court.

(3)In this section-

"document" includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in legible form;

(4)A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale."

Under section 14(1) of the 1959 Act I can direct a coroner to hold an inquest where I consider it is 'advisable' to do so. I do not possess a statutory power to obtain papers or information that may be relevant to the exercise of this power. In recent years I have had some difficulty in securing access to documents from Health and Social Care Trusts ('HSC Trust'), such as

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Serious Adverse Incident ('SAI') report forms, which I have considered relevant to the proper exercise of my discretion. One recent, and high profile, incident involving a particular HSC Trust has served to strengthen my view that a power to obtain relevant material is crucial to the public interest in ensuring a high standard of healthcare and investigation of incidents that result in the death of a patient.

On 30 March 2014 I became aware of media reports concerning the deaths of at least twenty patients, including five babies, occurring between 2008 and 2013, at both Antrim Area and Causeway Hospitals. One report indicated that some of the deaths may have been treated as an SAI and reported to a coroner, but others may not.

I immediately sought information from the Northern HSC Trust concerning each death and on 6 June 2014 I was supplied with material relating to eleven deaths. Of these deaths, six had not been reported to a coroner at the time of death and four were only referred after my request for information. That medical practitioners had not reported these deaths before my intervention, and a considerable time after these deaths, is of very great concern and highlights the importance of my proposed amendment in closing the current information gap.

As you know, the proposed amendment was first considered during the Committee Stage of the Legal Aid and Coroners' Courts Bill. It was not thought possible to include the amendment in this Bill as further clarification was required. However, when the Committee took the opportunity of requesting written evidence on my proposed amendment a number of favourable responses were received from a wide variety of consultees including the Health Minister and HSC Trusts.

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Three HSC Trusts (South Eastern, Southern and Northern) responded with a spectrum of degrees of support for the amendment. The Health Minister is also supportive of the amendment, subject to further clarification on a number of discrete matters.

The Law Society indicated that I should have adequate powers in order to provide me with sufficient information to take a decision under section 14(1) and agreed with the proposed amendment. The Association of Personal Injury Lawyers, Castlereagh Borough Council and the Law Centre all agreed that the proposed amendment was necessary to ensure that deaths were investigated effectively.

The Information Commissioner's Office indicated that it would be appropriate to provide a specific statutory power to the Attorney General so that relevant documents could be disclosed.

The Northern Ireland Policing Board sought further clarity regarding the remit of the proposed amendment and was concerned about resource implications for the Police Service of Northern Ireland ('PSNI'). I have since written to Mr Jonathan Craig, the Chairman of the Policing Board Performance Committee, on behalf of the Policing Board, assuring him that no additional obligations will be placed on the PSNI as a result of the amendment.

When I gave evidence to the Committee on 28 May 2014 I indicated that the amendment would be confined to deaths that occurred within a health and social care setting and would not affect historic inquests which involved the police or military. This remains the case. Neither do I believe that the amendment will create a burden on the health service and I remain of the view that there is a degree of urgency with the issue that the amendment

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seeks to address, given the circumstances regarding the Northern HSC Trust outlined above.

Rights of audience for lawyers working in Attorney General's Office

In September 2013 I wrote to the Minister for Justice raising an issue which affects the operation of my office and which could usefully be dealt with in the Justice Bill. At present employed barristers and solicitors in my office cannot fully avail of their considerable advocacy skills because they do not have rights of audience in all courts. It would be of very great assistance to me, and would result in substantial savings, if the new Bill contained a clause conferring the rights of audience of barristers in independent practice on any lawyer working in the Office of the Attorney General for Northern Ireland and designated by the Attorney General. At present there are three barristers and five solicitors working in my office so this change will not deprive the Independent Bar of significant amounts of work.

The Minister for Justice wrote to me in August 2014 indicating that the Department of Justice had issued a short preliminary discussion paper to a number of key stakeholders inviting their views. The responses to this paper will be used to inform further consideration of the need for a wider consultation exercise. My view remains that this proposal should apply, at the outset, to the small number of lawyers working in my office and under my direct supervision.

I would be grateful if the Committee would look favourably on this proposal which, as well as having considerable substantive merit, has particular importance in this period of budgetary pressure.

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Proposed Clause 11A – Ending the life of an unborn child.

I have examined clause 11A and am satisfied that it would be within the legislative competence of the Assembly to enact this provision.

Comments on the Justice Bill as introduced

Part 1 Single Jurisdiction

In clause 3, a further safeguard could be added to protect local justice. I note that in clause 4(4) the Lord Chief Justice, in giving a direction, is to have regard to the desirability of a lay magistrate sitting in courts in reasonable proximity to where he or she lives or works. A similar duty to have regard to the benefit of justice being administered locally could be usefully added to clause 3.

Part 3 Prosecutorial Fines

Multiple Offences

Where a person is accused of a number of summary offences arising out of the same circumstances, a prosecutorial fine notice can only be offered in relation to *all* the offences and a person cannot accept a fine for one offence and proceed to trial on others (clause 17(2)). I understand that this arrangement is to avoid a prosecution for an offence being hampered by the suggested inability to refer at trial to the evidence relating to a separate offence, arising out of the same circumstances, for which a fine has been accepted. There may be some concern about a person being unduly pressured to accepting responsibility for one of the offences which they would otherwise have defended given the certainty of avoiding a conviction

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via a prosecutorial fine. There is no reason in principle why provision cannot be made to enable relevant evidence to be used despite the acceptance of a prosecutorial fine, if the person is to be prosecuted for an offence arising out of the same circumstances.

Part 4 Victims and Witnesses

Clauses 28(7) and 30(6) exclude judges and members of the prosecution service (in the exercise of a discretion) from any obligations under the Victim or Witness Charter. It seems to me that an obligation, for example, to treat a victim with courtesy, dignity and respect would not in any way impinge on judicial independence – and could be viewed as strengthening support for it. Further, it seems to me that the obligations in Article 1 of the Victims' Directive must apply to judges and prosecutors.

Part 7 – Violent Offences Prevention Orders

Clauses 51(4) and 53(3) contain retrospective provisions regarding the making of VOPO's when the offence was committed prior to the commencement of the Bill. A VOPO is more likely to constitute a public protection measure than a penalty. In that circumstance, the Committee can be confident that article 7 ECHR is not engaged. The severity of the VOPO prohibitions or requirements can be measured by the sentencing judge to ensure Convention compliance.

Part 8 - Miscellaneous

Avoiding delay in criminal proceedings

In relation to clause 79, rather than providing a power to make regulations outlining a general duty to progress cases, this duty could be placed onto

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the face of the Bill (perhaps as an amended clause 79). The duty might be phrased similarly to Rule 1.1 of the English Criminal Procedure Rules 2013.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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Correspondence from the Attorney General providing additional information in support of his proposed amendment

Attorney General for Northern Ireland

Mr Alastair Ross MLA
Chairman
Committee for Justice
Room 242 Parliament Buildings
Stormont Estate
Ballymiscaw
Belfast BT4 3XX

Our Ref: 18/01/14/032 &
18/05/13/012

23 December 2014

Dear Chairman

Justice Bill 2014 – Proposed amendment to the Coroners Act (Northern Ireland) 1959.

You will be aware that by letter dated 5 March 2014, during the passage of the Legal Aid and Coroners Bill, I asked the Committee to give consideration to a potential amendment to the Coroners Act (Northern Ireland) 1959 ('1959 Act') which I considered would of material benefit to the public. My letter of 16 September 2014 to Ms Darrah contains the proposed text of the amendment. The Committee is currently considering this amendment in the context of the Justice Bill and I am grateful to the Committee for its continued interest in this matter.

Under section 14(1) of the 1959 Act I can direct a coroner to hold an inquest where I consider it is 'advisable' to do so. I do not possess a statutory power to obtain papers or information that may be relevant to the exercise of this power. In recent years I have had some difficulty in securing access to documents from Health and Social Care Trusts ('HSC Trust'), such as Serious Adverse Incident ('SAI') report forms which I have considered relevant to the proper exercise of my

discretion. In two recent, and high profile, incidents I was able to secure documents relating to delay in treatment in the Royal Victoria Hospital Emergency Department and concerning the deaths of a number of babies and adults in Causeway and Antrim Hospitals. In a number of these cases medical practitioners had not reported the deaths to a coroner. These two cases caused me very real concern and strengthened my view that a power to obtain relevant material is crucial to the public interest in ensuring a high standard of healthcare and investigation of incidents that result in the death of a patient.

In June 2014 I was made aware that a death had occurred during February 2014 in the Urology Department of the Belfast City Hospital. This death had occurred as a result of a cystectomy and, although the coroner was informed and an Incident Reporting ('IR') form had been completed, the death had not warranted a Serious Adverse Incident inquiry, despite this death being the first death within 30 days following cystectomy in the Urology Department in over ten years.

On 7 July 2014, for the purpose of deciding whether to exercise my discretion under section 14(1) of the 1959 Act to direct a coroner to hold an inquest, I corresponded with the relevant HSC Trust and requested details on this death to include the IR form, materials relating to internal HSC Trust investigations and specific details of any involvement of the Coroners Service and details of the information that was provided to the coroner. It would, you will agree, be a matter of concern if the coroner was given an incomplete picture about such a serious matter.

After some delay my colleague received a letter, a copy of which is enclosed, from the Chief Legal Adviser to the Trust questioning the legal basis for obtaining this information. The Committee may well think, as I do, that this response further emphasises the need for an amendment dealing with this issue.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

By E Mail Only

Mr Joseph McCrisken BL
Principal Legal Office
Office of the Attorney General for NI

Date:	Our Ref:	Your ref:
23 December 2014	CNG B101/17	18/01/14/032

Dear Sir

REPORTED DEATH FROM CYSTECTOMY SURGERY

I refer to the above matter and to an email from Julian Johnston, Belfast Health and Social Care Trust dated 27th November 2014.

The Trust has instructed me to write to you. I understand you are seeking access to certain Trust documents relating to the Serious Adverse Investigation. I should be grateful if you would provide me with your legal authority for accessing same.

I await hearing from you.

Yours faithfully

ALPHY MAGINNESS
Chief Legal Adviser

Direct Line 028 9536 3585
E-mail Address – alphy.maginness@hscni.net

jjohnson

Correspondence from the Attorney General providing information in advance of his oral evidence on the proposed amendment on 4 February 2015

Attorney General for Northern Ireland

Mr Alastair Ross MLA
Chairman
Committee for Justice
Parliament Buildings
Stormont
BT4 3XX

Our Ref: 18/05/13/012

Date: February 02 2015

Dear Chairman

Justice Committee meeting 4 February 2015

Thank you for your invitation to speak to the Committee on 4 February. On the matter of the proposed amendment to establish a clear basis upon which I can obtain information to assist in the exercise of my function in relation to inquests (on which the Committee has heard from both the Health and Social Care Board and the DHSSPS in recent weeks) I thought it might be helpful, in advance of the meeting, if I commented on some of the key points raised. I will also respond in this letter to the issues highlighted in the responses to the preliminary discussion paper on extension of rights of audience to lawyers in this office. While I understand that you wish to explore aspects of the Bill and the other proposed amendments, what follows addresses only the two issues noted above. I will, of course, be very happy to assist you on any matter arising from the Bill on Wednesday.

Proposed amendment to the Coroners Act (NI) 1959

An inquest is designed in our legal system to be a transparent and accessible way of discovering how death has occurred. It has much in common, in that regard, with the serious adverse incident process. As a

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coroner cannot offer any opinion on questions of civil or criminal liability, it is important therefore not to equate the disclosure of information to the Attorney General necessarily as a step towards apportioning blame or determining culpability. If information points towards culpability, particularly criminal culpability, then no one should shrink from acting on that information but I see the proposed amendment primarily as a tool to increase transparent and public knowledge. Here I am conscious of what was said recently by Sir Liam Donaldson in his report on the quality of care in Northern Ireland when he referred to the 'overwhelming evidence that a climate of fear and retribution will cause deaths not prevent them' [p27]

The Donaldson report is of relevance in many ways. While noting that the phenomenon is not particular to Northern Ireland, his view is that,
'patients are dying and suffering injuries and disabilities from poorly designed and executed care on a scale that would be totally unacceptable in any other high risk industry' [p.33].

The proposed amendment seeks to ensure that one of the safeguards in place, the Attorney General's power to direct an inquest, can be improved. We are, rightly, more concerned now with statutory authority for disclosure of information than we might have been in 1959. A clear statutory basis for the processing of relevant information does not alter the scope of the power to direct but it does place the gathering of the relevant information on a firm statutory footing.

I note that the Donaldson report picks up on the role that families can play when a death occurs:

> 'the judgments of clinicians and coroners' officers alike have a substantial bearing on which cases proceed to inquest. The subset of cases that end up in front of a coroner's inquest are also determined as much by family's wishes as by the content of the cases.' [p29]

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You will remember that I highlighted my concern about how we learn from deaths when the deceased did not have surviving friends or family. Self evidently those who die without interested friends or family may not have concerns, including well founded concerns, expressed on their behalf. The proposed amendment could help close this public safety gap.

Contrary to the misapprehension of the Board, the statutory power to direct an inquest is not limited to cases on which a coroner has already been informed of the death or has made a decision about whether or not to hold an inquest. My function is not limited to reviewing the decisions of a coroner or enabling a fresh inquest where new evidence comes to light. I am able to direct an inquest where there has been a decision not to notify the coroner. A coroner, in contrast, has no statutory power to 'call in' a death where the death is not referred to him. He will, of course, become involved if I make a direction and any material which is made available to me, is, in turn, made available by me to the coroner.

It can be seen, therefore, that it would not be sufficient to rely, as the Board suggests, on a request from me to the coroner to share the documents received by him in order to inform my decision on whether or not to direct. This suggestion does not (1) cover those cases which are not referred to the coroner and (2) does not, more generally, deal with the absence of any legal requirement on the coroner to share material with me.

I appreciate that the criminal law by section 10 (1) of the Coroners Act (NI) 1959 imposes a sanction for failure to comply with the section 7 obligation to report certain deaths to the coroner and that the duty to refer has been brought to the attention of practitioners. Nevertheless, the impetus still remains with those closely associated with the circumstances of the potential malpractice or negligence. I am pleased that the 'look back study' commissioned by the former Minister to review emergency department serious adverse incidents revealed that deaths were being referred to the coroner in line with the statutory duty. I do maintain however that there will be, hopefully isolated, cases which are neither recorded as serious adverse

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incidents nor referred to the coroner. If a death in such circumstances is drawn to my attention, I need to be able to access information in order to carry out my statutory function in the public interest.

Perhaps paradoxically, the Board suggests that I may be able to direct an inquest without obtaining information. While it is true that the threshold of advisability is low, it would not be right to burden the coronial system with unnecessary inquests. If an independent Attorney General decides, and explains, why he has not directed an inquest, family members and other interested parties will have the reassurance that the decision took place on a properly informed basis – provided I am able to access relevant material. A decision of this nature is of benefit to family members, clinicians and the much-burdened coronial system.

In terms of the scope of relevant material, the Committee heard evidence from the Board that even with this proposed amendment it would not consider a Trust to be under an obligation to disclose to the Attorney General an expert report similar to that produced by Dr Warde at the time of the inquest into the death of Raychel Ferguson. I understand that the coroner considered that the report should have been disclosed to him. If, as I believe, the coroner was correct in that view then such a report would fall within the terms of the proposed amendment. Indeed, even if the Trust was not bound to disclose it, the report would still come within the terms of the amendment unless protected by legal professional privilege. In general terms, if a report is prepared for legal proceedings then it would, quite properly, fall outside the proposed amendment.

Rights of audience

Extending rights of audience to the small number of lawyers in my office would represent increased value for money, while preserving and, on occasion enhancing quality, without risk to the independent Bar. The lawyers who assist me are familiar with the legal issues in advance of a case coming to court. It makes no economic sense to have them instruct junior

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counsel to spend additional time reading papers and attending court when the real expertise may already be being paid for through lawyers in this office. In short, public funds would be much better spent if the role of junior counsel is undertaken in appropriate cases by my employed legal staff who are fully familiar with the issues rather than by external counsel at greater public expense. In advance of the law society regulations being drafted, which would also confer rights generally on employed barristers – albeit indirectly, there would be no harm in rights of audience being extended to a small group of public sector lawyers pending the implementation of the broader change contemplated by the Justice (Northern Ireland) Act 2011.

The working environment in my office is distinct from that elsewhere in government and public sector legal services. In this office lawyers are working on a daily and intensive basis with the senior Law Officer of this jurisdiction who has personal responsibility for the quality of the work produced. In addition to the personal supervision which the scale and nature of this office permits, there is an underpinning of statutory independence which is simply not present in the Departmental Solicitor's Office, the Crown Solicitor's Office or the Directorate of Legal Services.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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Correspondence from the Attorney General providing further clarity on his proposed amendment

Attorney General
for Northern Ireland

Mr Alastair Ross MLA
Chairman
Committee for Justice
Room 242 Parliament Buildings
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Belfast BT4 3XX

Our Ref: 18/05/13/012

Date: March 10 2015

Dear Chairman,

Re : Justice Bill 2014-Proposed Amendment to the Coroners Act (Northern Ireland) 1959

I refer to my letter dated 23 December 2014 and to my subsequent appearance before the Justice Committee. As you will recall I asked the Committee to consider an amendment to the Bill which would provide the Attorney General with a power to require health or social care providers to produce documentation or to provide information relevant to a decision whether or not to exercise the power to direct an inquest pursuant to section 14 of the Coroners Act (Northern Ireland) 1959. I understand that the response of the Health and Social Care Board was that the amendment was unnecessary and that the present system was sufficiently robust to ensure that the interests of justice would be properly served.

In my letter I referred to the fact that my request for access to Trust documentation in one particular case was met with a request to know my legal authority for accessing the documents in question. As you will be aware, it is my view that, in the event of meeting a refusal to provide such documentation, I have no legal power to access such documents and information, no matter how relevant they may be to the exercise of my statutory power under section 14.

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It has recently come to my attention that I am not alone in having encountered difficulties in obtaining documentation from health care providers which is necessary for the exercise of a statutory duty. I have recently become aware of evidence given to the Coroners Court by a PSNI officer in the inquest relating to the death of Sean Paul Carnahan in July 2013 which indicates that the police had encountered similar difficulties. It was reported in the Belfast Telegraph on 18 February 2015 that a police officer giving evidence before the coroner in that case told the court at a preliminary hearing that "*inquiries were being stifled because the Belfast Health and Social Care Trust had repeatedly refused to provide important papers including patient medical records.*" In that case it was reported that the Senior Coroner Mr Leckey made an order that the Trust provide documentation, including medical records to the PSNI, Coroners Service and the legal representatives of the next of kin.

I think that this case focuses attention on the lacuna in the law which the proposed amendment is intended to fill. In the Carnahan case, because the inquest was before the court, the PSNI had available to them a remedy for the alleged failure to provide the documentation in question. The Coroner was able to make an order that the documents/information be produced. Where no inquest is before a coroner, no such remedy exists. The suggestion that the remedy is to order an inquest is an impractical one and would lead to inquests being directed in circumstances where the simple provision of information might well have satisfied me that no such direction would be necessary. Needless to say, to add to the pressure upon the Coroners Service by directing inquests simply as a means to obtain documentation which could easily have been provided at an earlier stage, is not a procedure which anyone would consider to be in the public interest.

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An extract from the Department of Justice response to the written and oral evidence on the Attorney General's Proposed Amendment

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Our ref SUB/649/2014

From: **Tim Logan**

Date: 22 **May 2014**

To: **Christine Darrah**

Summary

Business Area:	**Public Legal Services Division**
Issue:	**Justice Committee consultation on the Legal Aid and Coroners' Courts Bill**
Restrictions:	**None**
Action Required:	**For consideration**
Officials Attending:	**Mark McGuckin, Deputy Director, Public Legal Services Division** **Siobhan Broderick, Deputy Director, Civil Justice Policy Division** **Carol Graham, Bill Manager, PLSD** **Padraig Cullen, PLSD**

BACKGROUND

The Legal Aid and Coroners' Courts Bill is currently with the Justice Committee for scrutiny as part of the Bill's passage through the Assembly. The Committee has recently consulted on the Bill, receiving both written and oral evidence. The Committee requested the Department's views on the summary of the issues raised and an updated version taking account of the oral evidence is attached at Annex A. The Department's officials have also been invited to attend the Committee meeting on 28 May 2014 to provide further comment on both the clauses in the Bill and on the issues arising from the Committee's consultation.

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DISCUSSION

The Department has noted, from both the written responses to the consultation and from the oral evidence session in the Long Gallery on 14 May 2014, that the main issues of concern with dissolving the Northern Ireland Legal Services Commission and the setting up of a new Agency within the Department are around: (a) the operational independence and professional qualifications / experience of the Director of Legal Aid Casework, and (b) the new independent Appeal Panels. The views expressed in relation to the Attorney General's proposed amendment have also been noted.

In preparation for meeting the Committee on 28 May 2014 the Department has set out below further information on the key issues raised.

OVERVIEW

The current position is that the Bill envisages that the Director will be (or, potentially, will become) a civil servant who will be designated to undertake a number of statutory functions. The functions will be set out in both primary and secondary legislation and relate, centrally, to the award of funding by way of civil legal services. In undertaking these functions, the Director will be applying the relevant primary / secondary legislation – in broadly the same manner as the Northern Ireland Legal Services Commission under the current scheme. Crucially, the Director will also attract the protections in the Bill. These include that the Department can issue guidance and directions about the carrying out of the Director's functions, but not in respect of individual cases. Indeed, the Department is under an obligation to ensure that the Director acts independently when applying a direction or guidance in relation to an individual case. When the Director refuses an application for funding, or further funding, there is provision in the Bill for an appeal to independent Appeal Panel.

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DIRECTOR OF LEGAL AID CASEWORK

Some consultees expressed the view that the Director of Legal Aid Casework should be legally qualified. As is currently the case with the NILSC, the Director will have access to independent legal advice if, and when, required and will receive all the necessary training to effectively discharge the functions. Consequently, we do not believe that it is essential that the Director is legally qualified.

The intention to designate a civil servant as the Director was also challenged with the suggestion that the post should be filled by a public appointment. Public appointments do not normally apply to Departments or their Executive Agencies but to appointments made to a public body listed in the Commissioner for Public Appointments (Northern Ireland) Order. The Director will be protected by the safeguards set out in the legislation and the designation of his or her role.

SAFEGUARDS INCLUDED IN THE BILL

There is a range of safeguards which the Department has already built into the Bill, most of which were specifically designed to address concerns that the Department anticipated and / or were expressed during our initial consultation in February 2013 (see Annex B). Key among these is the mandatory requirement for independent Appeal Panels, which the Department developed in response to the comments in England and Wales when the Legal Aid, Sentencing and Punishment of Offenders Bill was being brought forward, and which we have enhanced following the comments received during our earlier consultation. In particular, the Joint Human Rights Committee expressed concern about the independence of the Director of Legal Aid Casework in the absence of a right of appeal to an independent appeals body.

The Appeals Panel mechanism we have developed will be entirely independent and will be entirely free from any possible suggestion of undue influence. In addition, there will be the option of judicial review if funding (or further funding) is still refused in a specific case.

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The contribution that the Appeal Panels can make to the independence of the overall scheme should not be understated, not least since it has been specifically designed to address in Northern Ireland the concerns which had been expressed elsewhere and goes directly to the concerns of the Human Rights Committee, which are now being quoted by some consultees, but without recognition that the Department has addressed the key issues.

The Department has also noted and responded to the concerns expressed about the panel not being made up of lawyers. The intention is that the Appeal Panels will consist of three people and the Presiding Officer will be a lawyer. We expect that the members of the panels will be drawn from the legal profession, but with the option of including suitably qualified lay persons which will introduce a multidisciplinary approach to decision making thereby strengthening the process.

As currently drafted, the Bill provides a series of safeguards which, in combination, should provide a very high level of reassurance as to the actual (and perceived) operational independence of the Director. Briefly listed, these are as follows:

(1) the office holder will be formally designated as such by the Department, in a transparent fashion – clause 2(1)

(2) the Department must not give a direction or guidance about the carrying out of the Director's functions in relation to an individual case – clause 3(2)(a)

(3) the Department must ensure that the Director acts independently of the Department when applying a direction or guidance in relation to an individual case – clause 3(2)(b)

(4) any directions or guidance given under section 3 must be published – clause 3(3)

(5) there will be a statutory mechanism providing for the right of appeal to an independent appeal panel[1] on applications for *civil legal services* funding – clause 6, with paragraph 6(22) of Schedule 2

[1] It is proposed that the appeal panel members will be appointed through a public appointments process

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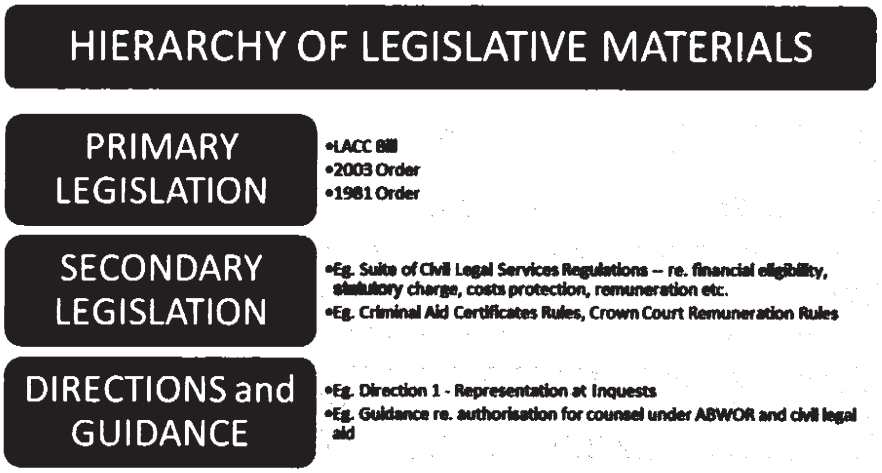
(6) the Director must prepare an annual report stating how he has carried out his functions, which will be laid before the Assembly and published – clause 5.

POTENTIAL IMPACT OF DIRECTIONS AND GUIDANCE

It is also important to address the issue of the potential impact of directions and guidance, where some misunderstanding may have arisen.



Firstly, it must be emphasised that any direction or guidance issued by the Department cannot override the provisions of the relevant legislation (primary or secondary). Secondly, the requirement to follow directions and guidance issued by the Minister already exists and can be illustrated by two examples.

The first relates to the award of exceptional grant funding for inquests where the Lord Chancellor issued a direction under Article 10A(1) of the 1981 Order requiring the Commission to fund the representation of the immediate family of the deceased at an inquest into a death occurring in police or prison custody or during the course of police arrest / shooting etc. That direction has remained in operation post-devolution.

A more recent and local example, is the guidance which has recently been issued to the Commission in respect of the authorisation of counsel under Assistance by Way

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of Representation (ABWOR) and civil legal aid. This sets out the expectation that the Minister has concerning the appropriate level of representation at each court tier in, for example, private law family cases. The focus of the guidance is to ensure that representation is available as required, but that it is set at the most appropriate level. The guidance sets the expectation but does not in any way fetter the independence of the decision-maker in any specific case, and provision for exceptionality is built in. The guidance on levels of representation was subject to extensive consultation and detailed scrutiny by the Justice Committee.

Article 12(5) of the 2003 Order, together with Schedule 2 to the Order, prescribes the services which the Director of Legal Aid Casework may not fund as *civil legal services*. Article 12(6) of the Order provides that regulations may amend Schedule 2 by adding new services or omitting or varying any of the services listed. Furthermore, Article 46(5) of the 2003 Order provides that any regulations made under Article 12(6) are subject to Assembly control by way of the draft affirmative procedure. Accordingly, it would not be possible for the Department to give a direction or guidance to the Director of Legal Aid Casework regarding the scope of cases which may be funded by way of legal aid – that is, adding new services or omitting or varying the services listed in Schedule 2 to the 2003 Order.

ATTORNEY GENERAL'S AMENDMENT

The Attorney had raised the question of an amendment with the Department earlier this year, when preparation for the Bill's introduction was at an advanced stage. We had responded to say that we had no objection to considering his request in principle, but that it would require further consideration, and might be better examined in the context of a wider review of coronial law. We note that the Attorney subsequently wrote to the Committee with his request, and has since submitted an amendment to his original request.

The Committee will be aware that the Department has now given a commitment to review the coronial law as part of the Package of Measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 to help address the issues of

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delay in legacy inquests. We are considering how the review might be taken forward: One option would be to refer the matter to the Law Commission.

Agreeing this approach would facilitate proper consideration of the problems the Attorney has encountered, and the most appropriate solution in the context of coronial law generally.

The Committee may wish to be aware that the proposed amendment may be technically outside the scope of the Bill. The Bill, as regards the coroners' courts, is restricted to providing for the Lord Chief Justice to be the president of the coroners' courts and for the appointment of a Presiding Coroner. This is, however, ultimately a matter for the Speaker.

It is also the Department's view that this request raises cross-cutting issues, particularly for the Department of Health, Social Services and Personal Services, and so is a matter which should be determined by the Executive.

We note the comments in support of the proposal which have been received by the Committee, and the Department agrees that the Attorney should be able to discharge his functions effectively, however, in light of the foregoing, the Department is not convinced that this Bill is the appropriate legislative vehicle for the Attorney's request.

NEXT STEPS

The Department welcomes the opportunity to discuss these issues further with the Justice Committee on 28 May 2014.

Tim Logan

TIM LOGAN
DALO

Correspondence from the Department of Justice outlining the existing statutory framework for the Attorney General's proposed amendment

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Our ref SUB/685/2014

Christine Darrah
Clerk to the Committee for Justice
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4 June 2014

Dear Christine,

The Attorney General briefed members of the Justice Committee on his proposed amendment to the Legal Aid and Coroners' Courts Bill at last week's meeting on 28th May.

This letter is intended to provide the Committee with information in respect of the existing statutory framework to assist in its consideration of the amendment requested by the Attorney General.

Duty to report deaths to the coroner

Section 7 of the Coroners Act (Northern Ireland) 1959 provides a continuing and extensive duty to report deaths to the coroner where it is believed that the death occurred, either directly or indirectly, as a result of:

- violence or misadventure or by unfair means;
- negligence or misconduct or malpractice on the part of others;

- any cause other than natural illness or disease for which he had been seen and treated by a registered medical practitioner within twenty-eight days prior to his death; or
- in such circumstances as may require investigation (including death as the result of the administration of an anaesthetic).

The duty applies to:

- medical practitioners;
- registrars of deaths;
- funeral undertakers;
- occupiers of houses or mobile dwellings; and
- every person in charge of any institution or premises in which a deceased person was residing.

Failure to comply with the duty is an offence under section 10 of the 1959 Act.

In his text book "Coroners' Law and Practice in Northern Ireland", the Senior Coroner illustrates the extensive nature of this duty by reference to a case where a 17 year old girl had died following a severe and sustained asthma attack. An ambulance was called but was delayed, and medical evidence suggested there was a good chance that the girl would not have died if she had arrived at the hospital earlier. Mr Lecky comments that such a death must be reported to a coroner as there would have been reason to believe that the deceased had died at least indirectly from a cause other than natural illness, or that she had died in such circumstances as may require investigation.

Attorney General's Power to Order an Inquest

As the Committee will be aware, the Attorney General for Northern Ireland may direct an inquest under section 14 of the 1959 Act, where he has reason to believe

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this may be advisable, and he now seeks an additional power to require information from health or social care providers when exercising this power.

Under section 24 of the Coroners Act 1962, the position in Ireland is almost identical to the current position here; the coroner may direct an inquest where he has reason to believe that a person died in circumstances which, in his opinion, make the holding of an inquest advisable.

The power of the Attorney General for England and Wales (AGEW) differs slightly, in that, under section 13 of the Coroners Act 1988, the AGEW may apply to the High Court for an order that an inquest (or another inquest) be held.

In neither of those jurisdictions is there a specific ancillary power for the Attorney General to require information. Nor is there an intention to introduce such a power.

I hope the Committee finds this information helpful in its consideration of the proposed amendment by the Attorney General.

TIM LOGAN
DALO

Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment

FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Edwin Poots MLA

Department of
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Mr Paul Givan MLA
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Our Ref: AGY/271/2014

Date: 18 April 2014

Dear Paul

THE LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 4 April 2014 seeking comments on the contents of The Legal and Coroners' Courts Bill and on the Attorney General's proposal for a potential amendment to that Bill.

I have noted the contents of the Bill as drafted and introduced on 31 March 2014, and there is nothing contained therein which is relevant to the work of my Department.

In relation to the Attorney General's proposed amendment, I have not seen the exact wording of that proposal. It would be important to consider whether the proposal would meet the Attorney General's policy intent and if it meets data protection requirements.

In your letter you have indicated that he has experienced some difficulty in securing access to documents and that the principle focus of his concerns relates to deaths in hospital or where there is a suggestion that medical error may have occurred.

If the Attorney General's proposal is, as suggested, related purely to deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred, I would wish to see the detail of the proposed amendment, along with a clear indication of how it would be used in practice and what the wider implications would be.

My Department promotes a culture of learning, openness and transparency. I want to ensure that when things do go wrong, the necessary learning is applied across the entire Health and Social Care system in Northern Ireland.

I have initial concerns that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information which in turn could damage the potential to identify and share learning from serious adverse incidents or deaths in hospital.

Without knowing the specific detail of the Attorney General's proposal, I would not wish to comment any further at this stage.

I think it is important to bear in mind that the Executive have agreed the policy to inform the Bill as introduced to the Assembly on 31 March 2014. As this proposal would have an impact on, at least two Departments, it would need to be considered by the Executive.

There is also the issue of whether the proposed amendment will fall within the scope of the Bill and this will be a matter to be considered by the Minister of Justice and the Speaker.

Edwin Poots MLA
Minister for Health Social Services and Public Safety

Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment

FROM THE MINISTER FOR HEALTH,
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Edwin Poots MLA

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David Ford MLA
Minister of Justice
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BT4 3SG

Our Ref: AGY/320/2014

Date: 23 May 2014

Dear David

THE LEGAL AID AND CORONERS' COURTS BILL

On 30 April Paul Givan, Chairman of the Committee for Justice, wrote to me in relation to the Legal Aid and Coroners' Courts Bill.

He forwarded a copy of a proposed amendment to the Bill from the Attorney General dated 5 March 2014, as well as an amended text dated 30 April.

I have enclosed a copy of my response to the Committee for Justice for your information.

Edwin Poots MLA
Minister for Health Social Services and Public Safety

FROM THE MINISTER FOR HEALTH,
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Edwin Poots MLA

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Paul Givan MLA
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Our Ref: AGY/320/2014

Date: 23 May 2014

Dear Paul

THE LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 30 April forwarding a copy of the Attorney General's proposed amendment to the above Bill dated 5 March 2014, and his subsequent amendment dated 30 April 2014.

I think it is important to reiterate that the Executive has agreed the policy to inform this Bill as introduced to the Assembly on 31 March 2014. As the Attorney General's proposed amendment impacts on at least two Departments, I believe that a revised policy position would need to be considered by the Executive as required under the Ministerial Code.

Section 14 of the Coroners Act (NI) 1959 provides the Attorney General with a power to direct any coroner to conduct an inquest into the death of a person in circumstances where the Attorney General has reason to believe that a deceased person has died in circumstances which, in his opinion, make the holding of an inquest advisable. In principle, therefore, I would have no objection to the Attorney General having the power to access the information necessary to allow him to discharge his functions under section 14 of Coroners Act (NI) 1959.

The letter of 5 March from the Attorney General's office indicates that he is experiencing difficulty in getting access to the information that he feels may be relevant to the exercise of the power under section 14. This would appear to be the rationale for seeking the proposed amendment to the Legal Aid and Coroners' Courts Bill.

However, I would have concerns if the proposed amendment goes wider than that and would enable the Attorney General to request access to information in the circumstances described in the second paragraph of the letter of 30 April from his office to the Clerk to the Justice Committee. This would seem to suggest a power to obtain information relating to any death occurring within the Health and Social Care system, even where the Attorney has no reason to believe an inquest would be advisable.

For that reason, I think it would be important to have more policy clarity as to the precise intent of the provision and how it would be used in practice. That, of course, would be a matter for the Department of Justice to pursue in its capacity as lead sponsor of the Bill.

Finally, I note the concern of others about the appropriateness of using the Legal Aid and Coroners' Courts Bill as a vehicle to make the Attorney General's proposed amendment. I understand that it will be for the Speaker to determine whether the proposed amendment falls within the scope of the Bill.

I am copying the reply to David Ford so that it may be taken into account in his consideration of the Attorney General's proposed amendment.

Edwin Poots MLA
Minister for Health Social Services and Public Safety

Working for a Healthier People

Correspondence from the Minister for Health, Social Services and Public Safety in response to the call for evidence on the Justice Bill

FROM THE MINISTER FOR HEALTH,
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Jim Wells MLA

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Our Ref: AGY/547/2014

Date: 4 November 2014

JUSTICE BILL 2014

Thank you for the Committee's letter to Minister Poots of 10 July 2014, inviting views on the Justice Bill and in particular, three main issues:

(i) Proposed amendments from the Department of Justice;
(ii) An amendment to the Coroners Act (NI) 1959 proposed by the Attorney General; and
(iii) The amendment regarding 'Ending the life of an unborn child'.

Proposed amendments from the Department of Justice

The only issue of note to my Department is contained within Part 5 – Criminal Records – Exchange of information between Access NI and Disclosure and Barring Service (DBS) for barring purposes. I welcome the proposed amendment which seeks to include statutory powers to allow Access NI to share information with DBS.

The Attorney General's proposed amendments to the Coroners Act (NI) 1959

The previous Minister wrote to you providing comments about the Attorney General's proposed amendment to the Coroners Act (NI) 1959, which he first attempted to introduce through the Legal Aid and Coroners' Courts Bill.

I am aware that further to this correspondence, the Attorney General has given evidence to the Committee regarding his proposals. Having reviewed the official report of the evidence session there are some matters that should be brought to the attention of the Committee as they consider these proposals in the context of the Justice Bill.

These relate primarily to the policy context of the proposed amendments, understanding of the Serious Adverse Incident process and the exact scope and nature of the proposed new powers.

The policy context for the proposals is not currently sufficiently clear. The Attorney General has suggested that his concerns relate to deaths in hospital and his proposed powers would allow him to access to documentation such as Serious Adverse Incident (SAI) reports. He also has concerns that deaths are not referred appropriately to the Coroner. During his evidence session, the Attorney General also suggested that he anticipated that his powers could be extended to consider deaths in nursing homes, or those where the deceased had received treatment from the private sector. As such, it is not currently clear what the full extent of his concerns are, and therefore how these proposals would address them.

You will be aware that the HSC Trusts were asked to carry out a look back exercise of all SAIs over a five year period from 1 January 2014 – 31 December 2013. As part of this review, Trusts have been asked to review those SAIs where death has occurred, detailing the date the coroner was notified and providing an explanation if there was a delay in referral to the Coroner. This will provide evidence to indicate whether deaths are being referred appropriately to the Coroner and the outcome of the exercise will be shared with the Coroners' office and the Committee for Justice. The conduct of the look back exercise by Trusts will be independently validated by the RQIA.

I should also point out that the SAI process is a non-statutory based system to identify learning. It is not an investigative system for the purposes of investigating deaths. The role of investigating deaths sits with the Coroner and the police service. As a learning process, the SAI system supplements the statutory accountability reporting processes in dealing with deaths that meet the criteria for some form of formal investigative process. Not all SAIs relate to deaths or to patients, with some concerning estate type issues, the health and safety of staff, or information data breaches, all of which occur in a range of settings in an outside of hospitals.

As the precise policy intent of the Attorney General's proposals are currently not entirely clear, it is difficult to foresee the practical implications of the proposals and what impact they would have for staff and patients.

The Committee should also be aware that Sir Liam Donaldson is currently undertaking an Expert Examination of the Application of HSC Governance Arrangements for Ensuring the Quality and Care Provision in Northern Ireland (The Donaldson Review). I understand that the Attorney General met with Sir Liam on 28 August to discuss his concerns and it may be appropriate to await any recommendations from that review when considering how to take this matter forward.

In principle, I have no objection to the Attorney General having the power to access the information necessary to allow him to discharge his functions under section 14 of Coroners Act (NI) 1959. I firmly believe however that it would be important to have more policy clarity as to the precise intent of the proposals and how they would be used in practice.

Proposed amendment regarding 'Ending the life of an unborn child'

In order to avoid any unnecessary confusion in the health system, if this amendment is being taken forward and the Justice Committee is supportive, it may be useful for a discussion to take place with professionals in my Department on terminology and finalising the drafting in order to prevent any unintended consequences.

I would ask that the Committee consider the issues I have highlighted in this letter. My officials would be happy to meet with the Committee to provide further information if they deem that would be helpful.

Jim Wells MLA
Minister for Health Social Services and Public Safety

Correspondence from the Minister for Health, Social Services and Public Safety providing information in advance of his oral evidence on the proposed amendment on 28 January 2015

FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Jim Wells MLA

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Our Ref: AGY/3/2015

Date: 15 January 2015

Dear Alastair

JUSTICE BILL 2014 – DHSSPS WRITTEN SUBMISSION FOR 28 JANUARY 2015

Please find attached a written submission paper for the Committee (Appendix 1) which summarises the Department's position on the proposals by the Attorney General to amend the Coroners Act (NI) 1959 through the Justice Bill.

As previously advised Dr Paddy Woods, Deputy Chief Medical Officer, Mr Fergal Bradley, Director of Safety, Quality and Standards Directorate and Mr David Best, Head of Learning, Litigation and Service Framework Development Branch will be attending the evidence session on behalf of the Department on Wednesday 28 January 2015.

I trust this is helpful.

Jim Wells MLA
Minister for Health Social Services and Public Safety

Working for a Healthier People

INVESTORS IN PEOPLE

Appendix 1

Written Submission from DHSSPS to Justice Committee

Attorney General's proposal to amend the Coroners Act (Northern Ireland) 1959 through the Justice Bill

Background

1. The Department first became aware of the amendment from the Attorney General (AG) following correspondence from the Committee in April 2014. At that time the AG was seeking powers, through the Legal Aid and Coroners' Court Bill, to obtain information or documentation for consideration when deciding whether to direct an inquest. Full details of the proposed amendment were not provided and this was indicated in the Department's response.

2. Further correspondence was received on 30 April 2014 which provided the original proposal of 5 March 2014 as well as amended text from the AG dated 30 April. The amended text appears to broaden the scope of his intentions to seek information or documentation on any death where health or social care has been provided at any time.

3. The current position is that, under Section 14(1) of the Coroners Act (NI) 1959, where the AG has **reason to believe** that a deceased person has died in circumstances **which in his opinion** make the **holding of an inquest advisable** he may **direct any coroner** to conduct an inquest into the death of that person. This would indicate that the AG already has the power to direct an inquest and therefore it is not clear what value the proposed amendment would add.

4. The Department has indicated in previous responses that there is no objection in principle to the AG having the power to access the information necessary to allow him to discharge his functions under section 14 of the Coroners Act. There is however, a need for greater policy clarity as to the precise intent of the

provision and how it would be used in practice. The Departments concerns will be addressed under four broad headings:

(i) The rationale for the provision
(ii) The scope of the provision
(iii) The implications of the provision
(iv) Alternatives to the provision

(i) Rationale for the provision

5. Legislation is deemed necessary when there is a need to regulate, authorise, sanction, grant, declare or to restrict practices. The essential starting point in the development of any legislation is a clearly defined policy direction. The Department does not believe this has been provided and remains to be convinced that the additional powers being sought by the AG are necessary.

6. Originally the AG indicated in his proposed amendment of 5 March, that he had experienced difficulties in getting access to information on hospital deaths to allow him to exercise his power under section 14.

7. Our understanding from contact we have had with the Trusts is that the AG does on occasion make requests for information on hospital deaths and where possible this information is provided as requested.

8. Under section 14 of the Coroners Act, the AG can currently direct the coroner to conduct an inquest into the death of a person if he has reason to believe that the deceased person died in circumstances which in his opinion make holding an inquest advisable.

9. In order to exercise his power all that is required is for the AG to have a reason to believe that the circumstances of the death make the holding of an inquest advisable. The use of these words and phrases seem to import a wide degree of discretion and a low threshold for taking action and the wording does not envisage the AG having to carry out an investigative role to determine whether to direct the conducting of an inquest.

10. The AG also stated in his evidence session to this Committee in May last year that it was from his own experience and from media interest that there is a concern that unexpected deaths occurring in hospital, in particular are not, in all cases, being reported to the Coroner. He added that at present it is largely the decision of doctors as to whether those matters are referred onwards to the Coroner.

11. Section 7 of the Coroners Act, states that a death should be reported to the coroner, if it resulted, directly or indirectly, from any cause other than natural illness or disease for which the deceased had been seen and treated within 28 days. The duty to report arises if that death falls within a set of clearly defined criteria which includes as a result of violence or misadventure or by unfair means, or as a result of negligence or misconduct or malpractice on the part of others, or in such circumstances as may require investigation (including death as a result of the administration of an anaesthetic).

12. The medical practitioner attending the deceased must make a decision on whether the death falls within any of the defined criteria. If it does, or if there are any doubts or concerns surrounding the circumstances of the death, it should be reported to the Coroner immediately.

13. If a death occurs in a hospital and meets the criteria outlined in The Coroners Act, it will be reported to the Coroner for consideration. However, there will be occasions when a death may be reported to the Coroner sometime after the date of death. This can happen when information comes to light that may not have been apparent at the time of death. There is a perception that these are 'late reports', however, this is not the case as the Coroner will be informed once such information becomes apparent.

14. The AG's proposals may have been as a result of his understanding following media reports that there may have been deaths in hospital including Emergency Departments where there was no report to the Coroner.

15. Last year, Edwin Poots commissioned a look back exercise to review all Emergency Department Serious Adverse Incidents. The exercise covered three aspects, one of which related to the engagement by HSC Trusts with the Coroner.

16. This exercise indicated that Trusts are complying with the statutory requirement to report deaths to the Coroner and are doing so in a very timely fashion. The information supplied by HSC Trusts for this look back exercise has been independently validated by the RQIA, and from this it is evident that doctors are meeting their statutory obligation to report deaths to the Coroner when required.

17. It is not entirely clear whether the rationale behind these proposals is due to a lack of information being provided to the AG from Trusts, a belief that deaths are not being reported to the Coroner, a misunderstanding of the SAI process or indeed, some other reason. Before accepting the AG's proposals, it would be important to have more policy clarity before legislation of this nature is introduced.

(ii) SCOPE

18. Secondly, the Department has concerns that the scope of the AG's proposed powers is ambiguous. He stated in March 2014, that his principal focus of concern was deaths in hospitals or where there was a suggestion of medical error. However, through the amendment submitted in April 2014 and during his evidence session in May 2014, he appears to broaden rather than restrict the scope of the power. He would, if his amendment is accepted, have the power to request any document or any other information from any person who provided health and social care to the deceased.

19. This could therefore relate to any death, not just deaths in hospital or where there was a suggestion of medical error. The wording leaves the scope of his powers very open and could therefore equally apply to deaths in residential homes, the death of an individual who may have been receiving private counselling or all deaths in a particular hospital, hospital ward, or GP practice.

20. In April 2014, the AG advised that his proposal would give him powers to obtain information, for example, about Serious Adverse Incidents (SAIs). There appears to be some misunderstanding regarding the purpose of the SAI process. The SAI Reporting System was first introduced in 2004 and has been revised and refined over the years. Its purpose is to ensure an agreed approach to reporting, managing, analysing and learning from adverse incidents and to prevent reoccurrence in as far as possible.

21. Primarily, the SAI system operates to identify and promote **learning and improvement**. It does not exist to investigate deaths or attribute blame or fault – that is the role of other agencies and processes. The health and social care system aspires to a 'no blame' culture or a 'just' culture in which staff can be open without fear of inappropriate reprisal.

22. Not all SAIs relate to deaths as the SAI criteria are much broader than deaths. The Department has on a number of occasions amended the definition of an SAI on the basis of exploring different opportunities for learning by focussing on different types of incident. The Department reserves the right to continue to change the focus of SAI investigations in the future on the basis of exploring other opportunities for learning and improvement.

23. The SAI reporting system is fundamentally dependent on a culture of openness and learning rather than one of blame, recognising that when things go wrong and a patient is harmed that the reasons are often complex and rarely simply the result of individual failing. The Department considers that openness, transparency, blame and fear, are multi-dimensional issues that cannot be improved directly by legislation, rules or procedures alone.

24. The culture of blame with regard to SAIs has been fuelled by the misrepresentation of the SAI system as one whereby Trusts investigate themselves and by inference as part of a system of cover ups.

25. The statutory requirement to report a death to the Coroner (as clearly defined in section 7 of the Coroners Act (NI) 1959), exists entirely separately from the SAI process. In addition to the Coroners Act, there are a range of other statutory requirements on HSC bodies to report certain incidents to external organisations such as Professional Regulatory Bodies, the Health and Safety Executive, or the Police Service of Northern Ireland. Whilst such incidents may also meet the criteria to be reported and investigated as an SAI, the SAI process is not a portal to reporting incidents to these external agencies.

26. The scope of the AG's policy context is conflicting and unclear. We suggest that if the proposed amendment is supported in principle, then it should be rewritten to precisely indicate which deaths in particular it relates to. The Department would also support the view of the Lord Chief Justice outlined in the written submission, dated 9 April 2014, where as in England and Wales the AG should make an application to direct an inquest through the High Court as this would provide the Coroners with a greater understanding of why an inquest was being directed.

(iii) IMPLICATIONS OF PROPOSAL

27. Whilst the AG has said that he "does not believe" his proposed amendment will burden the health service, no evidence has been provided to support his supposition and there are concerns that his proposals may have negative implications for the health and social care sector in a number of ways.

Accessing information

28. It is unclear at this stage, what information the AG will be seeking. The proposal suggests that any person who has provided health or social care to the deceased would be required to "produce any document or give any other information" that he would require. This would need to be more clearly defined.

29. There are many people, both administrative and professional, within the HSC who are responsible for updating and maintaining information on patients. This can range from patients or client notes, x-rays, prescribed drugs or outpatient appointments to name but a few. Under the current proposal any of this

information may need to be provided and whilst most of this will relate to the deceased and not be affected by the Data Protection Act, other information may relate to family and friends as well as to medical staff and may be subject to confidentiality or data protection restrictions.

30. When a unexplained death occurs there may already be a number of "investigations" to ascertain the cause of death. This can include action by the Trust through the SAI process, action by the Coroner, the RQIA, the Health and Safety Executive or the PSNI. These investigations may be happening simultaneously and all require documentation to be produced to help to inform the circumstances surrounding the death.

31. There is a real concern that adding a further investigation by the AG would place an additional administrative burden on HSC staff which has the potential to direct much needed resources away from frontline services.

Openness and transparency

32. Another implication of the proposed legislation is the summary conviction element, which applies if a person fails without reasonable excuse to provide the relevant documentation or information. The Department believes that a potential conviction could actually discourage openness and transparency if something has gone wrong.

Management and Resources

33. The Department also has concerns as to how the proposals will be managed and resourced or the potential risks and their impact. As the suggested amendment relates to "*any* person who has provided health or social care to a deceased person", it will relate not only to medical practitioners and nurses, but to carers, pharmacists, therapists, dentists, allied health professionals, counsellors, healthcare assistants and home helps etc. It covers such a wide spectrum of individuals and organisations in the HSC, that as already stated, the service may not be able to cope with the additional burden.

Penalties

34. The Department has concerns that the criteria for establishing the exact circumstances under which someone would be guilty of such an offence has yet to be defined, e.g. the precise mechanisms for ascertaining non compliance; the person or authority who would determine when a criminal offence has taken place; if the penalty would be issued to an individual or to the governing organisation.

35. If applied to individuals, a criminal offence could result in appearances at Professional Regulatory Bodies which could well have a detrimental affect on professional and healthcare workforces.

Consultation

36. The Department is concerned that no formal public consultation has been carried out on the legislative proposals. There will be many HSC organisations, professionals and healthcare workers, who will not have had an opportunity to comment on how these proposals will be applied and the implications for them and their work practices.

(iv) ALTERNATIVES TO PROPOSAL

37. The Department is already taking forward a number of initiatives and programmes of work, which are designed to provide greater scrutiny around the processes for certifying death in Northern Ireland.

38. In April 2012, the NI Executive considered two options following a review of death certification. The first option was the implementation of a series of enhancements to the existing assurance arrangements for death certification with a view to strengthening and improving the current process. The second option was the introduction of a Medical Examiner/Reviewer, a medically qualified person with the appropriate specialism and expertise, who would carry out a basic independent review of non-reportable deaths.

39. The Executive agreed that Option 1 be implemented as soon as practicable and that an evaluation of this option be undertaken over a two year period in order to inform a decision on whether the introduction of a Medical Examiner/Reviewer should go ahead.

40. Work is well underway on the implementation and evaluation of the enhancements under Option 1. These include the development and implementation of a Regional Mortality and Morbidity Review System (RM&MRS). In April last year, Edwin Poots, gave the go ahead for this system to be rolled out across all hospitals in NI over the next two to three years. The RM&MRS will allow for the accurate recording, reviewing, monitoring and analysis of all deaths occurring in hospitals, thereby facilitating identification of poor care management, learning form errors, openness and transparency and improvements in patient safety and care. The Technical Specification for the system is currently being developed in conjunction with the Belfast HSCT, the Southern HSCT and the Regional Health and Social Care Board.

41. This will not only allow for the quality assurance of all hospital based deaths, but will provide further assurance and oversight in line with existing statutory responsibilities and will ensure that learning from the mortality and morbidity of patients is shared. The suitability and adaptation of this system to both Primary Care and the wider community will also be considered in order to capture equitable information on all deaths. The Department will also continue to work closely with the Coroner to monitor the timeliness of reporting and to address any concerns he may have.

42. Under Option 2, the appointment of a Medical Examiner/Reviewer, it is envisaged that there might be 2 levels of independent scrutiny of deaths that are not be required to be reported to the Coroner. Level 1 scrutiny would involve, for example, the review of a random selection of approximately 10% of non-reportable deaths including completion of the Medical Certificate of Cause of Death (MCCD) and discussion with the certifying doctor. Level 2 scrutiny would provide further scrutiny including examination of medical records and discussion with families or interested parties.

43. These arrangements would be similar to those being introduced in Scotland in May 2015; however this would be subject to the full development of the proposals and NI Executive approval.

44. Under the AG's proposal it appears that cases would be selected on an ad hoc basis, whereas the Medical Examiner/Reviewer would systematically scrutinize the cause of death, in a way that is robust, proportionate and consistent.

45. In addition to proportionate and effective independent scrutiny of MCCDs, it is anticipated that medical examiners would provide medical advice to Coroners and advice to certifying doctors. They would work with HSC colleagues to use the information they collect to support clinical governance and they would assist in training doctors and other healthcare professionals on the appropriate certification of death.

46. The Department is taking a systematic approach to all of this work, as it is based on research, evidence, statistical data and stakeholder engagement including liaising with the other UK administrations. We are therefore of the opinion that the comprehensive initiatives which the Department is already undertaking to supplement extant statutory and legal processes, will adequately provide the level of assurance that is necessary to ensure that information regarding deaths is being appropriately recorded, reported and analysed. Whilst the AG's proposals are well intended, there is some duplication of resources which we believe make them superfluous to requirements.

SUMMARY

47. In summary, the Department, in principle, has no objection to the AG having the power to access the information necessary to allow him to discharge his functions under section 14 of the Coroners Act (NI) 1959. However, as outlined in the paper above there are real concerns surrounding the rationale, the scope and the implications of the AG's proposals, which can be expanded on further during the evidence session.

48. The Department also understands that a full review of Coronial legislation is likely and as the AG's proposed amendments relate to the Coroners Act (Northern Ireland) 1959, it would seem more appropriate for his proposals to be considered under the review of that original legislation.

Correspondence from the Minister for Health, Social Services and Public Safety regarding the Review of Handling of Serious Adverse Incidents following the evidence from departmental officials on 28 January 2015

FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Jim Wells MLA

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Our Ref: AGY/123/2015

Date: 25 February 2015

Dear Alastair

REVIEW OF THE HANDLING OF SERIOUS ADVERSE INCIDENTS BETWEEN 1 JANUARY 2009 AND 31 DECEMBER 2013.

On 28 January 2015, Departmental Officials attended the Justice Committee to give evidence in relation to the Attorney General's proposed amendment to the Coroner's Act (Northern Ireland) 1959 through the Justice Bill. At that evidence session, the Committee was advised that information regarding the "Look Back" Exercise of Serious Adverse Incidents (SAIs) would be provided to the Committee.

From the 1417 Serious Adverse Incidents reported during 1 January 2009 to 31 December 2013, there were 777 cases where a death was associated with the SAI. Of the 777 cases only 18 (2.3%) were reported to the Coroner more than 3 days after the date of death, see table 1.

Table 1

	Number of deaths	Number reported to the Coroner more than three days after date of death
2009	119	3
2010	123	3
2011	152	3
2012	174	5
2013	209	4*
	777	**18**

*Includes 3 Stillbirths (not a statutory requirement to report at time of death)

It is important to clarify that in respect of these 18 cases, the timescales involved ranged from as little as 5 days after the death to 5 years. In almost all cases the deaths were reported as a result of additional information or considerations not available at the time of death. The requirement to report relates to the point in time when a Trust has knowledge that a death should be reported. In most cases this decision will be taken at the time of death, in a minority of cases this may be sometime later when further information comes to light.

There are a number of other reasons why additional time may elapse before a death is reported to the Coroner. A case may have been complex in nature, for example where a patient has transferred between two hospitals, the medical professionals involved may take more time before being able to identify that a case needs to be referred resulting in a small delay. In some cases, further information may only come to light at a later date for example as part of a look back exercise, an SAI investigation, a complaint investigation, information from GPs, from another Trust if care was provided in more than one location or from some other third party.

It should also be noted that 3 of the 18 cases referred to were stillbirths. The Trusts, in those instances, complied entirely with the guidance as it existed at the time as there was no statutory requirement to report these cases to the Coroner at that time. The duty to report to the Coroner in the case of a stillbirth only came into effect following a Court of Appeal ruling in November 2013.

Whilst giving evidence to the Justice Committee the Attorney General referred to a number of NHSCT cases that had not been reported to the Coroner at the time of death and that, following his intervention, 4 cases were now being investigated. These cases were all identified as a result of an exercise undertaken by the Trust itself which they reported to the Department. The Department had advised the Trust to review these cases against the statutory requirement to report deaths. We believe that some of these 4 cases relate to stillbirths, which at the time when they occurred did not require reporting to the Coroner but which would be routinely reported now.

In their report, the RQIA have independently verified the quality of the information provided by the Trusts for the SAI look back exercise, which included detailed information on notification to the Coroner if a death occurred.

In his evidence to the Committee, the Attorney General acknowledged the pressure currently placed on the Coroner's Service. In a large proportion of cases considered by the Coroner there is a knock on effect of requests for information, witness statements etc. from Health and Social Care Bodies who provide information to assist the Coroner in discharging his duties. The Committee will be generally aware of the pressures on the Health system. The Attorney General's proposals would place additional pressure on the same Health and Social care bodies.

Mortality and Morbidity Review system

As you are aware, the Department is currently taking forward a number of initiatives to strengthen and enhance public assurance and scrutiny of the death certification process. One of these initiatives is the roll-out of a Regional Mortality and Morbidity Review system. The introduction of this system will ensure that all deaths in hospital are accurately recorded, reviewed, monitored and analysed. This will provide additional scrutiny through peer review; enhance a culture of learning across trusts; improve reporting of serious adverse incidents where a death has occurred; act as an additional safeguard to ensure

that deaths are appropriately reported to the Coroner; and improve the quality of information provided to the Coroner and as part of serious adverse incident investigations.

The introduction of an Independent Medical Reviewer, similar to that being introduced in Scotland from May 2015, is also being considered. The appointment of an Independent Medical Reviewer would provide additional safeguards and assurances. Within the proposals currently being considered the Medical Reviewer, who will be an appropriately clinically qualified professional, would have the power to examine the health records of the deceased, seek the views of the medical practitioner who completed the Medical Certificate of Cause of Death and make enquiries of any other person who may have information, for example, a family member, carer or a nurse.

The Independent Medical Reviewer would also have the power to refer cases to the Coroner for further investigation should there be any reason to do so.

I hope you find this information useful.

Jim Wells MLA
Minister for Health Social Services and Public Safety

Northern Ireland Assembly

Appendix 6

Correspondence regarding the Attorney General's proposed amendment on Rights of Audience for Lawyers working in the Attorney General's Office

Contents

Correspondence from the Department of Justice providing a copy of the preliminary discussion paper inviting the views on wider implications of making legislative provision in relation to Rights of Audience for Lawyers working in the Attorney General's Office

FROM THE OFFICE OF THE JUSTICE MINISTER

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Our ref: SUB/991/2014

Christine Darrah
Committee Clerk
Committee for Justice
Northern Ireland Assembly
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8 August 2014

Dear Christine,

PRELIMINARY DISCUSSION PAPER INVITING VIEWS ON ANY WIDER IMPLICATIONS OF MAKING LEGISLATIVE PROVISION IN RELATION TO RIGHTS OF AUDIENCE FOR LAWYERS WORKING IN THE ATTORNEY GENERAL'S OFFICE

The Attorney General has invited the Minister of Justice to consider making legislative provision to confer rights of audience equivalent to those of barristers in private practice on any barrister or solicitor working in his office and designated by him. Such provision would sit outside the existing provision on solicitors' and barristers' rights of audience prescribed in legislation and the Bar Code of Conduct respectively.

The Department's provisional soundings with key stakeholders indicated that extending rights of audience for lawyers in the Attorney General's Office may have implications for the wider legal services landscape and its regulation, which would need to be identified and evaluated. Therefore, whilst acknowledging the potential benefits of making such legislative provision, the Minister of Justice advised the

FROM THE OFFICE OF THE JUSTICE MINISTER

Department of
Justice
www.dojni.gov.uk

Attorney General that he considered it appropriate to allow key stakeholders the opportunity to formally comment on the proposal.

The Department is issuing a short preliminary discussion paper to a number of key stakeholders (copy enclosed for the Committee's information) inviting views on any implications for the legal profession of the Attorney General's proposal and whether there is a case for treating lawyers working in his office differently to other employed lawyers. The responses to the discussion paper will be used to inform further consideration of the proposal and the need for a wider consultation exercise. The Committee will of course be kept informed.

Tim Logan

TIM LOGAN
DALO

Enc: Preliminary Discussion Paper

Department of Justice
www.dojni.gov.uk

Preliminary Discussion Paper

Proposal by the Attorney General for Northern Ireland for legislative provision in relation to rights of audience for lawyers working in his office

Introduction

1. The Attorney General for Northern Ireland has invited the Minister of Justice to consider legislating to confer the same rights of audience as barristers in private practice on lawyers working in his office and designated by him.

2. Such statutory provision would sit outside the provision on solicitors' and barristers' rights of audience prescribed in legislation and in the Bar Code of Conduct respectively.

3. The purpose of this paper is to formally seek views from the key stakeholders listed at **Annex A** on any wider implications for the legal profession and how it is regulated, or for the provision of legal services, of making discrete provision in relation to rights of audience for lawyers working in the Office of the Attorney General. The responses to the paper will inform further consideration, advice to Ministers and the need for a wider consultation exercise. Responses are requested by **10 October 2014**. There is information about how to respond at the end of this paper.

Attorney General's Proposal

4. There are presently eight lawyers (three barristers and five solicitors) working in the Attorney General's office. The Attorney General's legal staff are appointed by him and work under his personal supervision but are members of the Northern Ireland Civil Service. Their role is to assist the Attorney General in carrying out his statutory and other functions.

5. The Attorney General has highlighted that the lawyers working in his office cannot avail of their very considerable advocacy skills because they do not have rights of audience in all courts. He has also noted that the position of the employed barristers is particularly odd because their rights of audience are tied to those of solicitors.

6. The Attorney General has advised that it would be of considerable assistance to him if legislative provision were to be made conferring the rights of audience of barristers in private practice on any lawyer working in his office and designated by him.

7. The Attorney General has suggested that the number of lawyers employed in his office is so small that this would not deprive the independent Bar of significant amounts of work but would on the other hand enable his office to make full use of the talent in it and result in substantial savings.

8. The Attorney General's main responsibilities include acting as the Executive's most senior representative in the courts (representing Ministers or Departments in court), protecting the public interest in the courts (which can include both bringing proceedings and participating in extant proceedings) and defending the interests of charities in proceedings before the High Court. The Attorney's proposal, if taken forward, would enable his staff to act as junior counsel in the High Court in such proceedings.

9. Under section 22 of the Justice (Northern Ireland) Act 2002 the Attorney General's functions are exercised independently of any other person.

Existing Provision on Rights of Audience of Solicitors and Barristers

Solicitors

10. At present, solicitors have rights of audience in all courts except the High Court and Court of Appeal, where they may only appear in limited circumstances, mainly insolvency related proceedings or where Counsel is instructed but unable to appear (section 106, Judicature (Northern Ireland) Act 1978).

11. However, the Justice Act (Northern Ireland) 2011 makes provision extending solicitors' rights of audience in the higher courts. It creates a system of authorisation for solicitors wishing to exercise rights of audience in the High Court and Court of Appeal. Regulations made by the Law Society will prescribe the authorisation process and the education, training and experience which a solicitor must possess before authorisation can be granted.

12. The 2011 Act also creates certain duties which will apply where a solicitor is minded to engage an authorised solicitor to represent a client or, where he or she is an authorised solicitor, to provide that representation. A solicitor will be required to advise their client in writing of the advantages and disadvantages of representation by an authorised solicitor and by counsel respectively and that the decision as to representation is entirely that of the client. The detail of the matters to be covered by this advice is to be prescribed in regulations made by the Law Society.

13. Regulations made by the Law Society are subject to the concurrence of the Lord Chief Justice and the Department of Justice, which must consult the Attorney General.

14. Commencement of the provision in the 2011 Act is dependent on the Law Society making the above regulations and the making of consequential legislation, for example, amendments to court rules.

15. The Law Society has consulted on draft regulations and is presently carrying out an impact assessment of them. Taking account of the impact assessment process and the need for consequential legislation, including a draft affirmative order, it is anticipated that it will be next year at the earliest before the provision in the 2011 Act can be commenced.

Barristers in Private Practice

16. The Bar Council's Code of Conduct sets out the professional rules of the Bar. The rights of audience a barrister has, as set out in the Code, depend on their employment status. The Code defines a barrister in independent practice as "a

barrister who represents to the public generally that he is willing, in return for payment of fees, to render legal services to a client." Barristers in independent practice have rights of audience in all courts.

Employed Barristers

17. An employed barrister is defined in the Bar Code as "a barrister who, in return for the payment of a salary, is employed wholly or primarily for the purpose of providing legal services to an employer either under a contract or employment, or by virtue of an office under the Crown or in the institutions of the European Communities". Under the Code an employed barrister may appear on behalf of their employer in any court, in any circumstances where barristers in independent practice do not have an exclusive right of audience in such court (paragraph 28.02). The rights of audience of employed barristers are therefore linked to the rights of audience of solicitors. This means that employed barristers presently do not have rights of audience in the High Court and Court of Appeal but (subject to any amendment of the Bar Code) this would change once the provision in the Justice Act extending solicitors' rights of audience comes into operation.

18. However, it is to be noted that the rights of audience of employed barristers would (again subject to any amendment of the Code) remain subject to the other restrictions in the Bar Code, in particular that, in general, they may only provide legal services (defined to include representation in court) to their employer (paragraph 28.04). There are a few exceptions to this rule including:

- a barrister in the government legal service (defined as meaning being employed or holding office as a lawyer in any Government Department or the Public Prosecution Service) can act on behalf of Ministers / Officers of the Crown / organisations or public officers or servants for whom GLS customarily acts;

- a barrister employed by trade assocations may act for the association in matters affecting all or a class of members; and

- a barrister employed in a Law Centre or Citizens' Advice Bureau.

Wider Implications

19. Making discrete legislative provision in relation to rights of audience for lawyers employed in the Attorney General's Office may have wider implications.

20. There is a question as to how such provision would sit with the current and future arrangements. For example, the measures contained in the 2011 Act in relation to the exercise by solicitors of rights of audience in the higher courts are designed to protect the public by ensuring high standards of advocacy and competition for advocacy services are maintained and conflicts of interest are prevented.

21. There is also a question as to whether there is a case for treating lawyers working in the Attorney General's Office differently to other lawyers working in an employed capacity. Apart from solicitors and barristers employed in the Attorney General's Office, there are solicitors and barristers employed in other parts of the public sector (for example, Public Prosecution Service, Departmental Solicitor's Office, Crown Solicitor's Office) and by voluntary and private sector organisations. Arguably some, or all, of these groups of lawyers would also benefit from having the same rights of audience as barristers in private practice.

22. The Attorney General has suggested that his close personal reputational engagement and his statutory independence would be the highest possible guarantee of the conscientious professional judgment and quality of the advocacy skills of his staff. He has also emphasised that in any litigation involving his office, there is a degree of personal supervision by the Attorney of his staff which, in his view, cannot be replicated in other government legal offices.

23. Whilst legislating on the rights of audience of lawyers employed in the Attorney General's office (given the small numbers involved) is unlikely to have a significant impact on the independent Bar, the impact of any provision on rights of audience of employed lawyers having wider application would need to be fully assessed.

Questions

24. We welcome comments on the following issues and any other issues which you think may be relevant:

- What would be the wider implications for the legal profession and the provision of legal services, of making discrete provision on rights of audience for lawyers working in the Attorney General's office? Please give reasons for your answer.

- Is there a case for treating lawyers working in the Attorney General's Office differently to other employed lawyers? Please give reasons for your answer.

Responses

25. Responses should be submitted **no later than 5.00pm on 10 October 2014**. If you have any queries please contact Civil Justice Policy Division on 028 9016 9539.

26. When responding please state whether you are making your comments as an individual or representing the views of your organisation.

27. Unless respondents specifically indicate that they wish their response or part of it to be treated in confidence, their name and the nature of their response may be included in any summary of responses made publicly available. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that any responses not subject to specific exemptions under the Act be disclosed to third parties on request. Any personal data which you provide will be handled in accordance with the Data Protection Act 1998.

28. Please forward your responses to:

Post: Civil Justice Policy Division
Department of Justice
Massey House
Stormont Estate
Belfast
BT4 3SX

E-mail: [To be inserted]

Annex A

Copies of this paper are being sent to:

Departmental Solicitor's Office
Public Prosecution Service
Directorate of Legal Services
Crown Solicitor's Office
The Bar Council of Northern Ireland
The Law Society of Northern Ireland
Law Centre (Northern Ireland)

A response from the Attorney General to the Committee for Justice consultation on the Justice Bill

Attorney General for Northern Ireland

Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX

Our Ref: 18/05/13/012

Date: September 16 2014

Dear Ms Darrah,

Justice Bill

Thank you for sending me the draft Justice Bill following its initial consideration by the Committee. I offer some comments below but am, of course, happy to deal with any specific issue that the Committee might later wish to raise with me.

Proposed amendment to the Coroners Act (Northern Ireland) 1959

By letter dated 5 March 2014, during the passage of the Legal Aid and Coroners Courts Bill I asked the Committee to give consideration to a potential amendment to the Coroners Act (Northern Ireland) 1959 ('the 1959 Act') which I considered would be of material benefit to the public.

My proposed amendment (drafted as an insertion into the 1959 Act) reads as follows:

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"Provision of information to Attorney General for purposes of section 14

14A.-(1) The Attorney General may, by notice in writing to any person who has provided health care or social care to a deceased person, require that person to produce any document or give any other information which in the opinion of the Attorney General may be relevant to the question of whether a direction should be given by the Attorney General under section 14.

(2)A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings to the High Court.

(3)In this section-

"document" includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in legible form;

(4)A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale."

Under section 14(1) of the 1959 Act I can direct a coroner to hold an inquest where I consider it is 'advisable' to do so. I do not possess a statutory power to obtain papers or information that may be relevant to the exercise of this power. In recent years I have had some difficulty in securing access to documents from Health and Social Care Trusts ('HSC Trust'), such as

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Serious Adverse Incident ('SAI') report forms, which I have considered relevant to the proper exercise of my discretion. One recent, and high profile, incident involving a particular HSC Trust has served to strengthen my view that a power to obtain relevant material is crucial to the public interest in ensuring a high standard of healthcare and investigation of incidents that result in the death of a patient.

On 30 March 2014 I became aware of media reports concerning the deaths of at least twenty patients, including five babies, occurring between 2008 and 2013, at both Antrim Area and Causeway Hospitals. One report indicated that some of the deaths may have been treated as an SAI and reported to a coroner, but others may not.

I immediately sought information from the Northern HSC Trust concerning each death and on 6 June 2014 I was supplied with material relating to eleven deaths. Of these deaths, six had not been reported to a coroner at the time of death and four were only referred after my request for information. That medical practitioners had not reported these deaths before my intervention, and a considerable time after these deaths, is of very great concern and highlights the importance of my proposed amendment in closing the current information gap.

As you know, the proposed amendment was first considered during the Committee Stage of the Legal Aid and Coroners' Courts Bill. It was not thought possible to include the amendment in this Bill as further clarification was required. However, when the Committee took the opportunity of requesting written evidence on my proposed amendment a number of favourable responses were received from a wide variety of consultees including the Health Minister and HSC Trusts.

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Three HSC Trusts (South Eastern, Southern and Northern) responded with a spectrum of degrees of support for the amendment. The Health Minister is also supportive of the amendment, subject to further clarification on a number of discrete matters.

The Law Society indicated that I should have adequate powers in order to provide me with sufficient information to take a decision under section 14(1) and agreed with the proposed amendment. The Association of Personal Injury Lawyers, Castlereagh Borough Council and the Law Centre all agreed that the proposed amendment was necessary to ensure that deaths were investigated effectively.

The Information Commissioner's Office indicated that it would be appropriate to provide a specific statutory power to the Attorney General so that relevant documents could be disclosed.

The Northern Ireland Policing Board sought further clarity regarding the remit of the proposed amendment and was concerned about resource implications for the Police Service of Northern Ireland ('PSNI'). I have since written to Mr Jonathan Craig, the Chairman of the Policing Board Performance Committee, on behalf of the Policing Board, assuring him that no additional obligations will be placed on the PSNI as a result of the amendment.

When I gave evidence to the Committee on 28 May 2014 I indicated that the amendment would be confined to deaths that occurred within a health and social care setting and would not affect historic inquests which involved the police or military. This remains the case. Neither do I believe that the amendment will create a burden on the health service and I remain of the view that there is a degree of urgency with the issue that the amendment

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seeks to address, given the circumstances regarding the Northern HSC Trust outlined above.

Rights of audience for lawyers working in Attorney General's Office

In September 2013 I wrote to the Minister for Justice raising an issue which affects the operation of my office and which could usefully be dealt with in the Justice Bill. At present employed barristers and solicitors in my office cannot fully avail of their considerable advocacy skills because they do not have rights of audience in all courts. It would be of very great assistance to me, and would result in substantial savings, if the new Bill contained a clause conferring the rights of audience of barristers in independent practice on any lawyer working in the Office of the Attorney General for Northern Ireland and designated by the Attorney General. At present there are three barristers and five solicitors working in my office so this change will not deprive the Independent Bar of significant amounts of work.

The Minister for Justice wrote to me in August 2014 indicating that the Department of Justice had issued a short preliminary discussion paper to a number of key stakeholders inviting their views. The responses to this paper will be used to inform further consideration of the need for a wider consultation exercise. My view remains that this proposal should apply, at the outset, to the small number of lawyers working in my office and under my direct supervision.

I would be grateful if the Committee would look favourably on this proposal which, as well as having considerable substantive merit, has particular importance in this period of budgetary pressure.

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Proposed Clause 11A – Ending the life of an unborn child.

I have examined clause 11A and am satisfied that it would be within the legislative competence of the Assembly to enact this provision.

Comments on the Justice Bill as introduced

Part 1 Single Jurisdiction

In clause 3, a further safeguard could be added to protect local justice. I note that in clause 4(4) the Lord Chief Justice, in giving a direction, is to have regard to the desirability of a lay magistrate sitting in courts in reasonable proximity to where he or she lives or works. A similar duty to have regard to the benefit of justice being administered locally could be usefully added to clause 3.

Part 3 Prosecutorial Fines

Multiple Offences

Where a person is accused of a number of summary offences arising out of the same circumstances, a prosecutorial fine notice can only be offered in relation to *all* the offences and a person cannot accept a fine for one offence and proceed to trial on others (clause 17(2)). I understand that this arrangement is to avoid a prosecution for an offence being hampered by the suggested inability to refer at trial to the evidence relating to a separate offence, arising out of the same circumstances, for which a fine has been accepted. There may be some concern about a person being unduly pressured to accepting responsibility for one of the offences which they would otherwise have defended given the certainty of avoiding a conviction

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via a prosecutorial fine. There is no reason in principle why provision cannot be made to enable relevant evidence to be used despite the acceptance of a prosecutorial fine, if the person is to be prosecuted for an offence arising out of the same circumstances.

Part 4 Victims and Witnesses

Clauses 28(7) and 30(6) exclude judges and members of the prosecution service (in the exercise of a discretion) from any obligations under the Victim or Witness Charter. It seems to me that an obligation, for example, to treat a victim with courtesy, dignity and respect would not in any way impinge on judicial independence – and could be viewed as strengthening support for it. Further, it seems to me that the obligations in Article 1 of the Victims' Directive must apply to judges and prosecutors.

Part 7 – Violent Offences Prevention Orders

Clauses 51(4) and 53(3) contain retrospective provisions regarding the making of VOPO's when the offence was committed prior to the commencement of the Bill. A VOPO is more likely to constitute a public protection measure than a penalty. In that circumstance, the Committee can be confident that article 7 ECHR is not engaged. The severity of the VOPO prohibitions or requirements can be measured by the sentencing judge to ensure Convention compliance.

Part 8 - Miscellaneous

Avoiding delay in criminal proceedings

In relation to clause 79, rather than providing a power to make regulations outlining a general duty to progress cases, this duty could be placed onto

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the face of the Bill (perhaps as an amended clause 79). The duty might be phrased similarly to Rule 1.1 of the English Criminal Procedure Rules 2013.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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Correspondence from the Department of Justice providing a summary of the responses to the preliminary discussion paper inviting the views on wider implications of making legislative provision in relation to Rights of Audience for Lawyers working in the Attorney General's Office

FROM THE OFFICE OF THE JUSTICE MINISTER

Department of Justice
www.dojni.gov.uk

Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG
Tel: 028 90522744
private.office@dojni.x.gsi.gov.uk
Our ref SUB/1280/2014

Christine Darrah
Committee Clerk
Committee for Justice
Northern Ireland Assembly
Parliament Buildings, Stormont Estate
Belfast BT4 3XX

7 November 2014

Dear Christine,

RESPONSES TO PRELIMINARY DISCUSSION PAPER INVITING VIEWS ON ANY WIDER IMPLICATIONS OF MAKING LEGISLATIVE PROVISION IN RELATION TO RIGHTS OF AUDIENCE FOR LAWYERS WORKING IN THE ATTORNEY GENERAL'S OFFICE

As the Committee is aware from previous correspondence, dated 8 August, the Department issued a short discussion paper (copy enclosed again for reference) to a number of key stakeholders inviting views on any wider implications of a request by the Attorney General for legislative provision to confer on lawyers employed in his office and designated by him, the same rights of audience as barristers in private practice.

A summary of the responses received by the Department is enclosed for the Committee's information. As the Committee will note, many of the responses express concern that such bespoke provision would fragment the rights of audience landscape and dilute the role of the professional bodies. Some also request the same special rights of audience for lawyers in their offices.

Having considered the matter carefully, including the responses, the Minister is not persuaded that it is necessary to make the particular legislative provision which the Attorney General has requested and which others might now also seek.

FROM THE OFFICE OF THE JUSTICE MINISTER

Department of
Justice
www.dojni.gov.uk

The Minister recognises the potential benefits of suitably skilled lawyers in the Attorney General's office (and those in other offices) having the right to appear in the higher courts. He considers, however, that this will be achievable under the mechanisms already legislated for in the Justice (Northern Ireland) Act 2011. As the Committee may recall, the relevant provisions of that Act confer power on the Law Society to make Regulations authorising solicitors, with the prescribed training or experience, to exercise the same rights of audience in the higher courts as barristers in independent practice. Under the current Bar Code such rights of audience would also then extend to employed barristers. (It is possible that the Bar may wish to amend its Code in this regard, but we expect that any proposal that employed barristers should have fewer rights of audience than authorised solicitors would be the subject of some consultation.)

Key to progressing this matter is the Law Society Regulations under the 2011 Act. The Minister has asked his officials to continue working with the Law Society to establish a timeline for the making of those Regulations as soon as possible.

Once those Regulations are in place, the lawyers employed in the Attorney General's office (and those elsewhere) will be able to obtain rights of audience in the higher courts on the same basis as other lawyers. The Minister does not therefore think that a bespoke arrangement under the Justice Bill is necessary to achieve the desired outcome.

Officials would be happy to brief the Committee further if required.

Tim Logan

TIM LOGAN
DALO

Enc – preliminary discussion paper and summary of responses

[redacted]

Preliminary Discussion Paper

Proposal by the Attorney General for Northern Ireland for legislative provision in relation to rights of audience for lawyers working in his office

Summary of Responses

Introduction

1. This paper summarises the responses to the preliminary discussion paper on the proposal by the Attorney General (AG) for legislative provision to confer the same rights of audience as barristers in private practice on lawyers working in his office.

2. The paper invited views on two issues:

   (i) the wider implications for the legal profession and the provision of legal services of the AG's proposal; and

   (ii) whether there is a case for treating lawyers working in the AG's office differently to other employed lawyers.

3. The paper was issued to the following key stakeholders: the Departmental Solicitor, the Director of Public Prosecutions, the Director of Legal Services, the Crown Solicitor, the Bar Council, the Law Society and the Law Centre. Responses were received from all except the Law Centre.

Responses

Issue (i)

4. Several of the responses express concern about making discrete provision on rights of audience for any group of employed lawyers outside the provision on rights of audience prescribed in legislation (in the Justice Act (Northern Ireland) 2011, which is still to be commenced) and the Bar Code of Conduct.

5. The Departmental Solicitor considers that this issue is primarily one for the professional bodies however, is concerned that exempting one group from the

normal arrangements would diminish the standing of the process of authorisation and the requirements for education, training and experience and undermine its rationale.

6. Similarly, the Crown Solicitor expresses concern that making the discrete provision proposed would serve to fragment the rights of audience available throughout public sector lawyers generally and that this would be detrimental to the consistency of standards, training and regulation. The Crown Solicitor considers that it is questionable whether the factors on which the AG has based his proposal are sufficient to justify a fragmented approach.

7. The Bar Council advises that they are not in favour of carving out a distinct class of lawyers who enjoy rights of audience independently from the rights of audience conferred on barristers or solicitors generally. They highlight the safeguards contained in the Justice Act (Northern Ireland) 2011 in relation to the exercise by solicitors of rights of audience in the higher courts and that the Bar Council has its own procedures for ensuring the highest standards of training and provision of professional services. The Bar considers that the use of in-house lawyers by the AG's office would undermine these protections and interests. In addition the Bar Council (without in any way challenging the good faith of the AG) expresses concern that the AG's ability to personally supervise his staff may be overstated and about the impact on the independent Bar.

8. The Law Society notes that the Justice Act (Northern Ireland) 2011 confers responsibility on them to set regulatory requirements for solicitors seeking to exercise rights of audience across higher court tiers and considers that no departure from this holistic and comprehensive regulation is warranted without good reason. The Law Society emphasises that exempting all or some solicitors working in the public service from the new advocacy regulations has the potential to diminish the importance of the regulations and undermine attempts to successfully launch and accredit solicitor advocacy in the higher courts. Whilst the Law Society does not doubt the professional credentials of the current AG, they do not regard investing oversight within a particular individual as best practice in terms of designing regulation of the profession. The also

express concern that crafting exemptions from regulatory requirements also carries with it the potential for unintended consequences. The Law Society suggests that irrespective of the organisation a solicitor works for, the substance of the skills required remain the same and that regulatory requirements should reflect this. The Law Society concludes that the test for departing from comprehensive application of the advocacy regulations has not been met in the circumstances proposed.

Issue (ii)

9. All of the respondents consider that a case for treating lawyers working in the AG's Office differently to other lawyers employed in the public sector has not been made out.

10. The Departmental Solicitor is of the view that legislating as proposed by the AG would make an unnecessary and undesirable distinction between lawyers working in one branch of the public sector and those working in other branches. He notes that his office also has a number of barristers and solicitors skilled in advocacy and rights of audience similar to those sought by the AG for his staff would also be helpful to his own staff. The Departmental Solicitor, making reference to the AG's rationale for his proposal, also states that he believes the AG would not suggest that he (or indeed the Crown Solicitor, the Director of Public Prosecutions or the Director of Legal Services) would be in any way inferior in terms of conscientiousness, concern for the reputation of their offices or engagement in cases where their staff had an advocacy role. The Departmental Solicitor concludes that either all lawyers in the public service should have a statutory right of audience or all should be subject to the same arrangements as apply to the professions in general. He expressly requests that if provision is made in respect of the staff in the AG's office, it extend beyond the AG's staff at the very least to his staff also.

11. The Director of Legal Services considers that the same arguments used on behalf of lawyers working in the AG's Office can be extended to those working elsewhere in the public and private sectors. He notes that within DLS there are 18 (of 43) solicitors who have completed the Advanced Advocacy course,

whose skills and ability have been recognised by clients and who are subject to rigorous management and administrative systems and concludes that, if there is a case for treating the lawyers in the AG's office differently, that must logically extend to the 18 solicitors working in DLS.

12. The Crown Solicitor is of the view that, if the Department considers it appropriate to take forward the AG's proposal, a case could be made for other employed lawyers based on factors of equal if not greater strength as those highlighted by the AG and that this should be taken into account.

13. The Director of Public Prosecutions (DPP) does not oppose the AG's proposal however, considers that this facility should not be exclusive to the office of the AG. The DPP suggests that the reasons cited by the AG in support of his proposal would apply equally to him and expressly requests that he is also given the power to designate the small group of experienced advocates currently prosecuting as Higher Court Advocates in the Crown Court as lawyers who have rights of audience to conduct work in the High Court and Court of Appeal.

14. The Bar Council considers that there is no convincing justification as to why it is necessary to extend rights of audience to the AG's legal staff. Whilst acknowledging it may be of assistance to the AG, they consider this is not the same as these rights of audience being necessary or in the public interest. They also consider that the AG's proposal would see employed barristers working in his office treated more favourably than other employed barristers.

15. The Law Society considers that many of the arguments for making special provision for the AG's legal staff could apply equally to solicitors working in the public sector and therefore it is not possible to justify bespoke provision limited to the AG's office without opening up the question of exemptions more broadly.

Department of Justice
November 2014

Correspondence from the Attorney General

Attorney General for Northern Ireland

Mr Alastair Ross MLA
Chairman
Committee for Justice
Parliament Buildings
Stormont
BT4 3XX

Our Ref: 18/05/13/012

Date: February 02 2015

Dear Chairman

Justice Committee meeting 4 February 2015

Thank you for your invitation to speak to the Committee on 4 February. On the matter of the proposed amendment to establish a clear basis upon which I can obtain information to assist in the exercise of my function in relation to inquests (on which the Committee has heard from both the Health and Social Care Board and the DHSSPS in recent weeks) I thought it might be helpful, in advance of the meeting, if I commented on some of the key points raised. I will also respond in this letter to the issues highlighted in the responses to the preliminary discussion paper on extension of rights of audience to lawyers in this office. While I understand that you wish to explore aspects of the Bill and the other proposed amendments, what follows addresses only the two issues noted above. I will, of course, be very happy to assist you on any matter arising from the Bill on Wednesday.

Proposed amendment to the Coroners Act (NI) 1959

An inquest is designed in our legal system to be a transparent and accessible way of discovering how death has occurred. It has much in common, in that regard, with the serious adverse incident process. As a

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coroner cannot offer any opinion on questions of civil or criminal liability, it is important therefore not to equate the disclosure of information to the Attorney General necessarily as a step towards apportioning blame or determining culpability. If information points towards culpability, particularly criminal culpability, then no one should shrink from acting on that information but I see the proposed amendment primarily as a tool to increase transparent and public knowledge. Here I am conscious of what was said recently by Sir Liam Donaldson in his report on the quality of care in Northern Ireland when he referred to the 'overwhelming evidence that a climate of fear and retribution will cause deaths not prevent them' [p27]

The Donaldson report is of relevance in many ways. While noting that the phenomenon is not particular to Northern Ireland, his view is that,
'patients are dying and suffering injuries and disabilities from poorly designed and executed care on a scale that would be totally unacceptable in any other high risk industry' [p.33].

The proposed amendment seeks to ensure that one of the safeguards in place, the Attorney General's power to direct an inquest, can be improved. We are, rightly, more concerned now with statutory authority for disclosure of information than we might have been in 1959. A clear statutory basis for the processing of relevant information does not alter the scope of the power to direct but it does place the gathering of the relevant information on a firm statutory footing.

I note that the Donaldson report picks up on the role that families can play when a death occurs:

> 'the judgments of clinicians and coroners' officers alike have a substantial bearing on which cases proceed to inquest. The subset of cases that end up in front of a coroner's inquest are also determined as much by family's wishes as by the content of the cases.' [p29]

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You will remember that I highlighted my concern about how we learn from deaths when the deceased did not have surviving friends or family. Self evidently those who die without interested friends or family may not have concerns, including well founded concerns, expressed on their behalf. The proposed amendment could help close this public safety gap.

Contrary to the misapprehension of the Board, the statutory power to direct an inquest is not limited to cases on which a coroner has already been informed of the death or has made a decision about whether or not to hold an inquest. My function is not limited to reviewing the decisions of a coroner or enabling a fresh inquest where new evidence comes to light. I am able to direct an inquest where there has been a decision not to notify the coroner. A coroner, in contrast, has no statutory power to 'call in' a death where the death is not referred to him. He will, of course, become involved if I make a direction and any material which is made available to me, is, in turn, made available by me to the coroner.

It can be seen, therefore, that it would not be sufficient to rely, as the Board suggests, on a request from me to the coroner to share the documents received by him in order to inform my decision on whether or not to direct. This suggestion does not (1) cover those cases which are not referred to the coroner and (2) does not, more generally, deal with the absence of any legal requirement on the coroner to share material with me.

I appreciate that the criminal law by section 10 (1) of the Coroners Act (NI) 1959 imposes a sanction for failure to comply with the section 7 obligation to report certain deaths to the coroner and that the duty to refer has been brought to the attention of practitioners. Nevertheless, the impetus still remains with those closely associated with the circumstances of the potential malpractice or negligence. I am pleased that the 'look back study' commissioned by the former Minister to review emergency department serious adverse incidents revealed that deaths were being referred to the coroner in line with the statutory duty. I do maintain however that there will be, hopefully isolated, cases which are neither recorded as serious adverse

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incidents nor referred to the coroner. If a death in such circumstances is drawn to my attention, I need to be able to access information in order to carry out my statutory function in the public interest.

Perhaps paradoxically, the Board suggests that I may be able to direct an inquest without obtaining information. While it is true that the threshold of advisability is low, it would not be right to burden the coronial system with unnecessary inquests. If an independent Attorney General decides, and explains, why he has not directed an inquest, family members and other interested parties will have the reassurance that the decision took place on a properly informed basis – provided I am able to access relevant material. A decision of this nature is of benefit to family members, clinicians and the much-burdened coronial system.

In terms of the scope of relevant material, the Committee heard evidence from the Board that even with this proposed amendment it would not consider a Trust to be under an obligation to disclose to the Attorney General an expert report similar to that produced by Dr Warde at the time of the inquest into the death of Raychel Ferguson. I understand that the coroner considered that the report should have been disclosed to him. If, as I believe, the coroner was correct in that view then such a report would fall within the terms of the proposed amendment. Indeed, even if the Trust was not bound to disclose it, the report would still come within the terms of the amendment unless protected by legal professional privilege. In general terms, if a report is prepared for legal proceedings then it would, quite properly, fall outside the proposed amendment.

Rights of audience

Extending rights of audience to the small number of lawyers in my office would represent increased value for money, while preserving and, on occasion enhancing quality, without risk to the independent Bar. The lawyers who assist me are familiar with the legal issues in advance of a case coming to court. It makes no economic sense to have them instruct junior

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counsel to spend additional time reading papers and attending court when the real expertise may already be being paid for through lawyers in this office. In short, public funds would be much better spent if the role of junior counsel is undertaken in appropriate cases by my employed legal staff who are fully familiar with the issues rather than by external counsel at greater public expense. In advance of the law society regulations being drafted, which would also confer rights generally on employed barristers – albeit indirectly, there would be no harm in rights of audience being extended to a small group of public sector lawyers pending the implementation of the broader change contemplated by the Justice (Northern Ireland) Act 2011.

The working environment in my office is distinct from that elsewhere in government and public sector legal services. In this office lawyers are working on a daily and intensive basis with the senior Law Officer of this jurisdiction who has personal responsibility for the quality of the work produced. In addition to the personal supervision which the scale and nature of this office permits, there is an underpinning of statutory independence which is simply not present in the Departmental Solicitor's Office, the Crown Solicitor's Office or the Directorate of Legal Services.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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Correspondence from the Departmental Solicitor's Office providing its position on the consultation and the Attorney General's proposed amendment

Departmental Solicitor`s Office

Department of
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Christine Darrah
Committee for Justice
Northern Ireland Assembly
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02 February 2015

Dear Madam

Rights of Audience for Employed Lawyers

Thank you for your letter of 5th January.

I note the position of the Minister of Justice on legislative change. In my response to the consultation I said in relation to a question concerning the wider implications for the legal profession and legal services of discrete provision for lawyers in the Attorney General's Office:

> It does seem to me that to exempt one group, however small in number, from the normal arrangements, does diminish the standing of the process of authorisation and the requirements for education, training and experience and undermines its rationale.

Accordingly I can readily understand the Minister's conclusion and I have never been a proponent of the exemption of public sector lawyers from the requirements to be established for solicitors and employed lawyers to enable them to have rights of audience in the higher courts.

Rather my position is that if such an exemption were to be granted to the legal staff in the Attorney General's Office, it should not be restricted to those staff but should also be available, at the least, to my staff.

In that context my response to the specific question you ask is that I would initially want all my staff on the judicial review team, twelve at present including myself, to be exempted. This team deals with civil cases, including applications for judicial review, often brought before the courts at short notice outside normal office hours that is from 5.15pm to 9.00am and on Saturdays and Sundays. In due course I would wish to give further consideration to widening the exemption to the remaining twelve lawyers in the litigation division.

Yours faithfully

Oswyn Paulin

Correspondence from the Director of Public Prosecutions providing clarity on some issues surrounding the Attorney General's proposed amendment

PUBLIC PROSECUTION SERVICE

Director

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BELFAST CHAMBERS
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Mr Alastair Ross MLA
Chairman
Committee for Justice
Northern Ireland Assembly
Room 242
Parliament Buildings
Stormont
BT4 3XX

10 February 2015

Dear Mr Ross

Re: Rights of audience.

I am prompted to write to you to clarify some issues around the matter of additional rights of audience for selected employed lawyers, which was discussed with the Attorney General at the meeting of the committee on Wednesday last. The Attorney, quite understandably, seeks a facility to permit him to bestow full rights of audience upon certain employed lawyers from within his staff. He makes the point that employed barristers are currently prevented by their professional body from appearing in the Court of Appeal where many of his cases are heard and that additional lawyers must be therefore engaged at a further cost to the public purse and, arguably, against the public interest. He has also stated that, in a small office, he can personally vouch for the quality of his lawyers which may not be the case in the much larger set up of the PPS.

As alluded to by the Deputy Chairman, Mr McCartney, I have only sought a similar facility for a very small number of lawyers in my office (3 in total), who hold the position of Higher Court Advocate. These are senior lawyers who present trials on indictment for the PPS on a daily basis and have been doing so for some two years now. They were appointed to this role following a rigorous selection procedure with an independent lawyer on the panel. They are monitored regularly by senior management and very positive feedback on their performance as advocates has been received from both the public and the bench. Unfortunately, due to the restrictions imposed to their right of audience by their professional body, these advocates cannot appear in the Court of Appeal in the

very same cases they have presented in the Crown Court. This requires the PPS to instruct an entirely new advocate from the self-employed Bar at extra cost. The knowledge these lawyers have built up of the case is therefore lost and there is a risk that the confidence of the victims may be adversely affected by the change in lawyer. Quite apart from these issues, the PPS is keen to attract the very best lawyers from the ranks of the self-employed Bar and such restrictions are not conducive to attracting those lawyers who wish to pursue advocacy at the highest level. For example, in order for a junior counsel to reach advancement to the ranks of Queen's Counsel, it would be expected that at least part of their experience would include work in the Court of Appeal. I would argue that this facility is currently denied to employment lawyers. It is therefore very much in the public interest that any special provision made in respect of increased rights of audience is extended to the PPS.

I would also like to take the opportunity to address a point made by Mr Alban McGuinness MLA on the matter of independence of decision making. There is nothing wrong in principle with directing lawyers also presenting cases, which they have decided to prosecute. We have 100 public prosecutors who carry out both functions in Magistrate's Courts on a daily basis throughout the jurisdiction, without any suggestion ever having been made that our independence has been affected. In any event, the only body with statutory responsibility to determine whether a case is taken or continued is the PPS and while the opinion of an outside advocate instructed to take a case may be considered it is for the PPS and the PPS alone to take the directing decision. As it happens, the primary function of HCA lawyers is to appear in cases directed upon by other lawyers in the office and they are free to express any concerns they may have about the viability of any case in which they are instructed. This should meet any concerns Mr McGuinness may have.

This may represent the only opportunity for the PPS to address this important issue for some time. If the committee considers it helpful, I would be only too happy to attend and address any outstanding concerns any members of the committee may have.

Yours sincerely

Barra McGrory QC
Director of Public Prosecutions

Correspondence from the Director of Public Prosecutions providing further information in relation to the Attorney General's proposed amendment to have rights of audience for lawyers working in his Office

FAO Christine Darragh
Urgent
The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
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10th March 2015.

Dear Madam

The Justice Bill and Proposed Amendments

Having regard to certain evidence given at recent meetings of the Justice Committee by representatives of the Department of Justice in relation to committal proceedings, the Director of Public Prosecutions, Barra McGrory QC, considered it necessary to arrange a series of private meetings with representatives of all the main parties represented on the Committee to clarify certain aspects of that evidence. As a result of those meetings, the Director has asked me to write to you to clarify two points. The Director has asked that this letter be put before the Committee in time for their meeting on 11th March to enable the content to be considered at that time.

1. Evidence to the Committee by the Department of Justice in respect of the number of cases not returned to the Crown Court on committal.

The Director wishes to clarify some of the information given in connection with the Bill's proposal to remove the right of the defence to call oral evidence at committal. I hope the Committee will find it of assistance if I provide some background information.

The ability to call evidence at Committal is a right which defendants exercise to establish whether the witness will turn up to give evidence or to use the evidence given by the witness to try and undermine their evidence at trial by highlighting differences between the two accounts, even where those differences may be minor. It is a layer in the criminal justice process that is additional to the fundamental right that an accused should be permitted to confront his accuser and to cross examine any witness against him. Under no circumstances are we asking that such fundamental rights be diluted but we are asking the committee to consider these reasonable proposals to confine the right to cross examine to the trial. This should be understood as a proportionate reform in the context of a changing criminal justice environment where there is now a greater understanding and recognition of the experiences of victims and witnesses within the criminal justice process.

There have been cases where the PPS has been required to call witnesses, often bringing them in from other countries which takes time and is costly, only for the defence to decide on the day that they do not require the witnesses. In other cases, committal can add a very considerable delay to the progress of the proceedings. For example, in the McDaid case, where the victim died as a result of a sectarian attack, committal papers were served on the defence in March 2012. Twenty eight witnesses were requested by the defence. A very small number of these were required to give evidence and the case was eventually returned for trial in December 2013, over a year after the committal proceedings were first listed.

In another case, one involving allegations of child abuse, one of the witnesses requested by the defence had to be flown in from England. Her husband had to accompany her at his own expense. She left her home at 5am having arranged childcare for her young children. When she arrived at court she was nervous and exhausted. She had to wait all morning to be told at lunchtime that she would not be required by the defence to give evidence as they were conceding that there was a prima facie case against the defendant who was committed for trial. This is a classic example of the way in which the right to seek oral evidence by the defence impacts in a negative way upon the victim in a case.

The purpose of committal proceedings is for the District Judge to satisfy him / herself that there is sufficient evidence to commit the defendant for trial on the charges before the court. Very few cases are not returned for trial. In this regard we noted that at the Committee hearing on 18th February, the Department of Justice representative stated that in 2013 a total of 51 cases out of 1,743 were not committed to the Crown Court for trial . The Director was immediately concerned that these figures over represented the number of cases in which a District Judge decided that there was not a prima facie case to warrant committal to the Crown Court for trial. Having looked at our own figures they show that in 2013 out of a total of 2,289 defendants, only 6 were not committed for trial by a District Judge. This represents approximately 0.3% of defendants who were the subject of committal proceedings in 2013. Of these 6 cases, 2 were cases in which the defence called witnesses to give evidence and in both cases the witnesses did not attend. The cases against the remaining 4 defendants were decided on the basis of legal submissions on the evidence contained in the committal papers with no oral evidence being called.

The Committee might be interested to know that in 2014, of the 1938 defendants who were the subject of committal proceedings, only 4 were not committed for trial.

The reason for the figure of 51 cases referred to in evidence before the Committee appears to be that this figure includes cases which were withdrawn, where a caution was accepted by a defendant, where papers could not be served on a defendant and which were adjourned generally and where defendants did not attend for committal.

The current proposal contained in the Bill to remove the right of the defence to require the prosecution to call witnesses at committal, would not, in our view, occasion any detriment to the defence, particularly when the vast majority of cases are committed for trial whether or not prosecution witnesses are required to give evidence. Defendants will retain the right to challenge the sufficiency of the prosecution's evidence through the Crown Court's 'No Bill' procedure pre-trial or through the trial process itself.

The proposed amendment would rebalance this part of the process and provide greater protection for victims and witnesses. It would avoid them having to give evidence at the Magistrates' Court and the Crown Court and would prevent some withdrawing their support for the prosecution altogether because the prospect of having to give evidence twice is too onerous and distressing.

2. The Attorney General's proposed amendment to have rights of audience extended for the lawyers in his office.

The Director gave evidence on the Attorney General's proposed amendment and wrote to the Chairman of the Committee on 10th February 2015 clarifying that any increase in rights of audience of PPS would be limited to those senior lawyers in the recently established Higher Courts Advocacy unit of the PPS. The Director asks only that, in the event of the Attorney's request being favourably received, the PPS be included in the limited way outlined. It would be odd indeed that the only public legal office in respect of which court advocacy is a core function should be excluded from any statutory changes to the normal regulations on rights of audience.

Should I be of any other assistance please do not hesitate to contact me and should the committee wish to hear from the Public Prosecution Service at their meeting tomorrow or on another occasion we will be pleased to attend.

Yours faithfully

Ciaran McQuillan

Assistant Director

Policy Section
Public Prosecution Service for Northern Ireland

Northern Ireland Assembly

Appendix 7

Correspondence relating to the Proposed Amendment by Jim Wells MLA

Contents

Correspondence from The Northern Ireland Human Rights Commission providing additional information following its evidence session to the Committee on the proposed amendment by Jim Wells MLA

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Mr Alistair Ross MLA
Chairperson
Justice Committee
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

20 January, 2015

Dear Alistair,

Re: Jim Wells Amendment to the Justice Bill

Thank you for your recent letter regarding the Commission's evidence to the Justice Committee and the outstanding questions requiring additional information.

The Commission bases its advice on international human rights standards ratified by the UK government. The Commission notes that there is nothing in the relevant treaties that prevents a state from providing a foetus with a certain level of protection. For example, a state may restrict a woman's[1] access to termination of pregnancy. However, any such protections and restrictions must not violate a woman's human rights.

- **In relation to discussions around the rights of a mother and the pre-birth child being inextricably linked, whether the pre-birth child can be considered to be a patient?**

The Commission outlined in the evidence session that the particular European Court of Human Rights (ECtHR) reference to 'patients' in *Şentürk v. Turkey*, which was cited in the Commission's written submission, was setting

[1] Please note that any references to "woman" or "women" or pregnancy in general, should be read to include girls of whatever age who are capable of becoming pregnant.

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out general principles to be satisfied by a State.[2] In the sections of that judgment which apply these principles to the facts of the case, the Court refers to the deceased woman as a 'patient' in the singular.[3] In that case, the Court declined to consider rights claimed on behalf of the foetus as 'the life of the foetus in question was intimately connected with that of Mrs. Şentűrk and depended on the care provided to her.'[4]

Article 12 (2) of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) requires the provision of "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

In providing access to services during pregnancy the relevant treaties do not prevent a state from choosing to refer to both the mother and the foetus as a patient. In making such referrals it should, however, be noted that the ECtHR has affirmed that 'the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected...'[5] and that 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.'[6] Furthermore, the Committee on the Elimination of Discrimination against Women has held that a decision influenced by 'the stereotype that protection of the foetus should prevail over the health of the mother' violated article 5 of the CEDAW Convention.[7]

- **The status of an aborted foetus, and whether after an abortion, the foetus has acquired personhood?**

The term 'personhood' as referenced is not a term commonly used by international human rights mechanisms. The relevant international human rights treaties do not recognise a foetus as an independent person either in utero or following an abortion (whether as a consequence of a spontaneous miscarriage or following a termination of pregnancy).

[2] *Şentűrk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §§79-83
[3] *Şentűrk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §§89, 91, 96
[4] *Şentűrk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §109
[5] *Şentűrk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §108
[6] *Şentűrk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §107
[7] *L.C. v Peru*, CEDAW Committee, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 17 October 2011, para 8.15.

In *Vo v France* the ECtHR outlined relevant case law regarding circumstances examined by the Convention institutions and stated that 'the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests.'[8]

The Court of Appeal has recently noted in the case [2013] NICA 68 that in domestic law the definition of 'deceased person' has been extended only to a 'foetus in utero then capable of being born alive.'[9] Furthermore, the Court of Appeal made clear that the 'acceptance of the determination of when legal rights begin does not indicate any view on the difficult and controversial moral issues around the right to life of the unborn child.'[10]

I hope this additional correspondence is helpful to the Committee in its deliberations. The Commission remains available to provide further information.

Yours sincerely,

Les Allamby,
Chief Commissioner

[8] *Vo v France*, ECt.HR, no. 53924/00, 8 July 2004, §80.
[9] [2013] NICA 68, para 34.
[10] [2013] NICA 68, para 28.

Appendix 8

Northern Ireland Assembly Research Papers

Contents

Research and Information Service
Bill Paper

Paper 000/00 12 September 2014 NIAR 406-14

Fiona O'Connell

Justice Bill 2014

This paper outlines the provisions of the Justice Bill and policy proposals underpinning the Bill

Key Points

The Justice Bill 2014 was introduced in the Northern Ireland Assembly on 16 June 2014 and had its second reading on 24 June 2014.

The Bill is divided into nine parts has 92 clauses and six schedules. Indications are that a number of planned amendments to the Bill. These include amendments made by the Department, the Attorney General and a Private Member's amendment.

It has three policy aims: to improve services for victims and witnesses; to speed up the justice system; and to improve the efficiency and effectiveness of key aspects the system.

Some issues were raised by consultees to the equality consultation on the Bill in 2013. These included:

- criticisms of the Department's approach to equality screening;
- the impact of proposals relating to the creation of a single jurisdiction for county courts and magistrates' groups on certain groups such as young and old people and persons with disabilities;
- concerns that the proposed amendment to Section 53 of the Justice (Northern Ireland) Act 2002 would not fully reflect the spirit of Article 3 of the UN Convention on the Rights of the Child;
- concerns that proposals to remove the maximum age for jury service would have a disproportionate impact on those over 70, including widowed, those with disabilities and women;
- concerns that the focus on encouraging early guilty pleas was on speeding up the criminal justice system and savings, putting the right to a fair trial at risk.

The Department concluded that it was satisfied that no substantial or equality issues remained unaddressed and that the proposals did not adversely impact on Section 75 groups.

The proposed provisions were broadly welcomed during the Second Stage Debate. However, there were some concerns around:

- proposed changes to the historical and traditional divisions of the county court;
- proposals on the single jurisdiction: whether they would benefit victims and witnesses or be operated to judicial or professional convenience;
- that a complete abolition of evidence on oath could cause delay and some issues could be dealt with at a preliminary investigation;
- that prosecutorial fines could be open to abuse and that a person only had to consent to a fine rather than actually pay the fine
- whether there is sufficient clarity regarding the role of the court in relation to early guilty pleas;
- whether some clauses in relation to early guilty pleas are necessary as there are already Court of Appeal Guidelines in place to set out the percentage rebate if someone pleads guilty;
- whether clauses relating to case management were necessary as there are arrangements in some courts to consider the readiness of criminal cases;
- whether the Department's proposals to amend Article 53 of the Justice (NI) Act 2002 on the aims of the Youth Justice system fully comply with Article 3 of the UN Convention on the Rights of the Child.

Contents

1 Introduction

The Justice Bill 2014 was introduced by the Justice Minister, David Ford, in the Northern Ireland Assembly on 16th June 2014 and had its second reading on 24th June 2014. The Bill has 92 clauses, six schedules and is divided into 9 parts. The parts of the Bill relate to:

- Single Jurisdiction for County Courts and Magistrates Courts;
- Committal for Trial;
- Prosecutorial fines;
- Victims and Witnesses;
- Criminal Records;
- Live Links in Criminal Proceedings;
- Violent Offences Prevention Orders;
- Miscellaneous provisions including jury service, early guilty pleas, avoiding delay in criminal proceedings, Public Prosecutor's summons, Defence access to premises, court security officers and youth justice; and
- Supplementary provisions

The Bill has three main aims: to improve services for victims and witnesses; to speed up the justice system; and to improve the efficiency and effectiveness of key aspects the system.[1]

1 See paragraph 3 of the Explanatory Memorandum to the Bill

2 Consultations

The policies underpinning the Bill have been subject to consultation exercises. Full consultation exercises were conducted on:

- Committal reform;
- Encouraging early guilty pleas;
- The introduction of a statutory framework for the management of criminal cases;
- The introduction of a Victims and Witnesses Charter;
- The provision of Victim Personal Statements;
- Reform of the criminal records regime;
- Expanding live video link opportunities in courts;
- The introduction of Violent Offences Prevention Orders;
- Changes to the upper age limits for juries.

Some of the policy areas were consulted on previously for inclusion in a prior Justice Bill. These included:

- The creation of a single court jurisdiction for the county courts and magistrates' courts;
- Powers for the PPS to issue summonses; and
- The creation of prosecutorial fines.

Some of the policy areas included in this Bill were the subject of targeted consultations, including amendments to update the Juries (Northern Ireland) Order 1996 and creating a power to inspect property in criminal cases.[2]

2 See paragraph 10 of the Explanatory Memorandum to the Bill

3 Part 1 of the Bill-Clauses 1-6: A Single Jurisdiction for County Courts and Magistrates' Courts

Background

Part one of this Bill creates a single territorial jurisdiction in Northern Ireland for the county courts and the magistrates' courts. According to the Explanatory Memorandum to the Bill, this is similar to that which already exists in the High Court, Crown Court and Coroners Service. The rationale for this approach is to allow for greater flexibility in the distribution of court business by allowing cases to be listed in or transferred to an alternative court division, when there is a good reason to do so.[3]

Historically, Northern Ireland has been divided into County Court Divisions and Petty Sessions (Magistrates' Courts) districts based on the boundaries for Local Government Districts (LGDs).[4] In light of the reduction in the number of LGD from 26 to 11, the Northern Ireland Courts and Tribunal Service (NICTS) established a working group to consider the options for redesigning court boundaries.[5] At the time, the working group considered two main options:[6]

- Option 1- A conventional realignment of court boundaries to take account of the LGDs
- Option 2-Removal of statutory boundaries to establish a single territorial jurisdiction for County Courts and Magistrates' Courts in Northern Ireland. This model would be underpinned by an administrative framework governing the distribution of business.

Overview of Clauses

Clause 1 creates a Single Jurisdiction for County Courts and Magistrates' Courts and provides that Northern Ireland is no longer to be divided into county court divisions and petty sessions districts and the courts' jurisdiction and powers are exercisable throughout Northern Ireland.

Clause 2 deals with administrative court divisions. Clause 2(1) confers a power on the Department of Justice, after consultation with the Lord Chief Justice, to make directions which will divide Northern Ireland into areas to be known as administrative court divisions. Clause 2 (2) provides that the directions may specify different administrative court divisions for different purposes of the same court.

There is little detail in the Bill and accompanying Explanatory Memorandum on the possible divisions. However, a consultation exercise conducted in 2010, "Redrawing the Map- A Consultation on Court Boundaries", provides further information on this matter. The map below, taken from the NICTS consultation document, sets out the current Divisional structure.[7]

3 See paragraph 72 of the Explanatory Memorandum to the Bill

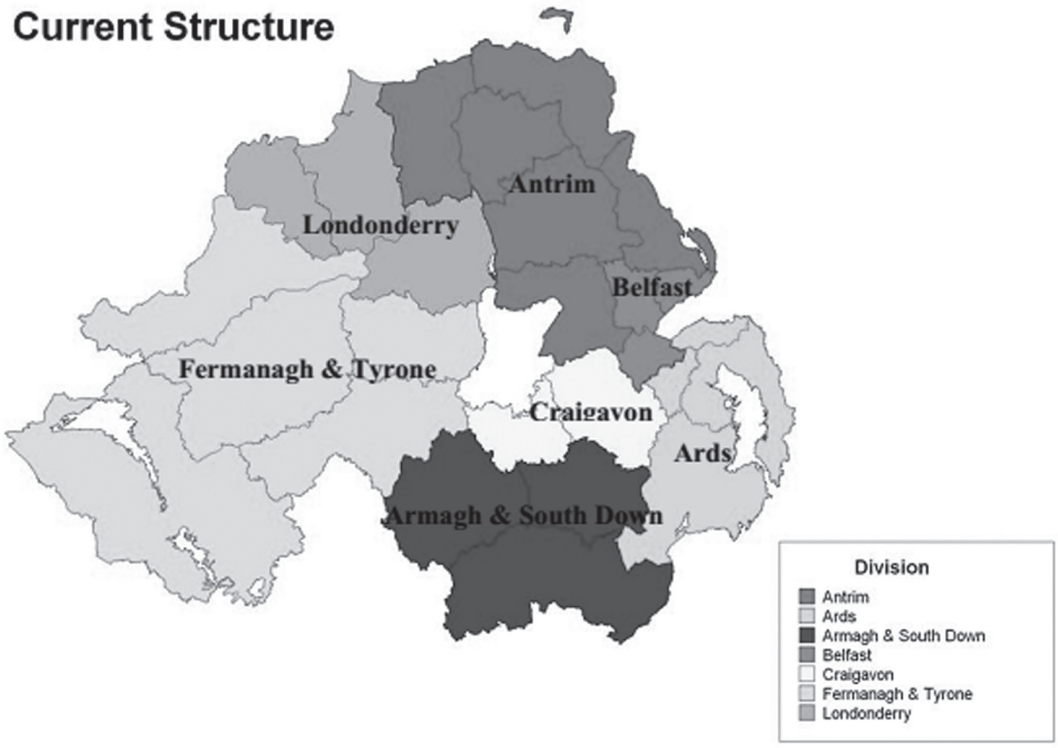
4 Northern Ireland Court Service "Redrawing the Map: A Consultation on Court Boundaries in Northern Ireland " March 2010, pg 2

5 Northern Ireland Court Service "Redrawing the Map: A Consultation on Court Boundaries in Northern Ireland " March 2010, pg 2

6 Northern Ireland Court Service "Redrawing the Map: A Consultation on Court Boundaries in Northern Ireland " March 2010, pg 2

7 Northern Ireland Court Service "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland , March 2010 Pg 6

Map 1: Current structure



The consultation paper in 2010 contains an appendix which provides a description of the various court divisions. The paper highlighted that during the first phase of the reforms it is proposed to preserve the links between court boundaries and local government boundaries, pre or post RPA reform. Appendix (version 1) of the consultation paper lists the current 7 court division structure, but the consultation paper suggested that this option would maintain the status quo, but it would lead to confusion post RPA reform.[8]

8 Northern Ireland Court Service "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland , March 2010, pg39

Appendix version 1

Appendix *(version 1)*

Court division	Current Petty Sessions Districts *(to be combined so only one per division)*	Current Local Government Districts	Courthouses
Antrim	North Antrim	Coleraine Ballymoney Moyle	Coleraine
	Ballymena	Ballymena	Ballymena
	Antrim	Antrim	Antrim
	Larne	Larne	Larne
Ards	Down	Down	Downpatrick
	Castlereagh	Castlereagh	
	Ards	Ards	Newtownards
	North Down	North Down	Bangor
Armagh and South Down	Armagh	Armagh	Armagh
	Newry and Mourne	Newry and Mourne	Newry
	Banbridge	Banbridge	Banbridge
Belfast	Belfast	Belfast Newtownabbey Carrickfergus	RCJ Laganside Old Townhall
Craigavon	Craigavon	Craigavon	Craigavon
	Lisburn	Lisburn	Lisburn
Fermanagh and Tyrone	East Tyrone	Cookstown Dungannon	Dungannon
	Omagh	Omagh	Omagh
	Strabane	Strabane	Strabane
	Fermanagh	Fermanagh	Enniskillen
Londonderry	Londonderry	Derry	Londonderry
	Limavady	Limavady	Limavady
	Magherafelt	Magherafelt	Magherafelt

The consultation paper sets out information on Appendix version 2 (see below) which comprises of 6 court divisions, each of which comprises of 1 or more of the eleven proposed Local Government Districts. The paper indicated that this model (shown below in Appendix version 2 and Map 2) would provide the most even distribution of workload across Northern Ireland. [9]

9 Northern Ireland Court Service "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland , March 2010, pg 40

Appendix Version 2

Court division	**Comprises the following Local Government Districts** (post R.P.A.)	***Current council areas included within Division*** *(For illustration only)*	***Courthouses*** *(For illustration only)*
Antrim	• Antrim and Newtownabbey; • Mid-Antrim.	*Antrim* *Newtownabbey* *Ballymena* *Carrickfergus* *Larne*	*Antrim* *Ballymena* *Larne*
Ards and Lisburn	• Lisburn City and Castlereagh; • Ards and North Down.	*Lisburn* *Castlereagh* *Ards* *North Down*	*Newtownards* *Lisburn* *Bangor*
Armagh and South Down	• Armagh City and Bann; • Newry City and Down.	*Armagh* *Banbridge* *Craigavon* *Newry and Mourne* *Down*	*Newry* *Armagh* *Downpatrick* *Craigavon* *Banbridge*
Belfast	• Belfast City.	*Belfast City*	*Laganside* *Old Townhall*
Western	• Fermanagh and Omagh; • Mid-Ulster.	*Fermanagh* *Omagh* *Cookstown* *Dungannon* *Magherafelt*	*Dungannon* *Omagh* *Enniskillen* *Magherafelt*
Northern	• Derry City and Strabane; • Causeway Coast.	*Derry City* *Strabane* *Ballymoney* *Coleraine* *Limavady* *Moyle*	*Londonderry* *Coleraine* *Strabane* *Limavady*

Map 2: Proposed Court Divisions

Clause 3 (1) of the Bill confers a power on the Lord Chief Justice to give directions as to the distribution of business of county courts among the county courts and magistrates' courts and for the transfer of business from one court to another. Clause 3 (4) also confers a power on the Department of Justice to give directions as to the distribution among the chief clerks and clerks of the petty sessions of the functions exercisable conferred by any statutory provision on them. This approach diverges from the initial policy thinking in the NICTS policy consultation. The consultation document in 2010 suggested that the responsibility for the administrative framework for issuing the proposed administrative framework could be issued by the Department of Justice with the agreement of the Lord Chief Justice or vice versa.[10]

In the summary of responses to the consultation paper, the NICTS indicated that having reviewed the options and considered the consultation responses, its view was that the function was one of judicial deployment and distribution of court business and it should be exercised by the Lord Chief Justice with the agreement of the Department of Justice.[11] The NICTS suggested it would be helpful to provide that the Department of Justice may make a recommendation to the Lord Chief Justice that the administrative framework should be amended.[12] However, the Bill contains separate direction making powers for the Lord Chief Justice and the Department and neither has exclusive responsibility for the administrative framework.

Clause 4 deals with lay magistrates. According to the Explanatory Memorandum, this clause re-enacts section 9 of the Justice (Northern Ireland) Act 2002 with amendments so that lay magistrates will have jurisdiction throughout Northern Ireland and will be appointed to an

10 Northern Ireland Court Service "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland , March 2010,pg 15

11 Northern Ireland Courts and Tribunals Service- "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland"- Summary of Responses and Proposed Way Forward",1 October 2010, pg11

12 Northern Ireland Courts and Tribunals Service- "Redrawing the Map"- A Consultation on Court Boundaries in Northern Ireland"- Summary of Responses and Proposed Way Forward",1 October 2010, pg11

administrative court division.[13] Clause 4 (1) of the Bill provides that the Northern Ireland Judicial Appointments Commission must appoint persons to be lay magistrates. Clause 4 (2) provides that a lay magistrate shall be appointed to an administrative court division and will have jurisdiction throughout Northern Ireland. Clause 4 also provides that a lay magistrate shall sit in accordance with directions given by the Lord Chief Justice. In giving such directions, the Lord Chief Justice is to have regard to the desirability of a lay magistrate sitting in courts held in reasonable proximity to where the lay magistrate lives or works. Clause 4 (7) confers a power on the Department of Justice, after consultation with the Lord Chief Justice, to make further provision by order about eligibility for appointment as a lay magistrate. The order may include provision that a person may not be eligible for appointment if they do not live or work within a prescribed distance of the administrative court division for which they are to be appointed. An order made under clause 4 (7) of the Bill may not be made unless a draft has been laid before and approved by a resolution of the Assembly (see clause 87 (7) (a)).

Clause 5 deals with Justices of the Peace. This clause re-enacts section 103 of the Judicature (Northern Ireland) Act 1978 with amendments so that justices of the peace shall have jurisdiction throughout Northern Ireland.[14] Clause 5(3) provides that a justice of the peace shall have as regards the whole of Northern Ireland the jurisdictions and duties which immediately before commencement were vested in or imposed on a justice of the peace as regards a county court division. Clause 5(5) requires the Department of Justice to make arrangements for keeping a copy of any instrument appointing or removing a justice of the peace and keeping a record and persons holding office as a justice of the peace.

Clause 6 provides for the consequential amendments contained in schedule 1 to have effect. Schedule 1 of the Bill amends various pieces of legislation as a result of the provisions in this part of the Bill.

13 Explanatory Memorandum to the Bill, pg 23

14 Explanatory Memorandum to the Bill, pg 24

4 Part 2 of the Bill-Clauses 7-16: Committal for Trial

Background

Part 2 of the Bill relates to committal for trial. It is divided into two chapters: abolition of preliminary investigations and direct committal for trial in certain cases. A committal hearing is a preliminary hearing to determine whether there is a case to answer in the Crown Court.[15] In Northern Ireland, there are two forms of committal proceedings. The first type and most commonly used form of committal proceedings is a 'Preliminary Inquiry' (PE). A PE is governed by Articles 31- 34 of the Magistrates' Court (Northern Ireland) Order 1981. Where a prosecutor intends to carry out a PE, they must serve a notice of intention to the Magistrates' Court to hold a PE along with the necessary documentation including a list of witnesses, the statement of complaint and a list of exhibits.[16] Copies of witnesses' written statements are presented to the court and, if either side requests, read out loud. This process avoids the necessity for witnesses having to attend court on two separate occasions to give evidence.[17]

The other type of committal proceedings is a 'preliminary investigation' (PI). A PI is conducted by oral evidence before a magistrate's court.[18] PI evidence is given by word of mouth on oath, it is written down in court and called a deposition. The witnesses are bound over to attend and give evidence if required at the main trial.[19]

The Criminal Justice System Review Report, published in 2000, noted that in the Scottish criminal justice system the committal process does not involve any form of a preliminary hearing. Instead the Procurator Fiscal exercises a quasi-judicial function in assessing whether there is sufficient evidence to secure a conviction if charged.[20] The Review also considered the system in England and Wales where there was a trend towards simplified procedures for transferring cases to the Crown Court. The Review recommended that consideration be given to introducing simplified procedures for transferring cases to the Crown Court in Northern Ireland, whilst ensuring safeguards for a defendant who wishes to argue that there is no case to answer.[21]

The Department of Justice consulted on proposals for reform of committal proceedings in January 2012. The consultation sought views on a proposal to remove the taking of oral evidence and cross examination of witnesses in committal proceedings. The defendant would retain the right to make representations on his/her own behalf, but it would not be possible to take oral evidence from other witnesses. All committal proceedings would take place by way for preliminary inquiry or 'on the papers'. The document also proposed that cases involving the Justice and Security (Northern Ireland) Act 2007 and cases involving extra territorial offences would be conducted as PE, or on the papers. The Department also welcomed views and comments on potential further reform, including extending the range of cases that could be transferred directly for trial to the Crown Court or alternatively, a magistrates' court could potentially be required to directly transfer a case to the Crown Court without any committal proceedings.[22]

15 NIO (2004) The Future of Committal Proceedings, published April 2004, p 5

16 BJAC Valentine (2010)"Criminal Procedure in Northern Ireland" 2nd Edition, 157

17 B Dickson 2011 "Law in Northern Ireland: An Introduction" SLS Publications, 201

18 BJAC Valentine (2010) "Criminal Procedure in Northern Ireland" Second Edition, 155

19 B Dickson 2011 "Law in Northern Ireland: An Introduction" SLS Publications, 201

20 Criminal Justice System Review Report, March 2000,

21 Criminal Justice System Review Report, March 2000, pg 89

22 DoJNI"Reform of Committal Proceedings: A Department of Justice Consultation" January 2012, available at http://www.dojni.gov.uk/index/public-consultations/archive-consultations/speeding_up_justice_consultation_on_reform_of_committal_proceedings.pdf

There were issues raised in response to the Department of Justice's policy consultation on committal reform. Eleven respondents made substantive comments on the proposal to abolish PIs and mixed committals. Of these responses, eight were in favour and three were opposed. Four of those who supported the proposal (PSNI, PPS, NIACRO and Victim Support) commented that existing arrangements can contribute to delay, be traumatic for victims and witnesses and place an unnecessary burden on the criminal justice system.[23]

The Law Society, Belfast Solicitors' Association and an individual considered that the proposal failed to consider the impact on the defendant and that it could be damaging to the criminal justice system. The respondents said that the proposal failed to recognise that committal proceedings could ensure efficiency and enable weak cases to be weeded out an early stage.[24]

The Law Society and Solicitors' Association suggested that instead of constraining the right to examine witnesses in committal proceedings, the Department should consider the use of special measures to address the needs of vulnerable and intimidated witnesses. One individual suggested that committal proceedings were not the prime cause of delay and suggested other measures including embedding PPS prosecutors in PSNI stations, the direct transfer of serious indictable cases from the magistrates' court to the Crown Court and quicker provision of case papers and forensic and medical reports.[25]

Five respondents (the Northern Ireland Legal Services Commission, PSNI, NIACRO, PPS and Office of the Lord Chief Justice (OLCJ)) agreed that the proposals should be extended to cases brought under the Justice and Security (Northern Ireland) Act 2007 and cases involving extra-territorial offences.[26]

Six respondents suggested there was benefit in making more fundamental reform to the committal process and in particular suggested the introduction of a more direct route from the magistrates' court to the Crown Court to get an accused to trial more quickly on cases being tried on indictment. The OLCJ suggested that committal should be abolished for cases where the defendant wished to enter a guilty plea in the magistrates' court and to allow transfer to court for sentencing.[27]

PSNI, PPS, Victim Support and an individual asked the Department to consider the scope for direct transfer for all cases to be tried on indictment without retaining any vestige of committal. NIACRO suggested there was an opportunity for direct transfer provided the right of the accused to challenge evidence is retained and that any decision to transfer a case directly to the Crown Court is made known to the accused and the injured party, along with the expected timeframe for the case to come before the court.[28]

The Department responded that the case for abolition of the right to call oral evidence and cross examine witnesses at committal proceedings has been made and that the proposal should be extended to cases brought under the Justice and Security (Northern Ireland) Act 2007 and extra-territorial cases. The Department also concluded that now was the opportunity for wider committal reform and indicated its intention to establish a Procedural

23 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 24 http://www.dojni.gov.uk/index/public-consultations/archive-consultations/early-guilty-pleas-and-committal-reform-report-on-responses-and-way-forward-report.pdf

24 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 24

25 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 24

26 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 25

27 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 26

28 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 26

Reform Group to develop proposals for more radical committal reform, to enable the transfer from the magistrates' court to the Crown Court in certain circumstances, for example where the defendant indicated that they wished to plead guilty.[29]

Overview of Clauses

Chapter 1- Abolition of Preliminary Investigations

Clause 7 of the Bill abolishes preliminary investigations by repealing Article 30 of the Magistrates' Courts (Northern Ireland) Order 1981. As a result, all committal proceedings in the magistrates' courts will be dealt with by preliminary inquiry.

Clause 8 repeals Article 34(2) of the Magistrates' Courts Northern Ireland Order 1981 which means that there will no longer be a requirement for witnesses at a Preliminary Inquiry to give evidence on oath.

Clause 9 gives effect to Schedule 2 of the Bill which contains consequential amendments as a result of section 7 and 8.

Chapter 2- Direct Committal for Trial in Certain Cases

Chapter 2 provides for the direct committal to the Crown court for trial in certain cases. Clause 10 (1) provides that the direct transfer provisions in this chapter apply where an accused person appears or is brought before a magistrates' court charged with an offence and certain conditions set out in subsection 2 are satisfied. The conditions are that the offence is an offence triable only on indictment or it is a summary offence but either the accused or the prosecution claims to be tried on indictment; or it is determined that the offence is to be tried on indictment.

Clause 10 (3) specifies that the provisions in the chapter do not apply for example where a notice has been issued to transfer proceedings in serious fraud cases or cases involving children to the Crown Court.

Clause 11 makes provisions for direct committal to the Crown Court for trial where the accused indicates an intention to plead guilty to an offence and therefore shall not conduct committal proceedings.

Clause 12 makes provision for direct committal to the Crown Court for trial where an accused is charged with a specified offence and committal proceedings will therefore not be conducted in relation to that offence. Specified offences are set out in clause 12(3) and include murder and manslaughter and offences of aiding, abetting, counselling, procuring, inciting the commission, conspiring or attempting to commit murder or manslaughter. Clause 12 (4) allows the Department of Justice to amend subsection 3 by order. This would allow the Department to add to the list of specified offences which could be directly committed to the Crown Court. An order made under clause 12(4) may not be made unless a draft has been laid before and approved by a resolution of the Assembly (see clause 87 (7) (a)).

Clause 13 sets out the procedures that have to be followed in relation to direct committal. The Court when committing a person for trial to the Crown Court shall specify in a notice the charges on which the person is to be committed for trial and the place where the person is to be tried. Clause 13 (2) provides that magistrates' courts rules have to make provision for the service of documents, including that a copy of the notice of committal and copies of documents containing evidence have to be given to the person and to the Crown Court.

29 DoJNI "Encouraging Early Guilty Pleas and Reform of Committal Proceedings: Report on responses and Way Forward" pg 27

The documents containing evidence are to be given to the person and the court either at the same time as the notice of committal or as soon as practicable thereafter. Magistrates' courts rules are made by the Magistrates' Courts Rules Committee and are subject to the negative resolution procedure of the Assembly.[30]

Clause 14 makes provision for the procedures to be followed after committal. The clause provides that a person who is committed for trial may apply orally or in writing to the Crown Court for the charge or any of the charges to be dismissed. The application can be made any time after that person is served with copies containing the evidence on which the person is charged and before that person is arraigned. The judge shall dismiss the charge if it appears that the evidence would not be sufficient for the applicant to be convicted. Clause 14(7) allows Crown Court rules to be made which may make provision as to the time and stage of proceedings at which anything required to be done is to be done and may prescribe the content and form of other notices or documents, the manner in which the material is submitted and the persons to be served with notices and other material. Crown Court rules are made by the Crown Court Rules Committee and are subject to negative resolution of the Assembly.[31]

Clause 15 provides for restrictions on reporting applications for dismissal. Subsection 1 provides that no written report of an application shall be published in Northern Ireland and no report of such an application shall be included in a relevant programme for reception in Northern Ireland. Relevant programme means a programme included in a programme service within the meaning of the Broadcasting Act 1990. According to subsection 4, subsection 1 does not apply where the application is successful. Subsection 6 provides that subsection 1 does not apply to the publication of a report or a relevant programme of a report of an unsuccessful application. Subsection 7 specifies that subsection 1 does not apply to a report that contains one or more of the following matters:

- The identity of the court and the name of the judge;
- The names, ages, home addresses and occupations of the accused and witnesses;
- The offence or offences, or a summary of them which the accused is or are charged;
- The names of counsel and solicitors in the proceedings;
- Where the proceedings are adjourned, the date and place to which they are adjourned;
- Any bail arrangements; and
- Whether legal aid was granted to the accused or any of the accused.

Subsection 10 of clause 15 provides that if a report is published or broadcast in contravention of the section, that specified persons are guilty of an offence.The provision includes proprietors, editors or publishers of a newspaper or periodicals or a body corporate engaged in providing a service in which the programme is included. A person guilty of an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (subsection 11). Level 5 on the standard scale is £5000.[32]

Clause 16 provides that schedule 3, which contains amendments consequential to the provisions on direct committal, has effect and makes further supplementary provision.

30 See Articles 13 and 13A (2) of the Magistrates' Courts (Northern Ireland) Order 1981.

31 See Articles 52(1) , 53A and 119 of the Judicature (Northern Ireland) Act 1978

32 Article 5 (2) of the Fines and Penalties (Northern Ireland) Order 1984, as amended by Artic e 3 of the Criminal Justice (Northern Ireland) Order 1994.

5 Part 3 of the Bill- Clause 17-27: Prosecutorial Fines

Background

Part 3 of the Bill creates new powers to allow public prosecutors to offer lower level offenders a financial penalty up to a maximum of £200 as an alternative to prosecution of the case at court.[33] The Criminal Justice System Review published in 2000 recommended that prosecutorial fines be considered in Northern Ireland. The Criminal Justice Review noted that it could be argued that prosecutorial fines involve imposing punishment or putting pressure on a suspect to accept punishment without recourse to due process. However, the Review indicated there were no objections on human rights grounds, if it were made clear that in issuing a fine the recipient has the option of contesting the case in court.[34]

The policy proposals were the subject of a consultation conducted by the Northern Ireland Office (NIO) in 2008 prior to the devolution of policing and justice to the Northern Ireland Assembly and the establishment of the Department of Justice.[35] A paper outlining the summary of responses to the consultation was published in October 2009. The majority of respondents were in favour of diverting suitable first time and non-habitual offenders committing minor offences from prosecution and providing alternative non court disposals which represented a proportionate justice outcome. The NIO signalled its intention to begin drafting legislation for the introduction of prosecutorial fines. The NIO set out the circumstances when prosecutorial fines would be available and these are rehearsed as follows:[36]

- Prosecutorial fines would be available to the prosecutor to exercise in any summary offence in which it is believed that it would be an appropriate and proportionate response;
- No designated list of offences is proposed and it would be for the prosecutor subject to strict internal guidelines to consider its appropriateness as a disposal in individual cases;
- The recipient would be required to admit the offence and consent to receiving a prosecutorial fine;
- The fine would not be recorded on an individual's criminal record but it may be taken into account by the PPS and courts if further offences are committed in the future;
- Have a variable, rather than a fixed fine value. The Prosecutor would consider the appropriate rate based on the level of court fine the offence would attract;
- The fine would have the ability to attract a compensation order to recompense victims for the value of the criminal damage costs incurred and the recipient would be offered the ability to pay by instalments based on means assessment.

Overview of Clauses

Clause 17 of the Bill allows the Public Prosecutor to issue a notice offering an alleged offender aged over 18 a prosecutorial fine notice where the Public Prosecutor receives a report that a summary offence has been committed. Clause 17 also specifies that the notice must contain particular information such as stating the alleged offence or offences, information on the circumstances alleged to constitute the offence or offences, the amount

33 Explanatory Memorandum to the Bill, pg 26.

34 Criminal Justice System Review Report, March 2000, para 4.154,available at http://cain.ulst.ac.uk/issues/law/cjr/chap4.pdf

35 NIO "Alternatives to Prosecution" March 2008, pg 28 http://webarchive.nationalarchives.gov.uk/20091013044625/http:/www.nio.gov.uk/alternatives_to_prosecution_-_a_discussion_paper.pdf

36 NIO "Summary of Responses to the Alternatives to Prosecution: A Discussion Paper" October 2009

of the prosecutorial fine to be paid. The notice must also specify that the alleged offender may accept or decline the offer given by the Public Prosecutor within 21 days of the date that the notice was issued and if the offer is declined that the alleged offender is liable to be prosecuted for the offence. The notice must also indicate that if the offer is accepted that the alleged offender will be discharged from liability to be prosecuted.

Clause 18 provides that where a person has accepted the offer under clause 17, the Public Prosecutor must issue a prosecutorial fine notice to that person. A prosecutorial fine notice is notice which states the alleged offence, the amount of prosecutorial fine and how the payment may be made. The period allowed for payment of a prosecutorial fine is the period of 28 days beginning with the date the fine notice was issued.

Clause 19 sets out that the amount of prosecutorial fine is the amount the Public Prosecutor determines appropriate having regard to the circumstance of the offence and a £10 offender levy. Clause 19(4) provides that in a criminal damage offence, the Public Prosecutor may also order an amount of compensation a person in respect of damage to their property as a result of the offence or offences. Clause 19 (5) provides that the prosecutorial fine may not exceed the amount for the time being of level 1 on the standard scale. Level 1 on the standard scale is currently £200.[37]

Clause 20 places restrictions on prosecutions. Proceedings may not be brought against the alleged offender for the offence within 21 days of the notice being issued. If the offer in a notice is accepted, no proceedings may be brought for the offence set out in the notice. The Explanatory Memorandum says that clause 20 provides that if the prosecutorial fine is paid before the end of the suspended enforcement period, no proceedings may be brought for the offence.

Clause 21 deals with the arrangements for payment of prosecutorial fines. According to clause 21(4), sums paid by way of prosecutorial fines for an offence are treated as if they were fines imposed by summary conviction of that offence. The Explanatory Memorandum explains that this allows the use of existing court fine recovery and compensation payment systems.[38]

Clause 22 deals with failure to pay a prosecutorial fine within the 28 day period allowed for payment. Where there has been a failure to pay the fine, the enhanced sum is one and half times the amount determined by the Public Prosecutor and the total amount is registered for enforcement as a court fine. The prosecutorial fine and the offender levy are enhanced. However, compensation relating to criminal damage is not increased.

Clause 23 allows the Director of Public Prosecutions to issue a registration certificate in respect of sums payable in default stating that the sum is registrable under section 24 for enforcement against the defaulter as a fine.

Clause 24 provides that where the fines clerk receives a registration certificate in respect of defaulted sums, the clerk must register that sum for enforcement as a fine. Clause 24 provides a delegated power for the Department may make regulations with respect to the enforcement of payment of sums. These regulations are subject to the negative procedure under clause 87 of this Bill.

Clause 25 enables a person to challenge the issue of a prosecutorial fine on the grounds of mistaken identity.. This clause allows a person who has received a notice for the registration of a sum under clause 24 for enforcement to challenge by making a statutory declaration that they were not the person to whom the relevant prosecutorial notice was issued. This

37 Article 5 (2) of the Fines and Penalties (Northern Ireland) Order 1984, as amended by Artic e 3 of the Criminal Justice (Northern Ireland) Order 1994

38 Explanatory Memorandum to the Bill, pg 27.

Clause 26 allows the court to set aside a sum enforceable as a fine in the interests of justice. Where the court sets aside such a sum, the prosecutorial fine notice, the registration or proceedings taken for enforcing a payment of fine are void and no further action is to taken in respect of the offence occurred.

Clause 27 defines a number of terms in Part 3 of the Bill including fines clerk, period allowed for payment, prosecutorial fine notice, public prosecutor and registration certificate.

6 Part 4 of the Bill- Clause 28-35 The Victim Charter and Witness Charter

Background

Part 4 of the Bill establishes statutory Victim and Witness Charters and provides a statutory entitlement for a victim to be afforded the opportunity to make a personal statement.

The Assembly's Justice Committee published a report of its inquiry on Criminal Justice Services available to Victims and Witnesses of Crime in Northern Ireland in June 2012. The report made a number of recommendations to improve the experience of victims and witnesses in the criminal justice system. In relation to the provisions contained within this Bill, the Committee strongly recommended the introduction of a Victim and Witness Charter with statutory entitlements in terms of information provision and treatment.[39] According to the report, the Charter should cover the following minimum entitlements:[40]

- Be treated with dignity and respect;
- Receive information on the progress of their case and the reasons for any delay at identified key milestones in accordance with timescales set out in the Code of Practice;
- Be informed about the outcome of their case in accordance with timescales set out in the Code of Practice;
- Be given the reasons for the decision not to prosecute in accordance with timescales set out in the Code of Practice;
- Be provided with additional support if they are vulnerable or intimidated;
- Receive information on the offender's release from custody and arrangements for their supervision in the community in accordance with timescales set out in the Code of Practice;
- Complain to an independent body if not satisfied with how an organisation has dealt with their concerns.

The Committee's report considered that it was important that victims of serious crime have an opportunity to relate during criminal proceedings the impact that a crime has had on them and for account to be taken of this impact. The Committee recommended that a formal system of completion and use of Victim Impact Statements and Reports should be introduced as a matter of urgency and that there should be an automatic right for Victim Impact Statements to be completed in all cases involving serious crime.[41]

The Department of Justice consulted on its draft Five Year Victim and Witness Strategy in October 2012. The consultation document included five main themes: the status and treatment of victims and witnesses; communication and information provision; support provisions and special measures; participation and improved understanding; and collation and information.[42] Elements of the strategy included the introduction of statutory Victim's

39 Committee for Justice "Report on the Committee's Inquiry into the Criminal Justice Services available to Victims and Witnesses of Crime in Northern Ireland" NIA 31/11-15, pg 45, available at http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/reports/

40 Committee for Justice "Report on the Committee's Inquiry into the Criminal Justice Services available to Victims and Witnesses of Crime in Northern Ireland" NIA 31/11-15, pg 45

41 Committee for Justice "Report on the Committee's Inquiry into the Criminal Justice Services available to Victims and Witnesses of Crime in Northern Ireland" NIA 31/11-15, pg 52

42 DoJNI "Making a Difference; Improving Access to Justice for Victims and Witnesses of Crime: A Five Year Strategy" October 2012, http://www.dojni.gov.uk/index/public-consultations/archive-consultations/making-a-difference-improving-access-to-justice-for-victims-and-witnesses-of-crime.htm

Charter and a Witness Charter and the statutory entitlement to make Victim Impact Statements.[43] Consultation on the draft Charter sets out the services to be provided to victims of criminal conduct in Northern Ireland by a range of service providers. The draft Charter sets out the entitlement and standards of services victims can expect to receive.[44]

Proposals regarding Victim Statements and the Victim's Charter were welcomed by the Northern Ireland Human Rights Commission (NIHRC) in its response to the Department of Justice public consultation on "Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime."[45] The NIHRC welcomed the proposals with respect to Victim Impact Statements as, in its view, they were broadly consistent with paragraph 6 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which states:[46]

> *The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:…(b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent with the national criminal justice system.*

The NIHRC also noted the proposals that the Victim Charter would include an entitlement to reasons for any delay and to reasons for a decision not to prosecute. The NIHRC indicated that these measures would go some way to ensuring compliance with the State's obligations in international law to "ensure that victims have access to information of relevance to their case and necessary for the protection of their interests and the exercise of their rights."[47]

Overview of Clauses

Clause 28 requires the Department of Justice to issue a Victim Charter which must set out the services, the standards of services and treatment expected from the criminal justice agencies by victims. It further provides that the Charter may restrict the application of its provision to specified descriptions of victims; victims of specified offences or descriptions of conduct or specified criminal justice agencies or to cases where the criminal conduct concerned has been reported to the police. According to Clause 28 (10), 'specified' means specified in the Victim Charter. The Clause also provides that the Charter may provide for exceptions to its provisions for the purpose of ensuring compliance with any statutory provision or order of the court, avoiding jeopardising any criminal investigation or criminal process or to avoid endangering the individual. The Explanatory Memorandum explains that the exceptions and restrictions would enable a more targeted service to be provided. Clause 28 also provides that the Charter may not require anything to be done by a person acting in a judicial capacity or a person acting in the discharge of a function of a member of the Public Prosecution which involves the exercise of discretion.

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43 DoJNI "Making a Difference; Improving Access to Justice for Victims and Witnesses of Crime: A Five Year Strategy" October 2012, pg 5.

44 DDoJNI"Draft Victim Charter" http://www.dojni.gov.uk/index/public-consultations/current-consultations/victim_charter_may_2014.pdf

45 http://www.nihrc.org/Publication/detail/nihrc-response-improving-access-to-justice-for-victims-and-witnesses-of-cri

46 NIHRC "Response to the Public Consultation on Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime" January 2013, available at http://www.nihrc.org/Publication/detail/nihrc-response-improving-access-to-justice-for-victims-and-witnesses-of-cri and para 6 (b) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted November 1985, 40/34, available at http://legal.un.org/avl/ha/dbpjvcap/dbpjvcap.html

47 NIHRC "Response to the Public Consultation on Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime" January 2013 , pg 14 cited the Committee of Ministers Recommendation on assistance to crime victims , para 6.1, Basic Principles , para 6 (a); and COE Guidelines on the protection of victims of terrorist acts, Guideline X

Clause 29 defines a 'victim' as 'a person who is a victim of criminal conduct'. It provides that, in determining whether an individual is a victim of criminal conduct, it is immaterial that no person has been charged with or convicted of a criminal offence. If the physical or mental state of a victim is such that a person is unable to act on his or her own behalf or a victim has died, references to the victim in clause 28 are to be read as a member of the family. If a victim is under the age of 18, references in clause 28 to the victim are to be read as including references to the parent of the victim. The Victim Charter may make provision as to the persons who are to be treated as members of the family of the victim.

Clause 30 requires the Department of Justice to issue a Witness Charter and replicates provisions contained in clause 28 relating to the Victim Charter. The Witness Charter must set out the services, the standards of services and treatment expected by witnesses from the criminal justice agencies. Clause 30 provides that the Charter may restrict the application of its provision to specified descriptions of witnesses; witnesses in criminal investigations or criminal proceedings or specified criminal justice agencies or to cases where the criminal conduct concerned has been reported to the police. According to Clause 30 (9), 'specified' means specified in the Witness Charter. The Clause also provides that the Charter may provide for exceptions to its provisions for the purpose of ensuring compliance with any statutory provision or order of the court, avoiding jeopardising any criminal investigation or criminal process or to avoid endangering the individual. The Explanatory Memorandum explains that the exceptions and restrictions would enable a more targeted service to be provided. Clause 30 also provides that the Charter may not require anything to be done by a person acting in a judicial capacity or a person acting in the discharge of a function of a member of the Public Prosecution Service which involves the exercise of discretion.

Clause 31 sets out the procedure for issuing Charters under Clause 28 and 30. The Department of Justice must lay the Charter before the Assembly and the Charter comes into operation by Order. Clause 31 (3) provides that the Charter comes into operation on such date as the Department may by order appoint. An order under section 31 (3) is subject to negative resolution only if it has been made without a draft of the Order having been laid and approved by a resolution of the Assembly.[48] Therefore, where a draft of the order has been laid before the Assembly, it is subject to approval of the Assembly, where a draft of the Order has not been laid, it is subject to the negative resolution procedure. Clause 31 also enables the Department to revise the Charter and the provisions relating to the procedure also apply to the revised Charter.

Clause 32 makes provision for the effect of non-compliance. If a criminal justice agency fails to comply with the Charter issued under clauses 28 and 30, the failure does not of itself make the agency liable to criminal or civil proceedings. However, Clause 32 (1) provides that the Charter is admissible as evidence in criminal or civil proceedings and a court may take into account failure to comply with the Charter in determining a question in the proceedings.

Clause 33 provides that a victim is to be afforded the opportunity to make a victim statement. If a victim is unable to act on their own behalf to make a statement due to their physical or mental state of if the victim has died, a member of the family is to be afforded the opportunity to make a statement. If the victim is under the age of 18, the parent of the victim is to be afforded the opportunity to make a statement in addition to the victim. Subsections (4) and (5) provide that regulations may provide for other to be afforded the opportunity to make a statement in addition to or instead of the person entitled to be afforded the opportunity to make a statement. Under clause 87, these regulations are subject to negative resolution. Clause 33 also provides that the statement is to be made in writing and is a statement as to how the offence or alleged offence has affected and continues to affect the victim or the person making the statement.

48 See clause 87 (5) of the Bill

Clause 34 relates to supplementary statements and allows the Department to make regulations to make provision for a person who has made a victim statement to be afforded the opportunity to make a supplementary statement to a victim statement. Under the Bill, these regulations are subject to the negative resolution procedure.[49]

Clause 35 relates to the use of victim statements. The Department may make regulations as to the provision of a copy of a victim statement to the defence and the court. The regulations may make provision for the court to have regard to the victim statement in determining the sentence in respect of the offence. The regulations are subject to the negative resolution procedure.[50]

49 Clause 87 of the Bill

50 Clause 87 of the Bill

7 Part 5: Clauses 36-43 Criminal Records

Background

The Minister for Justice appointed Sunita Mason, the Independent Advisor for Criminality Information Management for England and Wales, to conduct a review of the legislative framework governing criminal records in Northern Ireland in March 2011. Mrs Mason published her review in two parts: Part One considered the use of criminal record information in the context of disclosure relating to employment and volunteering and made a number of recommendations including:

- the portability of disclosures within workforces;
- up-dated online checking;
- ending the current system of issuing dual certificates to the employer and employee to issuing a single certificate;
- children under 16 should not be subject to criminal record checks except in certain circumstances, for example home based caring roles such as fostering or adoption.

More detail on the recommendations of Part One of the report are set out in Annex A of this paper.

Part Two of the review deals with broader aspects of the management, storage, access and retention of criminal records.[51] In particular it recommends that an individual's record should be retained within the Northern Ireland Criminal Justice System for 100 years from the subject's date of birth (See Annex B for further details).[52]

The Department of Justice conducted consultation exercises on both parts of the review. The consultation on Part One of the review was published in March 2012 and sought views on:

- whether employment vetting systems that involve Access NI could be scaled back, made more proportionate and still provide adequate protection to the public;
- how disclosures could be made more portable across different sectors of employment to reduce the number of applications made;
- whether police intelligence should form part of Access NI Disclosures;
- whether non-conviction information for example certain civil orders, police cautions, informed warnings and youth diversion disposals should be disclosed and if so, how best can this be achieved.

The Department reported that the consultation was welcomed by respondents and broadly they agreed either fully or in principle to the majority of the recommendations. In light of responses to the consultation, the summary of responses document highlighted that recommendations 4, 6, 7, 8(b), 8 (c), 8(f) and 8(g) would require changes to the Police Act 1997 and would be taken forward in the Faster, Fairer Justice Bill. Other administrative changes would be brought forward in 2012/13.[53] See Annex A for the recommendations and responses to the consultation.

51 S Mason (2011) "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason." and S Mason (2012) "A Managed Approach- Part Two: A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason."

52 S Mason (2012) "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland: Part Two." Pg 44

53 DoJNI "Consultation on Part One of the Review of the Criminal Records Regime in Northern Ireland: Summary of Responses and Way forward"

The Department of Justice conducted a subsequent consultation on Part Two of the Review and Recommendations 9 and 10 from the Part One report in May 2012.[54] Seven of the 10 recommendations in the Part Two report were not consulted on as they endorsed existing management processes for criminal record information that were effective or which were related to ongoing work (see Annex B).[55] The paper consulted upon recommendations 9 and 10 from the Part One report and Recommendations 2 and 4 from the Part Two report. Recommendations 9 and 10 from the Part One report relating to the introduction of a filtering scheme were accepted in full. The Department indicated that to implement these changes, amendments to the Rehabilitation of Offenders (Exceptions) (Northern Ireland) Order 1979, the Police Act 1997 and to the Police Act 1997 (Criminal Records) (Disclosure) Regulations (Northern Ireland) 2008 would be required. The Department indicated that the Minister intended to introduce legislation to provide for these changes as soon as possible.[56]

The Department indicated that the Minister accepted Recommendation 4 in full, and noted that the retention of criminal record for data for 100 years does not require legislative change and would be implemented from January 2014. The Department reported that the Minister accepted recommendation 2 in principle subject to further consultation.[57]

Overview of Clauses

Part 5 of the Bill introduces a number of provisions aimed at streamlining arrangements for the disclosure of criminal records, reflecting many of the recommendations made by Sunita Mason in Part One of her Review.

Clause 36 (1) repeals section 101 of the Justice Act (Northern Ireland) 2011 which required copies of certain criminal conviction certificates to be given to employers and also repeals sections 113A (4) (a requirement to send a copy of criminal record certificate to registered person) and 113B (5) and (6) of the Police Act 1997 (requirement to give relevant information and copy of enhanced criminal certificate to registered person). Only applicants will routinely receive a copy of the certificate. The Explanatory Memorandum to the Bill explains that section 113B (5) is not regarded as human rights compliant and the PSNI have not used the powers for some time and have no plans to do so.[58]

Clause 36 (2) inserts new sections 120AC and 120AD after section 120AB of the Police Act 1997. New section 120AC makes provision for the Department to respond to requests from a registered person providing information on the progress of an application. Section 120AC (1) requires the Department to advise a registered person as to whether certificate has been issued in response to an application for a criminal record check. Section 120AC (7) enables the Department to refuse a request under subsection 1 if the request was made after the end of the prescribed period. The clause does not explicitly set the time period, but this presumably would be set out in secondary legislation either by order or regulation as section 125 of the 1997 Act provides that anything required to be prescribed shall be prescribed by regulations. According to section 125 of the 1997 Act, these are subject to the negative resolution procedure.

54 DoJNI consultation on Part Two and Recommendations Nine and Ten from Part One Report of the Northern Ireland Criminal Records Regime and Summary of Responses available at http://www.dojni.gov.uk/index/public-consultations/archive-consultations/review-of-criminal-records-regime-further-consultation.htm

55 DoJNI "Second Consultation on Recommendations from the Review of the Criminal Records Regime in Northern Ireland: Summary of Responses and Way Forward" November 2013, pg 6

56 DoJNI "Second Consultation on Recommendations from the Review of the Criminal Records Regime in Northern Ireland: Summary of Responses and Way Forward" November 2013, pg 30

57 DoJNI "Second Consultation on Recommendations from the Review of the Criminal Records Regime in Northern Ireland: Summary of Responses and Way Forward" November 2013, pg 30

58 Explanatory Memorandum to the Bill, pg 30

New section 120AD deals with the circumstances in which a registered person may receive copies of certificates. This applies if the Department gives updated information in relation to standard or enhanced criminal record certificate, the up-date information is advice to apply for new certificate or the person whose certificate the up-date information is given applies for a new certificate. According to the Explanatory Memorandum, this provision is limited to the new update service.[59] New Section 120AD enables the department to prescribe time periods and circumstances in responding to such requests. These delegated powers are subject to the negative resolution procedure.[60]

Clause 37 amends a number of provisions in the Police Act 1997 to ensure that young persons under the age of 16 should not be subject to criminal record checks except in prescribed circumstances and that an individual under the age of 18 must satisfy the Department that there is a good reason for being registered. The Explanatory Memorandum explains that the prescribed circumstances would include home based occupations. Section 125 of the Police Act 1997 contains powers for the Department to make regulations to prescribe anything that requires to be prescribed in the Act. This would suggest that the Department have the power to make regulations to prescribe the circumstances when children under 16 are to be subject to criminal record checks. It appears that regulations made in relation to this clause are subject to the negative resolution procedure. Clause 87 of the Bill also provides that regulations made under the legislation, when enacted, will be subject to the negative resolution procedure.[61]

Clause 38 sets out the additional grounds for refusing an application to be registered. The clause provides a power for the Department to refuse an application to be registered if a person or body has previously been registered and has been removed from the register otherwise than at its own request. The Explanatory Memorandum to the Bill indicated that removal from the register may result from a breach of the Department's Code of Practice or condition of registration set out within the Police Act 1997 (Criminal Records) (Regulations) (Northern Ireland) 2007.

Clause 39 deals with additional safeguards in relation to enhanced criminal record certificates. It changes the duty on the Department in section 113B of the Police Act 1997 to send applications for enhanced criminal record checks to the chief officer of every relevant police office by replacing it with any relevant chief officer. The clause also replaces the test used by PSNI to make disclosure decisions under s 113B (4) of the Police Act and is amended from 'might be relevant to 'reasonably believes to be relevant'. Provision is made for a relevant chief officer to have regard to guidance being made by the Department in exercising functions. Section 117 of the Police Act 1997 is amended to allow persons other than the applicant to dispute information contained within a certificate. Finally, clause 39 amends the 1997 Act to allow a person to apply to the independent monitor to determine whether information provided under section 113B (4) of the Act is relevant or should be included on an enhanced criminal record certificate.

Clause 40 deals with updating certificates and inserts a new section 116A into the Police Act 1997. New section 116A requires the department to give up to date information to a relevant person about a criminal conviction, a criminal record certificate or an enhanced criminal record certificate which is subject to up-date arrangements. The Explanatory Memorandum indicates that the updating arrangements will allow an individual to apply for a variety of positions, ie that the certificate will be portable and will updated via an online facility. Clause 40 provides that the Department must not grant an application unless a prescribed fee has been paid. The Department would need to set the prescribed fee in secondary legislation. Section 125 of the Police Act 1997 indicates that anything requiring to be prescribed would be prescribed by regulations and would be subject to the negative resolution procedure.

59 Explanatory Memorandum to the Bill, pg 30

60 Section 125 of the Police Act 1997

61 Clause 87 of the Bill

Clause 41 deals with applications for enhanced criminal record certificates and allows self-employed individuals to apply for an enhanced criminal record certificate. The clause amends section 113B(2)(b) by substituting a new paragraph (b). Currently paragraph section 113B(2)(b) provides that the application has to be accompanied by a statement by the registered person that the certificate is required for the purpose of an exempted question asked for a prescribed person. The new subsection enables a statement by the applicant that the certificate is required for a prescribed purpose.

Clause 42 amends sections 113A and 113B of the Police Act 1997 by inserting a new subsection 2A to allow applications for standard and enhanced certificates to be submitted electronically.

Clause 43 makes provision for the consequential amendments in schedule 4 to have effect.

8 Part 6 of the Bill- Clauses 44-49 Live Links

Background

The Department of Justice consulted on proposals to extend live links in courts in June 2012. The proposals included:[62]

- an adjustment to allow expert witnesses on behalf of the Forensic Service Agency Northern Ireland (FSNI) and certain Police Service of Northern Ireland (PSNI) officers to give evidence by live link as the rule, rather than the exception;
- an adjustment to allow witnesses from outside the United Kingdom to give evidence in Northern Ireland in all magistrates' courts;
- an ability to hold committal proceedings by live link;
- an ability for a parole commissioner to conduct oral hearings by live link; and ;
- an ability to conduct breach proceedings on behalf of Probation Board NI and the Youth Agency where an offender has already been returned to detention to be dealt with by live link;
- extending the use of live links already available in courts and psychiatric hospitals to Part 2 patients where a criminal matter is being considered.

The Department of Justice conducted a further consultation on live links in weekend courts in March 2013. The Department's proposal was that a centralised system of weekend courts be devised on the use of live link facilities. The Department also proposed that weekend hearings by live links be available for first time remand hearings.[63] In light of responses to the consultation, the Department proposed:[64]

- to introduce legislation to allow the option of video links to be available for first remands at courts being held at weekends and public holidays;
- the package would not include live links between police stations and courts;
- to re-screen proposals for equality impact assessment purposes and conduct an EQIA including active engagement with young people;
- to review and conform the operational and technical capacity of existing live links systems before any additional services are provided; and
- to discuss with interested parties how to review and improve the operation of live links in young people's cases.

Overview of clauses

Clause 44 enables the court to give a direction that the accused may appear and give evidence in committal proceedings before the magistrates' courts by live links if the accused is likely to be held in custody or detained in hospital. The court may not give a live link direction unless the accused consents and the court is satisfied that it is not contrary to the interests of justice. The court may also rescind a live link direction at any time before or during committal proceedings if it appears to be in the interests of justice to do so. The court must also not give or rescind a live link direction unless the accused and the prosecutor have been given the opportunity to make representations. The court must also state its reasons in open court for refusing to make, or when rescinding, a live link direction. If the accused

62 DoJNI "Consultation on proposals to extend the use of live links in courts" 21 June 2012

63 DoJNI "Consultation on the proposals for the use of live links in weekend courts" 11 March 2013

64 DoJNI "Consultation on live links in weekend courts: summary of responses and way forward" July 2013.

is attending committal proceedings through live link and it appears to the court that the accused is unable to see and hear the court and to be seen and heard by the court and this cannot be immediately corrected, the court must adjourn the proceedings.

Clause 45 provides for persons for the first time to attend court hearings by live link at weekends and public holidays. Clause 45 contains similar safeguards as those contained in clause 44. The court may not give a direction unless it is satisfied that it is not contrary to the interests of justice. The court may also rescind a live link direction at any time before or during proceedings. The clause empowers the Department of Justice to make an order to amend the types of hearings and the days of the week that can be covered by the live links provisions. An order made under this clause may not be made unless a draft has been laid before and approved by a resolution of the Assembly (clause 87).

Clause 46 allows for live links to be used in proceedings where a person in custody or detained in hospital has failed to comply with specified orders or licence conditions. The court must not give a live link direction unless the offender has given consent to the direction and the court is satisfied that it is not contrary to the interests of justice to give the direction. The court may also rescind the direction at any time before or during the proceedings if it appears to be in the interests of justice. The offender may not give oral evidence by live link unless the offender gives consent and the court is satisfied it is in the interests of justice. The court has to state in open court its reasons for refusing or rescinding a live links direction. The Department may make an order to add breaching of other court orders and licence provisions that can be covered under this section. An order made under this clause may not be made unless a draft has been laid before and approved by a resolution of the Assembly (clause 87).

Clause 47 inserts a new Article 11A into Part 3 of the Criminal Justice (Northern Ireland) Order 2004. It provides that certain expert witnesses will give evidence by live link in criminal proceedings unless the court directs otherwise. The court shall not give a direction unless it is satisfied that it is in the interests of justice to do so and of the efficient administration of justice. The court may rescind a direction if it appears that it is not in the interests of justice. The court cannot give or rescind a direction unless the parties in the proceedings have been given the opportunity to make representations. This clause enables the Department to prescribe the class and description of expert witnesses in regulations. These regulations will not be made unless a draft of the regulations has been laid before and approved by a resolution of the Assembly (New Article 11A, subsection 7).

Clause 48 amends Part 3 of the Criminal Justice (Northern Ireland) Order 2004 by inserting a new Article 11B. This provision enables witnesses outside the United Kingdom to give evidence to a magistrates' court in Northern Ireland.

Clause 49 makes provision for the extension of live links in specified court proceedings to patients detained in hospital under the Mental Health (Northern Ireland) Order 1986. According to the Explanatory Memorandum, the current legislative framework only enables those compulsorily admitted to hospital via the criminal justice system to appear by live link. The specified proceedings include live link for the accused in preliminary proceedings and sentencing hearings and live link for appellant in preliminary hearing or sentencing hearings.

9 Part 7 of the Bill- Clauses 50-71- Violent Offences Prevention Orders

Background

The Department of Justice consulted on proposals to introduce Violent Offender Orders (VOOs) in July 2011.[65] The proposal would allow the police to ask the court to make an order to place conditions on the behaviour of a violent offender in the community to help manage any risk a person poses to the public. The order is like a Sexual Offences Prevention Order and the person would be subject to notification requirements such as telling the police where they are living, identity details and intention to travel outside the UK.[66] The Department asked for views on whether VOOs were needed in Northern Ireland and if so how should they differ from those already in place in England and Wales.

In England and Wales, VOOs were introduced by the Criminal Justice and Immigration Act 2008. They are a civil preventative order which can place preventative measures on offenders who pose a risk of serious harm. Prohibitions, restrictions or conditions may prevent the offender from going to a specified place or premises at all times or specified times, from attending a specified event or contact with a specified person. The main criteria for a VOO in England and Wales are:[67]

- a qualifying offender is a person over 18;
- the person has been convicted of a specified offence in respect of which a custodial sentence of which 12 months is imposed or a hospital or supervision order is made;

Specified offences include:

- Manslaughter;
- Soliciting Murder;
- Wounding with intent to cause grievous bodily harm;
- Malicious wounding;
- Attempt or conspiracy to attempt murder.

The duration of an order in England and Wales is a minimum of two years to a maximum of five years. The penalty for breaching an order is a maximum of five years imprisonment.[68]

In the summary of responses to the Department of Justice consultation, the PSNI commented that the sentencing thresholds for VOOs in England and Wales are too high. The PSNI suggested that VOOs would provide a useful tool in risk managing serial domestic abusers and those who move from partner to partner and commit crimes. This would allow the police to be more proactive in situations where a victim is too fearful to apply for a non-molestation order. EXTERN commented that the introduction of VOOs would be likely to enhance public protection arrangements and act as a preventative measure. EXTERN also suggested that the criteria for a VOO should be offence based and not sentence based. They also recommended that VOOs are used as much as a preventative measure to prevent escalation to more

65 DoJNI"Sex Offender Notification and Violent Offender Orders: Proposals for Legislation" http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-proposals-for-legislation-on-sex-offender-notification-and-violent-offender-orders.pdf

66 DoJNI "Sex Offender Notification and Violent Offender Orders: Proposals for Legislation" Pg 39

67 See section 98 of the Criminal Justice and Immigration Act 2008

68 Section 113 of the Criminal Justice and Immigration Act 2008

serious harm. The Department responded that it intended to pursue the introduction of the orders in the Strategy Bill.[69]

In a briefing to the Justice Committee in January 2013, Department of Justice officials informed the committee that Violent Offender Orders would differ to those in England and Wales in a number of respects. In Northern Ireland, the Order would be available for a longer list of offences and would be the same as the offences listed in the Criminal Justice (Northern Ireland) Order 2008 which allows public protection sentences to given for a range of offences. In England and Wales, there is a minimum sentence of 12 months before an Order can be applied, whereas in Northern Ireland, it is proposed that an order would be available regardless of the sentence passed. It is also suggested in Northern Ireland that assault occasioning actual bodily harm would be included in situations where the conviction is related to an offence in domestic or family circumstances, whereas this is not available in England and Wales. In Northern Ireland, there will no age restriction whereas in England and Wales, the qualifying offender must be over 18 years of age. In Northern Ireland, an order would have certain positive conditions, similar to Sexual Offences Prevention Orders (SOPOs) which can require a person to undertake a particular action.[70]

Overview of Clauses

Clause 50 of the Bill defines a violent offences prevention order as an order which contains prohibitions or requirements which the court thinks are necessary for the purpose of protecting the public from the risk of serious harm. The clause specifies that an order can be made for a minimum of two years and a maximum period of five years. Serious violent harm is defined as serious physical or psychological harm caused by that person committing one or more specified offences. Any reference to protecting the public is a reference to protecting the general public or any particular members of the public. Specified offences are those contained in Part 1 of Schedule 2 of the Criminal Justice (Northern Ireland) Order 2008. These include manslaughter, kidnapping, riot, affray, false imprisonment and a number of offences included under the Offences against the Person Act 1861, amongst others. However, clause 50 also provides that assault occasioning actual bodily harm is not a specified offence unless it was committed against a vulnerable adult, a person under the age of 18, a person living in the same household as the offender or the court in sentencing treated the offence as being aggravated by hostility.

Clause 51 enables the court to make a violent offences prevention order to protect the public from the risk of serious harm where the court deals with the defendant in respect of a specified offence: where the court finds that the defendant is found not guilty of a specified offence by reason of insanity or the defendant is not fit to plead and has done the act charged in respect of a specified offence. An order can be made whether the specified offence was committed before or after the commencement of this provision.

Clause 52 enables a Magistrates' court to make a violent offences prevention order for the purpose of protecting the public from risk of serious harm on application of the Chief Constable. The conditions are that the person is a qualifying offender and the person has since the appropriate date acted in a way to give reasonable cause to believe that it is necessary for such an order to be made. The appropriate date means the date: the person was convicted of a specified offence; the person has been found not guilty of a specified offence by reason of insanity; or the person has been found to be unfit to be tried and to have done the act charged in respect of a specified offence.

69 DoJNI "Sex Offender Notification and Violent Offender Orders: Summary of Representations Made" October 2011, pg 10

70 Committee for Justice Official Report "Violent Offender Orders: DoJ Policy Development Update" 24 January 2013. See also Section 10 of the Criminal Justice (NI) Act 2013

Clause 53 defines a qualifying offender in relation to applications made by the Chief Constable. A qualifying person is a person who has been convicted of a specified offence or: the person has been found unfit to be tried and to have done the act charged in respect of a specified offence. Clause 53 also applies to offences committed outside Northern Ireland, an act that constituted an offence under the law in force in the country concerned and would have constituted a specified offence if committed in Northern Ireland. An act committed in a foreign jurisdiction will be taken to be a specified offence unless the person serves a notice on the Chief Constable denying that the offence was a specified offence, the reasons for denying that this is the case and requiring the Chief Constable to prove that this condition is met.

Clause 54 specifies that a violent offences prevention order may contain provisions prohibiting a person from doing anything describes on the order or requiring the person to do anything described in the order. The only prohibitions or requirements that may be included in the order are those that are necessary for the purpose of protecting the public from risk of serious harm.

Clause 55 enables the person who is the subject of the VOPO or the Chief Constable to apply to the court for an order varying or discharging a violent offences prevention order or an order renewing a violent offences prevention order for a maximum period of five years. A violent offences prevention order may only be renewed or varied to impose additional prohibitions or requirements on the person if the court considers it is necessary to do so for the purpose of protecting the public from risk of serious harm. An order may not be discharged before the end of the period of two years unless consent to discharge is given by the person who is the subject of the order and the Chief Constable.

Clause 56 allows the court to make an interim violent offence prevention order where an application for a violent offence prevention order has been made. An interim order can be made if the court is satisfied that the person is a qualifying offender and, if the court were determining the application, it would be likely to make a violent offences prevention order and it is desirable to act before that application is determined. Interim orders may contain prohibitions or requirements the court considers necessary to protect the public from risk of harm. An interim order can be varied or discharged in the same way as the main order as per clause 55. However, subsection 5 of clause 55 does not apply (this provides that the court cannot discharge an order before the end of two years unless consent is given by the person subject to the order or the Chief Constable). The Explanatory Memorandum to the Bill indicates that an interim order cannot come into force while a person is subject to a custodial sentence or detained in hospital.

Clause 57 provides that the court may not begin a hearing for a main or interim violent offences prevention order or the variation, discharge or renewal of an order unless it is satisfied that the person has been given notice of the application and the time and place of the hearing at a reasonable time before the hearing.

Clause 58 provides for appeals against the making of a violent offences prevention order or an interim order or the making or refusal to vary, renew or discharge an order. A person may appeal against the making of a violent offences prevention order as if the order were a sentence passed on the defendant for the offence. Where a person is appealing against the making of an order on an application made by the Chief Constable, the appeal will be heard at the County Court. A person may appeal the making or refusal to vary renew or discharge a violent offences prevention order. Where an application for an order was made to the Crown Court, the appeal will go to the Court of Appeal or in any other case to the County Court.

Clause 59 deals with notification requirements and provides that an offender who is subject to a violent offences prevention order will also be subject to notification requirements.

Clause 60 specifies that an offender subject to notification requirements must notify the required information to the police within 3 days of the main or interim order coming into force.

Clause 60 sets out the required information the person must give to the police including: date of birth, national insurance number, name or names used on the relevant date, home address on the relevant date, the address of any other premises in the UK at which the offender regularly resides or stays and any information prescribed by regulations made by the Department of Justice. Regulations made under clause 60 will not be made unless a draft of the regulations has been laid before and approved by a resolution of the Assembly (clause 87 (2)). When determining the 3 day period, any time spent is remand or in custody, detention in a hospital or outside the UK is to be disregarded.

Clause 61 provides that an offender subject to notification requirements must within a period of 3 days notify any changes in information provided initially to the police. Changes to information include use of a name by the offender; any change of the offender's address; the address of any premises in the UK the offender has stayed or resided at for a qualifying period which has not been notified to the police; or the release of the offender from custody or any prescribed details. The qualifying period is defined as a period of 7 days or two or more periods in any period of 12 months, which taken together amount to 7 days. Clause 61 also enables the offender to notify the police of any changes before they are due to occur.

Clause 62 requires an individual subject to notification requirements to re-notify information provided to the police within an applicable period after each notification date. Where the applicable period ends while the person is remanded or committed to custody, serving a custodial sentence or is detained in a hospital, the person has to re-notify within three days of their release or discharge. Clause 62 also provides that the offenders who do not have a regular address or location of place in the UK they can be found at or if there is more than one place may be subject to different notification requirements as may prescribed in regulations made by the Department of Justice. In any other case, the applicable period is the period of one year. This clause does not apply to an offender who is subject to an interim violent offences prevention order. The regulations made by the Department must be laid in draft and approved by a resolution of the Assembly (clause 87(2).

Clause 63 requires that an offender subject to notification requirements must notify the police if they intend to be absent from their home address for a period of more than 3 days, not less than 12 hours before leaving that home address. The clause specifies the information that must be provided including, the date the offender will leave that home address, the offenders travel arrangements, the offender's accommodation arrangements and the offender's date of return. Where an offender has notified a date of return to the home address and returns home other than the date notified, the offender must notify the date of return to the police within 3 days of the actual return.

Clause 64 allows the Department of Justice to make regulations with respect to offenders subject to notification requirements setting out the notification requirements for travel outside the United Kingdom. A notification under this clause must provide information on:

- the date of travel;
- the country or if there is more than one;
- the first country the offender proposes to travel; and
- any other information prescribed by regulations regarding departure from or return to the UK or the offender's movements while outside the UK.

The regulations must be laid in draft and approved by a resolution of the Assembly (see clause 87(2)).

Clause 65 stipulates that an offender must give a notification to the police by attending at any police station in Northern Ireland prescribed by regulations made under the Sexual Offences Act 2003 and give an oral notification to any police officer or to any person authorised for the purpose by the police officer in charge of the station. Any notification must

be acknowledged by the police in writing. Fingerprints or photographs may be taken to verify the offender's identity.

Clause 66 provides that it is an offence for a person to fail to comply without reasonable excuse with a prohibition or requirement contained in a violent offences prevention order or an interim order. A person also commits an offence if they fail without reasonable excuse to provide information: on initial notification or changes to information within the three day period; if the person intends to be absent from their home address for more than three days; if they did not provide information within three days that they did not return home on date of notification; did not provide fingerprints or photographs to verify identity; or any other requirement imposed by regulations. A person will have committed an offence on the first day of failing to comply with provisions without reasonable excuse. The clause also provides that a person cannot be prosecuted more than once in respect of the same failure. A person guilty under this section is liable, on summary conviction, to a term of imprisonment not exceeding 6 months or a fine not exceeding the statutory maximum (£5000[71]) or both; or on a conviction on indictment to a term of imprisonment not exceeding five years or a fine or both.

Clause 67 provides that a Chief Constable may for the purposes of prevention, detection, investigation or prosecution of offences, supply information to a relevant Northern Ireland department, the Secretary of State or a person providing relevant services to a Northern Ireland department or the Secretary of State for the purpose of verifying the information. Relevant Northern Ireland department means the Department for Employment and Learning, the Department of Environment or the Department of Social Development. The section does not authorise anything that contravenes the Data Protection Act 1998.

Clause 68 provides that a report compiled under clause 67 may be supplied by the relevant Northern Ireland department, the Secretary of State or a person who provides relevant services to a Northern Ireland department or the Secretary of State.

Clause 69 allows the Department of Justice to make regulations requiring a person who is responsible for an offender subject to notification requirements and is either in custody or detained in hospital, to give notice to specified persons that they have become responsible for the offender, of any occasion when the offender is released, or that a different person has become responsible for the offender. Regulations may describe specified persons and make provision for specifying the responsible person. These regulations would be subject to negative resolution (Clause 87(1)).

Clause 70 provides the police with powers of entry and search of the offender's home. An application must be made by a police officer of the rank of superintendent or above to the court which has to be satisfied that a number of specified requirements are met in relation to any premises before issuing a warrant. The requirements are: that the address specified in the application is an address which was last notified; that there are reasonable grounds to believe that the offender resides there or may regularly be found there; that it is necessary for a constable to enter and search the premises for the purpose of assessing the risks posed by the offender; and that constable has sought to gain entry to the premises to search them for that purpose and had been unable to obtain entry on at least two occasions. The warrant may authorise the police to use reasonable force if necessary to enter and search the premises. The warrant may also authorise multiple entries in order to enter the premises for the purpose of assessing the risks posed by the offender subject to notification requirements.

Clause 71 is an interpretative clause which defines a number of terms used in part 7 of the Bill, including the meaning of country, custodial sentence, detention in hospital, home address, interim and main violent offences prevention order, qualifying offender and specified offences.

71 Article 5 (2) of the Fines and Penalties (Northern Ireland) Order 1984, as amended by Artic e 3 of the Criminal Justice (Northern Ireland) Order 1994.

10 Part 8 of the Bill- Clauses 72-85: Miscellaneous Provisions

10.1 Jury Service

10.1.1 Background

Currently in Northern Ireland, there is a statutory age limit for jury service of 70 and the right to excusal from jury service for persons aged between 65 and 69 years of age. The Department of Justice consulted on whether there should be an upper age limit for jury service in Northern Ireland in November 2011.[72] The document also consulted on if there was to be an age limit, at what should an upper age limit be set and finally, whether should there be an age related right to excusal.

The majority of respondents agreed that competence, representativeness and efficiency were the right principles upon which to base policy decisions. The majority of respondents did not think there should be an upper age limit for jury service. The majority of respondents also favoured a right to excusal for older people but there was not a consensus about the age at which a right to excusal should apply.[73] In light of the responses, the Minister decided that he intended to abolish the upper age limit and increase the age of excusal as of right to 70.[74]

The Department conducted a targeted consultation to make amendments to the Juries (Northern Ireland) Order 1996 in June 2012.[75] The Department proposed to amend Schedule 1 to specify that a person convicted and sentenced to an indeterminate custodial sentence or an extended custodial sentence would be disqualified for life. It was also proposed that the Bill would include a number of technical amendments as detailed below to update Schedule 2 (persons disqualified from jury service) and Schedule 3 (persons excusable as of right from jury service) and to amend the provisions relating to the duties of the Chief Electoral Officer. The technical amendments are set out below:

1. Remove “Members of the Royal Irish Regiment” from Schedule 2 [agreed with Ministry of Defence: no longer any need for separate designation since the disbandment of the part-time batallions: full-time members of the regiment are already ineligible under another provision of the Schedule]

2. Remove “person appointed for purposes of Article 7(6) of Treatment of Offenders Order” from Schedule 2 [this Article has been repealed and re-enacted elsewhere and relates to probation officers who are already listed in the Schedule]

3. Add Serious Organised Crime Agency to Schedule 2 [rectifying an omission: SOCA was not added to the Schedule at the time of its creation]

4. Amendment to Schedule 3 – “amend entry relating to “Secretary and any Director of the Northern Ireland Audit Office” [Secretary is now a redundant office].

5. Revoke Article 4(2)(b)(i) – duty on Chief Electoral Officer not to select those disqualified, ineligible or excused [updating legislation to reflect practice; information about persons disqualified, ineligible or excused may be out of date or unknown].

72 Consultation document available at this link http://www.dojni.gov.uk/index/public-consultations/archive-consultations/upper-age-limit.pdf

73 DoJNI “The Upper Age Limit for Jury Service in Northern Ireland: Report of the Consultation” July 2012, pg 7,

74 DoJNI “The Upper Age Limit for Jury Service in Northern Ireland: Report of the Consultation” July 2012, pg 36

75 All information in this section taken from a letter sent from the Department of Justice to consultees dated 21 June 2012, received with thanks from the Department via email on 01/09/14

Overview of clauses

Clauses 72-76 of the Bill relate to jury service. Clause 72 removes the maximum age for jury service of 70. The clause ensures that persons over the age of 18 are qualified and liable for jury service.

Clause 73 of the Bill amends article 4(2) of the Juries (Northern Ireland) Order 1996 by removing the duty on the Chief Electoral Officer not to select for inclusion electors whose names have been furnished by several Juries Officers as being disqualified, ineligible or excused from jury service.

Clause 74 amends Schedule 1 of the Juries (Northern Ireland) Order 1996 by adding a new paragraph to add to the categories of persons who are disqualified from jury service to include those who have received indeterminate custodial sentences.

Clause 75 amends Schedule 2 of the Juries (Northern Ireland) Order 1996 to add to the categories of persons ineligible for jury service to include members and staff of the National Crime Agency. Paragraph 3 also amends Schedule 2 of the Juries (Northern Ireland) Order by removing persons "appointed for the purposes of Article 7(6) of the Treatment of Offenders (NI) Order 1976" and members of the Royal Irish Regiment.

Clause 76 amends Schedule 3 of the Juries (Northern Ireland) Order 1996 to update the list of persons excusable from jury service. Paragraph 2 of clause 76 replaces "Representatives to the European Parliament" with "Members of the European Parliament". Paragraph 3 replaces "Secretary and any Director of the Northern Ireland Audit Office" with "the Deputy Comptroller and Auditor General for Northern Ireland and any assistant Auditor General for Northern Ireland." Paragraph 4 replaces "persons aged between 65 and 70" with "persons aged over 70".

10.2 Early Guilty Pleas

Background

Currently, there is a statutory power to give credit to those who plead guilty. Article 33 of the Criminal Justice (Northern Ireland) Order 1996 provides that courts, in determining a sentence on an offender who has pleaded guilty, shall take into account (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty and (b) the circumstances in which the indication was given. The court must also state in open court the credit that is being given to the offender for the early guilty plea.[76]

The Department of Justice conducted a public consultation entitled Encouraging Early Guilty Pleas in January 2012. Options for reform included:[77]

Option 1- Enhancing the existing arrangements by increasing understanding and transparency of the current scheme- the defendant would be provided with appropriate information at relevant stages, advising that a reduction in sentence may be available for an early guilty plea;

Option 2- Reforming procedures along similar lines to other neighbouring jurisdictions- by encouraging early engagement between prosecution and defence; provision of clear and concise summary of information of the criminal case and the evidence the prosecution intends to rely on; a formal 'earliest opportunity to plead'; and transparency of sentencing arrangements.

76 Article 33(2) of the Criminal Justice (Northern Ireland) Order 1996

77 DoJNI "Encouraging Early Guilty Pleas: A Department of Justice Consultation" January 2012, pg 24

Option 3- Introducing a statutory presumption of credit for an early guilty plea: to introduce a new law that means that a defendant who pleads guilty at an early stage to a legislatively defined level credit.

Twelve respondents to the consultation commented on the proposals. Ten respondents were in favour of one or more of the options. Two respondents, the Law Society and Belfast Solicitors' Association, were opposed to the proposals and indicated that they thought that the proposals did not properly recognise the presumption of innocence.[78]

The Department of Justice concluded that Option 2 had the broadest support and indicated that progressing elements of this option represented the best way forward.[79] The Department also noted that it was clear from the responses in relation to Option 1, that there would be benefit in enhancing the understanding of current arrangements. Furthermore, the Department acknowledged that in practice, many judges already state in open court the level of credit that would have been awarded for an early guilty plea, but that making this a duty would increase transparency.[80]

Overview of Clauses

Clauses 77 and 78 of the Bill deal with early guilty pleas. Clause 77 requires the court in certain circumstances to indicate the sentence it would have imposed for the offence if the defendant had pleaded guilty to the offence at the earliest reasonable opportunity in the proceedings. This applies in any criminal proceedings where a defendant is convicted of an offence and did not at any stage of the proceedings plead guilty to the offence or in the court's opinion, the defendant's guilty plea or indication to plead guilty was not entered at the earliest reasonable opportunity.

Clause 78 requires a solicitor who is representing a person in connection with an investigation into an offence or proceedings against the client for an offence to advise the client of the effect of Article 33(1) of the Criminal Justice (Northern Ireland) Order 1996 (reduction in sentences for guilty pleas) and the likely effect on any sentence that might be passed on the client of pleading guilty to the offence at the earliest reasonable opportunity or indicating an intention to plead guilty at the earliest possibility. The Law Society must also, with concurrence of the Lord Chief Justice, make regulations with respect to the giving of advice. Solicitors also have to notify the court that they have complied with the duty to advise the client. If a solicitor contravenes this section, any person may make a complaint to the Solicitors Disciplinary Tribunal.

The Explanatory Memorandum suggested that the majority of respondents to the policy consultation supported Option 2 which can largely be given effect by non-legislative means. However, some consultees identified that Option 1 would support these non-legislative measures and that the provisions in the Bill are in line with this approach.[81]

10.3 Avoiding Delay in Criminal Proceedings

Background

The Department of Justice published a consultation paper, Statutory Case Management in November 2012. The issue for the consultation was how criminal cases could be managed more efficiently and effectively. The Department highlighted that two reviews, by the Criminal Justice Inspection Northern Ireland and the Committee for Justice, found that issues such

78 DoJNI "Encouraging Earlier Guilty Pleas; And Reform of Committal Proceedings, August 2012 Pg 6

79 DoJNI "Encouraging Earlier Guilty Pleas; And Reform of Committal Proceedings, August 2012 Pg 21

80 DoJNI "Encouraging Earlier Guilty Pleas; And Reform of Committal Proceedings, August 2012 Pg10

81 Explanatory Memorandum to the Bill, pg 16

as lack of preparation at court, failure to agree witnesses or evidence can prolong a trial as adjournments are required and opportunities to progress cases are missed.[82]

The consultation paper considered four options for delivering better case management. The four options were:[83]

1. A general statutory duty to progress cases;
2. Specific statutory duties with identified timescales for named stages in the criminal justice process;
3. Case management procedure rules, similar to the model in England and Wales, rules setting out specific duties on the main parties to the case;
4. Placing the current Practice Directions on a statutory footing.

The Department's preferred option was Option 3, concluding that clarity around the duties and responsibilities, combined with an enforcement mechanism provides the best balance.[84] The majority of respondents expressed a preference for Option 3 as the most effective solution, either on its own or in combination with another option (primarily option 1).[85] In light of the responses, the Department proposed to legislate for:[86]

- A statutory framework for the duties on the prosecution, defence and judiciary, similar to the Lord Chief Justice's Practice Directions, but modified in line with the case management portions of the Criminal Procedural Rules IN England and Wales, in particular those sections which deal with duties on the judiciary; and
- A general duty to achieve a just outcome as quickly as possible, paying particular attention to the needs of victims, witnesses and vulnerable people.

Overview of Clauses

Clause 79 allows the Department to make regulations to impose a general duty on anyone involved in criminal cases to reach a just outcome as quickly as possible. The regulations must take particular account of the need to identify and respect the needs of victims, witnesses and young people. Under clause 87, these regulations would be made by negative resolution.

Clause 80 allows the Department to make regulations in relation to the management and conduct of criminal proceedings in the Crown Court or a magistrates' court. The regulations may impose duties on the court, the prosecution and the defence. The regulations may also confer functions on the court in relation to active case management. Active case management includes: early identification of the real issues and needs of witnesses; early setting of a timetable for the progress of case; monitoring the progress of the case and compliance with directions; ensuring evidence is presented in the shortest and clearest way; discouraging delay by avoiding unnecessary hearings; encouraging participants to co-operate on the progression of a case; making the use of technology and giving any direction appropriate to the needs of a case as early as possible. Under clause 87, these regulations will be made by negative resolution.

82 DoJNI "Managing Criminal Cases: A Department of Justice Consultation" November 2012, pg10

83 DoJNI "Managing Criminal Cases: A Department of Justice Consultation" November 2012, pg34

84 DoJNI "Managing Criminal Cases: A Department of Justice Consultation" November 2012,pg 38

85 DoJNI "Managing Criminal Cases: Report on Consultation Responses", March 2013, pg 5

86 DoJNI "Managing Criminal Cases: Report on Consultation Responses", March 2013, pg 5-6

10.4 Public Prosecutor's Summons

Background

The Criminal Justice Inspection Northern Ireland (CJINI) published a report, Avoidable Delay in May 2006. The report highlighted that the signing of summonses contributed to avoidable delay. This was reported as problematic in specific areas where the operation of split offices required a lay magistrate from Fermanagh and Tyrone to attend Belfast to sign summonses, or particularly when magistrates are on holiday. CJINI recommended that alternative arrangements for signing of summonses should be implemented, including the use of electronic signatures which are authorised by a PPS prosecutor.[87] A further report by CJINI in 2010 on Avoidable Delay highlighted that the summons process takes longer than charge cases as the summons is required to be issued by the PPS, signed by a lay magistrates and served directly by the PSNI or increasingly by post.[88]

Subsequently, the Northern Ireland Court Service (now the Northern Ireland Courts and Tribunals Service) consulted on a proposal to allow the Public Prosecution Service to commence criminal proceedings in the magistrates' court by issuing a summons on their own authority without first having to seek permission from a lay magistrate.[89]

There were 25 responses to the consultation and 17 commented specifically on the proposal. Eleven consultees agreed that a PPS prosecutor should be able to issue a summons without recourse to a lay magistrate. Ten respondents considered that benefits such as reducing delay and costs savings would be achieved. One respondent indicated that, whilst historically judicial intervention was necessary in the summoning process because the police were at the same time complainants and investigators,this requirement was no longer necessary. One respondent expressed concerns at the removal of the lay magistrate and suggested a number of safeguards. These included that a PPS prosecutor should only initiate a prosecution where satisfied that evidence can be adduced in court which is sufficient to provide reasonable prospect of conviction and where it is taken in the public interest.[90]

Six respondents did not agree with the proposal. Five respondents considered that the role of the lay magistrate provides an independent level of scrutiny of the process. Five respondents suggested that whilst CJINI recommended alternative arrangements for the signing of summonses, that the report fell short of recommending the removal of lay magistrates from the process. Two respondents highlighted the CJINI report recommended the introduction of an electronic signature which would be added by a lay magistrate and authorised by a prosecutor. Two respondents highlighted that the proposal did not reflect the report of the Criminal Justice Review which highlighted the importance of lay involvement in the criminal justice system. Four respondents raised issues around transparency and accountability and suggested that the proposal moved the balance of power too far in favour of the PPS and could potentially damage confidence in the criminal justice system. Four respondents noted that the system in England and Wales set out in the consultation paper and issued a note of caution in making comparisons between the jurisdictions, which operate differently. Four respondents argued the case for change had not been made and no evidence of the extent

87 CJINI " Avoidable Delay" May 2006 pg 48http://www.cjini.org/CJNI/files/ed/ed9d97d7-a15f-4fa5-90d1-3e3867124c21.pdf

88 CJINI " Avoidable Delay" June 2010 pg 92 http://www.cjini.org/CJNI/files/c0/c0243f51-1e73-47e8-a6fa-344d5f0063c5.PDF

89 NICS Consultation document "Proposal to allow the Public Prosecution Service to issue a summons" March 2010, http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Provision%20to%20allow%20the%20Public%20Prosecution%20Service%20to%20commence%20proceedings%20without%20recourse%20to%20a%20lay%20magistrate/p_pc_Proposal-to-allow-the-Public-Prosecution-Service-to-issue-summonses.pdf

90 Northern Ireland Courts and Tribunals Service "Consultation on a Proposal to allow the Public Prosecution Service to issue Summonses: Summary of Responses and Way Forward" pg 5, http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Pages/default.aspx

of delay caused by existing arrangements had been made. Two respondents commented that the views of lay magistrates were not included in the consultation paper.[91]

Overview of Clause

Clause 81 provides that where a complaint has been made by a Public Prosecutor to a lay magistrate that a person has, or is suspected, of committing a summary offence or an indictable offence where a magistrates court or county court has jurisdiction, the Public Prosecutor may issue a summons to that person requiring them to appear in court to answer the complaint. The clause also enables the Public Prosecutor to re-issue a summons without complaint to a lay magistrate, if they are satisfied that first summons had not been served.

10.5 Defences Access to Premises

Background

Currently, defence representatives in criminal proceedings have no remedy in the courts to apply for an order to inspect the property where a crime is alleged to have taken place. In practice, access to property is usually agreed informally between the defence and the prosecution or police. The Department of Justice conducted a targeted consultation on a proposed statutory provision be made to provide all courts in criminal cases with the power to make an order allowing defence representatives access to the property.[92] Indications from the Department are that there were no objections from consultees to the proposals.[93]

Overview of Clause

Clause 82 allows the court in criminal proceedings to make an order to allow access by or on behalf of the defendant to specified premises. The clause also allows the court to make such an order where a person is convicted of an offence and appeals against the conviction. Subsection 3(c) defines any place and includes a vehicle or moveable object. The court is prohibited from making such an order unless it is satisfied that access to the premises is required in connection with the preparation of the defendant's defence or appeal and the order is an appropriate means of securing access. The order may authorise entry into and inspection of the premises and any other specified activity on the premises. An order may also include conditions in connection with access including requiring the person to be accompanied by a police officer, the date and time when the access is to take place, the conduct of activity and other matters as the court sees fit.

10.6 Court Security Officers

Background

Consultation did not take place on the provisions to increase the powers of the court security officers. The Explanatory Memorandum explained that this is because it is a technical measure correcting a lacuna in the current law.[94]

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91 Northern Ireland Courts and Tribunals Service "Consultation on a Proposal to allow the Public Prosecution Service to issue Summonses: Summary of Responses and Way Forward" pg 5-6

92 Information obtained from a letter sent by the Department of Justice to consultees on provisions identified for inclusion in the Justice Bill, dated 21 June 2012

93 Information obtained via email from an official in the Department of Justice, 01/09/14

94 Explanatory memorandum to the Bill, pg 3

Overview of Clauses

Clause 83 amends Schedule 3 of the Justice (Northern Ireland) Act 2004 to make provision for powers exercisable by a court security officer in a relevant building also extends to the boundary of the land on which the building stands. The Explanatory Memorandum explains that this closes a gap to enhance the security of court venues and court users by specifying that Court Security Officer's powers to search, exclude, remove or restrain an individual are extended to include the grounds on which court buildings sit.[95]

10.7 Youth Justice

Background

Clauses 84 and 85 make provision for the youth justice system. Clause 84 amends current legislation on the aims of the youth justice system in Northern Ireland. This amendment is in line with a recommendation made in the Report of the Review of the Youth Justice System in Northern Ireland in 2011. That report noted that the aims of the youth justice system agreed in legislation in 2002 were a significant improvement .The report noted that while the aims of the youth justice system include the welfare of the child, they are not the principal aim, whereas Article 3 of the UN Convention on the Rights of the Child (UNCRC) states that the welfare of the child should be reflected in legislation as the principal aim. The report recommended that section 53 of the Justice (Northern Ireland) Act 2002 (the aims of the youth justice system) is amended to fully reflect the best interests of the child.[96] The Department of Justice consulted on the Youth Justice Review's report in September 2011. The consultation sought views on the section of the report which dealt with children's rights and international standards, including the recommendation to amend Article 53.[97] The Department published a summary of responses to the consultation.[98] The following sections set out the views on the recommendation to amend Article 53 of the Justice (Northern Ireland) Act 2002.

Age Sector Platform agreed with the recommendation but suggested that it must not absolve an offender of their actions and that action must be taken to ensure that a child is disciplined for any offence as part of the process of rehabilitation and justice. They said that it was in the best interests of the child and wider society that young offenders are held to account for their actions.

Various respondents commented that the recommendation did not go far enough and that the whole of the UNCRC should be incorporated. Other respondents said that the UNCRC and international children's rights should be incorporated and used as the benchmark upon which the youth justice system in Northern Ireland, including all of relevant law, policy and practice should be audited and measured against.

Mencap and the Equality Commission commented that proposals needed to include the UN Convention on the Rights of Persons with Disabilities. The Ulster Unionist Party, Children's Law Centre and Include Youth called for a UK wide Bill of Rights possessing a subsection addressing the particular circumstances of Northern Ireland.

Queens University Belfast recommended that Article 53 should be rewritten and that the aim of the Youth Justice System should be children's development and well-being rather than prevention of offending and public safety. CINI advocated the development and

95 Explanatory memorandum to the Bill, pg 22

96 A Review of the Youth Justice System in Northern Ireland, pg 100-101, published September 2011

97 DoJNI "Consultation Report on the Report of the Youth Justice Review in Northern Ireland" September 2011, pg 25, http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-the-report-of-the-review-of-youth-justice-nov11.doc

98 http://www.dojni.gov.uk/index/public-consultations/archive-consultations/youth-justice-review-consultation-summary-of-recommendations.pdf

implementation of a children's rights impact assessment tool. NICCY and Quaker Service highlighted the importance that all professionals in the youth justice system understand implications of the amendment and are fully committed to ensuring it is borne out.

Overview of Clauses

Clause 84 amends section 53 of the Justice (Northern Ireland) Act 2002 by substituting subsection 3. The new wording of section 53(3) requires persons and bodies working in the youth justice system to have the best interests of children as a primary consideration. Persons and bodies must also have regard to the welfare of children affected by the exercise of their functions with a view to furthering their personal, social and education development. The wording in the clause reflects the language in Article 3 (1) of the UN Convention on the Rights of the Child (UNCRC) which states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Clause 85 amends section 10 of the Criminal Justice Act (Northern Ireland) 2013 (release on license of child convicted of serious offence). Clause 85 (2) omits section 10 (5) of the 2013 Act. Clause 85 (3) substitutes section 10 (6) of the 2013 Act with a new subsection 6. Currently 10 (6) of the 2013 Act makes reference to subsection (5). The amendment is required as Section 10 (5) will be deleted. The Explanatory Memorandum says that the amendment is to maintain the integrity of the section.

11 Supplementary Provisions and Schedules

Supplementary Provisions

Clauses 86-92 of the Bill contain supplementary provisions. Clause 86 allows the Department by order to make supplementary, incidental or consequential provision and transitory, transitional or saving provisions as it considers appropriate for the purposes of giving effect to the Act. An order may amend, repeal or revoke any statutory provision, including the Act. An order which amends, repeals or revokes any statutory provision has to be laid in draft and approved by a resolution of the Assembly, but other orders made under Clause 86 will be subject to negative resolution (see clause 87).

Clause 87 deals with regulations, orders and directions and makes provision for the level of Assembly control required for the delegated legislation. Clause 88 is an interpretative clause. Clause 89 provides that schedule 5 which contains transitional provisions and savings has effect. Clause 90 provides that the repeals set out in Schedule 6 are to have effect. Clause 91 sets out that a number of provisions of the Act are to come into operation on the day after Act receives Royal Assent and enables the Department to make commencement orders. Clause 92 provides for a short title of the Bill to be cited as the Justice Act (Northern Ireland) 2014.

Schedules

There are six schedules to the Bill. Schedule 1 contains amendments to other pieces of legislation consequential to the provisions on a single court jurisdiction. Schedule 2 contains amendments consequential to the abolition of preliminary investigations and mixed committals. Schedule 3 contains amendments consequential to the provisions on direct committal for trial. Schedule 4 contains amendments consequential to the provisions on criminal records. Schedule 5 outlines transitional provisions and savings. Schedule 6 lists the repeals brought in as a result of the Bill.

12 Potential Amendments to the Bill

In June 2014, the Department of Justice signalled to the Justice Committee that it intended to propose a number of amendments to the Bill. They are as follows:[99]

- A clause in the Bill setting out that certain information would be shared between specified organisations for the purpose of informing victims and witnesses about services;
- Publication of a code of practice in relation to criminal records - an amendment to make it clear the Code must be published and it is being made at the suggestion of the Attorney General;
- A statutory power to allow AccessNI to share information with the Disclosure and Barring Service (DBS) for barring purposes;
- Review of criminal records where convictions or disposals have not been filtered - the Attorney General suggested that there should be provision for a person to ask for discretion to be exercised in their particular case and the Minister agreed to the introduction of a review process;
- Amendment of clause 78 on early guilty pleas to omit subsection 3 which confers a duty on the Law Society with the concurrence of the Lord Chief Justice to make regulations with respect to giving advice, this amendment is being made on the advice of the Attorney General;
- An amendment on defence access to premises on the recommendation of the Attorney General so that court can only grant an application for inspection for premises where it is necessary to ensure the fair trial rights of the defendant.

The Justice Committee also intends to consider a proposal from the Attorney General for Northern Ireland for a potential amendment to the Coroners Act (Northern Ireland) 1959 which it first considered during the Committee Stage of the Legal Aid and Coroners' Courts Bill. The Attorney General has a power under the section 14 of the Coroners (Northern Ireland) Act 1959 to direct an inquest where it is considered advisable to do so. However, the Attorney General has no power to obtain papers or information that may be relevant to the exercise of the power. It is proposed that the amendment could confer a power on the Attorney General to obtain papers and provide a statutory basis for disclosure. The proposed wording of the amendment can be found at Annex C.[100]

Mr Jim Wells, MLA advised members during a meeting of the Justice Committee on 2 July 2014, that he intended to bring forward an amendment to the Bill to restrict lawful abortions to National Health Services premises, except in cases of urgency when access to National Health Service premises is not possible and where no fee is paid. The amendment would also provide an additional option to the existing legislation for a period of up to 10 years imprisonment and a fine on conviction on indictment. The wording of the proposed amendment can be found at Annex D.

99 Information obtained from a letter sent from the Department of Justice on 24 June 2014 to the Clerk of the Justice Committee available at http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/legislation---committee-stage-of-bills/the-justice-bill-committee-stage/details-of-the-call-for-evidence-on-the-justice-bill-and-the-proposed-amendments/

100 http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/legislation---committee-stage-of-bills/the-justice-bill-committee-stage/details-of-the-call-for-evidence-on-the-justice-bill-and-the-proposed-amendments/

13 Equality

The Department of Justice conducted an equality consultation on the Justice Bill in March 2013. The Department's overall assessment was that the policy package contained within the Bill positively benefits all Section 75 groups. The Department emphasised that all sections of the public would benefit as victims and witnesses would see improvements. The Department also recognised that in terms of offenders, any changes would likely impact on young males. The Department highlighted that it undertakes considerable work which would mitigate any impact. Examples outlined in the consultation included:[101]

- The Youth Justice Agency exists alongside a youth justice strategy focusing on early intervention to reduce of prevent offending;
- Rehabilitation legislation exists to allow many offenders to put the past behind them;
- The Department spends considerable resources on crime prevention and education programmes to ensure that young people are diverted away from the criminal justice system;
- Statutory and voluntary bodies also operate early intervention programmes to try and prevent young people at risk of offending from doing so;
- The Probation Service provides a range of programmes, specialist service and financial assistance to offender focused groups in the voluntary sector;
- The Prison Service provides a range of prisoner programmes, trains its staff to deliver programmes and employs a range of professionals including psychologists to help offenders prepare for successful return to the community;
- The Probation Service works with prisons to deliver pre and post release programmes.

The report on the consultation concluded that there was broad support for the proposals with respondents welcoming the Department's approach. A number of responses were in agreement with the Department's overall assessment that the Bill would have positive benefits for all Section 75 Groups.

There were a number of specific issues raised by consultees. Sinn Fein made a number of criticisms about the Department of Justice's approach to equality screening, in particular the absence of specific types of data.[102] The Department responded that in each individual screening, policy officials took a proportionate approach to the gathering and analysis of available data. The Department noted that data is more readily available in some areas than others. The Department also concluded that it welcomed any further data or analysis.[103]

The Children's Law Centre (CLC) raised concerns regarding proposals to create a single territorial jurisdiction for county and magistrates' courts, particularly potential for adverse impact on younger or older people, as well as people with disabilities. This was linked to access to transport and possible difficulties travelling to courts geographically remote from their home location.[104] The Department responded that there are safeguards contained in the administrative framework with the guiding principle that court business will continue to be listed in the appropriate court and parties will have the opportunity to make representations if transfer is being considered.[105]

The CLC was supportive of the recommendation to amends Section 53 of the Justice (NI) Act 2002 to reflect the best interest principle in Article 3 of the UNCRC but were concerned that

101 DoJNI "Equality Consultation for a Proposed Justice (NI) Bill 2013", 8 March 2013.

102 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013

103 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 13 and 14

104 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 15

105 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 15

the spirit of Article 3 would not be legislated for in the way recommended by the Committee on the Rights of the Child.[106] The Department responded that it was its intention to make it explicit that the best interests of children must be a primary consideration for those exercising functions within the youth justice system. The Department emphasised that the amendment would not only strengthen the statutory aim but also fully reflect the actual terms of Article 3 of the UNCRC.[107]

The Grand Orange Lodge of Ireland raised concerns about proposals to extend eligibility for jury service and the removal of a maximum age limit. They suggested that the proposal would have a disproportionate impact on those over the age of 70 and the widowed or disabled, as well as women.[108] The Department responded that its view was that removing the maximum age limit would make juries more representative of society. To mitigate, the Department concluded there should be a right of excusal for any person aged 70 or over, The Department attached particular weight to views expressed by the Age Sector Platform and the Commissioner for Older People. Both of which supported the proposal and the Executive's policy of promoting the full participation of older people in civic life.[109]

Regarding encouraging early guilty pleas, the CLC raised concerns that the focus appeared to be on the speeding up of the criminal justice system and saving money, putting at risk the right to a fair trial. The Department responded that the primary focus is reducing the harmful impact of delay on the cause of justice and that the provisions do not create an early guilty plea scheme. The Department's view was that the proposal would increase transparency in sentencing as the judiciary would be obliged to give the offender information about the construction of their sentence. In relation to the proposal to require solicitors to advise their clients about the existence of the legislation, the Department concluded that knowledge of the existing legal framework as explained to the defendant by their solicitor is unlikely to create any new equality issues.[110]

The Northern Ireland Council for Ethnic Minorities (NICEM) raised a number of issues relating to the Victim Charter. NICEM called for inclusion of all rights set out in EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protections provided for victims of crime. The Department confirmed that it intended to give due regard to the Directive in the development of the Charter.

NICEM highlighted that victims of racially motivated crime were not included in the list of intimidated witnesses in the draft strategy issued for consultation in 2012. The Department responded that victims of racially motivated crime were now included in the new Victim and Witness Strategy.

NICEM called for bi-lingual workers in the Victim and Witness Care Unit. The Department said that whilst not directly related to the content of the Bill, this couldbe considered as plans are being developed for the roll out of the service.[111]

The Commission for Victims and Survivors asked whether it would be useful for the Bill to make specific reference to victims and survivors of the conflict. The Department responded that provisions of the Bill would refer to all victims of crime rather than referring to specific types of victims.[112]

106 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013

107 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 17

108 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 18

109 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 19

110 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 20-21

111 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 24-25

112 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 25

The Department concluded that it was satisfied that no substantial or significant equality issues remain unaddressed and that the provisions proposed would not create any adverse impact on Section 75 categories.[113]

113 DoJNI "Report on Equality Consultation for a Proposed Justice (NI) Bill 2013", June 2013, pg 29

14 Issues raised during the Second Stage Debate

The principles of the Bill were generally welcomed during the second stage debate but issues were raised by some Members in relation to specific provisions. They related to the proposals on: single court jurisdiction; the committal process; prosecutorial fines, criminal records; early guilty pleas;

Single Court Jurisdiction

The clauses in the Bill on the creation of a single jurisdiction for County Courts and Magistrates' courts were generally welcomed. However, some issues were raised by Members during the second stage debate on the Bill. Mr Alban Maginness MLA noted from officials in the Department of Justice that there was no resistance among county court judges or magistrates and it could provide for a more efficient system for the management of cases. Mr Maginness said:

However, I regret that the historic and traditional divisions of the County Court may be dropped and forgotten. They are historic and there is value in the history of these individual divisions. I also regret that the title of resident magistrate will be dropped. That historic title should have been retained in our system, because it is unique to Ireland. There was a value in the creation of that judicial office.[114]

Mr Jim Allister, MLA cautioned on the outworkings of the single jurisdiction and questioned whether the proposals would protect the interests of victims and witnesses or will it be operated to judicial or professional convenience. Mr Allister expressed concerns that a judgment may not be given in the court in which the case was heard.[115]

The Justice Minister, Mr David Ford responded to issues highlighted during the debate and indicated that there would be issues to consider when looking at a single jurisdiction to ensure that it is principally in the interests of victims and witnesses.

Committal Process

There was general support for the proposals for reform of the committal process during the Second Stage Debate. The Chairperson of the Justice Committee, Mr Paul Givan, MLA indicated that, during the inquiry into the criminal justice services available to victims and witnesses of crime, the Committee supported the proposals to reform the committal process and to abolish the use of preliminary investigations and the use of oral evidence at preliminary inquiries. He said:[116]

> *During the inquiry, the Committee was advised that the judiciary supported reform of the committal process, seeing no operational advantage for the courts in retaining the right to call witnesses at committal proceedings. Victims and witnesses of crime also indicated that the procedure only served to cause further stress and trauma, as it resulted in them having to give evidence and be cross-examined more than once.*

Lord Morrow, also supporting the proposals for reform, emphasised the cost of proceedings which incur unnecessary court time and require staff to be redeployed and specific days set aside for such hearings.[117]

114 Official Report of the Second Stage Debate of the Justice Bill, 24/06/14, http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

115 Official Report of the Second Stage Debate of the Justice Bill, 24/06/14, http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

116 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

117 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

However, concerns were raised about the proposals in the Bill by two Members. Mr Alban Maginness, MLA said there was a theoretical and real value in committal proceedings and there should be an opportunity to test the evidence at that preliminary stage. He highlighted that a complete abolition of evidence on oath could cause delay at the trial stage as some issues could have been dealt with at a preliminary investigation or inquiry. Mr Maginness suggested there should be a residual retention of the ability to call evidence on oath which he did not envisage being used extensively, but could be a safeguard.[118]

Mr Jim Allister, MLA also expressed concerns regarding the proposals. He said:[119]

> *I have yet to read a set of prosecution papers that do not, on the face of it, appear plausible or even convincing about the guilt of the accused. It is, on occasions, the testing of that evidence that shows that it is not entirely as it seems. How is that done? It is done through cross-examination, putting to witnesses alternative scenarios, their possible motives and their inconsistencies — all of that — and suddenly finding that what reads like a very coherent and convincing statement is in fact full of holes and is falling apart…*

Mr Allister also indicated that "such a blanket ban does not serve the interests of justice at all."[120]

The Justice Minister, Mr Ford noted that there was general support in relation to the proposals on committal but addressed the concerns highlighted by the two members. However, he said that his concerns were based on the committal process becoming a first go at vulnerable witnesses.[121]

Prosecutorial Fines

Mr Wells, MLA said he welcomed the introduction of fines at an early stage, but expressed concern regarding the lack of a criminal record arising and there may be a tendency to opt for the fine too often. Mr Wells argued that the criminal record was the deterrent rather than the fine.[122]

Mr Jim Allister, MLA suggested that the system was wide open to abuse and that a person only had to consent to accepting the fine to avoid prosecution. He raised concerns about clause 17 as it is currently drafted during the debate. He noted that clause 20 (2) states that "If the offer in a notice under section 17(1) is accepted, no proceedings may be brought for the offence to which the notice relates." Mr Allister argued that the clause as currently drafted could have unintentional consequences as a person could have immunity from prosecution from accepting the notice, whether the fine is paid is another matter. Mr Allister said "one could understand it if it said, "If the notice is accepted and the fine is paid, no proceedings may be brought for the offence to which the notice relates." [123]

The Minister noted that there was broad support for prosecutorial fines but responded to the issues raised by Mr Wells and Mr Allister. The Minister said that prosecutorial fines would be recorded and the information held. Decisions could be made on the basis of the information as to whether a prosecutorial fine is appropriate at a future stage.[124]

118 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

119 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

120 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

121 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

122 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

123 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

124 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

Criminal records

The proposals regarding criminal records disclosure were broadly welcomed during the second stage debate. Mr Wells highlighted difficulties with AccessNI due to the issue of multiple certificates for different youth organisations within the church. He said:[125]

Therefore, anything that can achieve a single transferable certificate awarded by Access Northern Ireland has to be a good thing, consistent, of course, with protecting the vulnerable and our young children to make certain that the perpetrators of horrible crimes are detected in the system. We will watch with interest the Committee Stage to see how that pans out.

Mr Dickson MLA whilst welcoming the proposals for the potential financial benefits benefits to applicants that could ensure issued a note of caution that checks need to be accurate to ensure that "no-one slips between the cracks."[126]

Ms Mc Corley, MLA highlighted that Mrs Mason's review made interesting reading and the recommendations of the report were wide ranging. She said

Ultimately, we will be seeking a structure in which the correct and proportionate vetting systems are put in place while still providing the appropriate protection to the public.[127]

The Justice Minister, David Ford, MLA addressed some of the issues highlighted during the Second Stage Debate. He acknowledged that there have been difficulties for a number of years because of the multiplicity of certificates being issued. However, he disagreed with the point raised by Mr Wells about somebody carrying out voluntary work in a number of different organisations in one church. The Minister said:[128]

From my personal experience, that would all be covered by information from Access NI, but there are clearly problems if somebody is a volunteer with different organisations not under the same umbrella. Even then, some cases relate to employment as well. That is why we are very keen to see the concept of the portable certificate, the online application and the ability to get round those difficulties, which will make things much more efficient than had been the case.

Early Guilty Pleas

Mr Maginness, MLA raised two issues in relation to the clauses in the Bill on early guilty pleas. The first issue related to clause 77 and he suggested that it was not clear what the clause intended. Clause 77(2) states:

The court in sentencing D for the offence must indicate the sentence which the court would have imposed for the offence if D had pleaded guilty to the offence (or indicated D's intention to do so) at the earliest reasonable opportunity in the proceedings.

Mr Maginness suggested that it was unclear what the court has to do in these circumstances and called on the Minister to clarify this. Mr Maginness also argued that clause 78 which deals with the duty of the solicitor to advice on early guilty pleas was an unnecessary addition to the volume of provision on criminal proceedings.[129]

Mr Elliott, MLA also expressed concern that, by putting the issue of early guilty pleas on a legislative basis, that there may be pressure on those facing criminal charges to enter an

125 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

126 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

127 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

128 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

129 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

early guilty plea. Mr Elliott said he was keen to see safeguards to mitigate the pressure on those facing criminal proceedings.[130]

Mr Allister, MLA also questioned whether some of the clauses were there to bulk out the Bill. He suggested that Court of Appeal guidelines already set out the percentage rebate if someone pleads guilty. He also argued that the provision of information about early guilty pleas is so elementary that everyone already does it and it is the bread and butter of solicitors and barristers who practice in the criminal courts.[131]

The Justice Minister responded to some of the issues raised in relation to early guilty pleas. He emphasised that early guilty pleas was not an issue of plea bargaining but about provision of information and ensuring the information is available. The Minister also acknowledged that lawyers may already provide information on early guilty pleas, but agreed that there would be no harm in making that explicit.[132]

Avoiding Delay in Criminal Proceedings

The proposals on progressing criminal proceedings and case management were generally welcomed. However, issues were raised by two members, Mr Maginness and Mr Allister. Mr Maginness noted there were tensions in clause 79 between reaching a just outcome as swiftly as possible. Mr Allister suggested that there was an inclination in the Bill to legislate for the sake of legislating and that the drafters of the legislation had little experience of the criminal courts. Mr Allister highlighted that answering questions by judges on the state of readiness of cases and why they were not ready already takes place.

The Justice Minister noted Mr Allister's arguments about scrutiny in the courts in Belfast on the state of readiness of cases but said that this does not happen in every court in Northern Ireland and that this needs to become the case in every court.[133]

Youth Justice

Mr Patsy McGlone, MLA raised concerns that there is a view that the proposed amendment under clause 84 (aims of the youth justice system) is not entirely compliant with the UNCRC and that it will not fulfil the recommendations of the youth justice review either. The Justice Minister responded to this issue, stating:[134]

Whilst I am aware that there are those in the children's lobby groups who have some concerns about the proposal as it currently stands within the Bill, my advice is that the provision delivers on both the spirit and the letter of the youth justice review and on what is intended by the UNCRC. I will certainly be interested to hear any evidence that comes to the Committee to the contrary, but my advice at the moment is that it is an entirely satisfactory provision.

130 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

131 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

132 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

133 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

134 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/24-June-2014/#8

Annex A: Recommendations made by Mrs Mason in Part One of "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland. [135]

Recommendation	Detail	Department of Justice response [136]
Recommendation 1	Government should assess how many people working or volunteering with children and vulnerable adults have not been subject to a criminal records check. Once established, such checks should be undertaken as soon as is practically possible	Views not sought in the consultation as Minister has written to the Health Minister to ask that his department co-ordinates the response to this recommendation through the interdepartmental group on safeguarding children
Recommendation 2	Where employers knowingly make unlawful criminal record check applications, they are subject to suitable penalties and sanctions	Recommendation accepted in full
Recommendation 3	Access NI should be resourced to: • Check applications applied for on enhanced criminal record applications are correct; • Provide clearer guidance about all aspects of criminal record checking; • Act as a one stop shop for both individuals and registered bodies	Recommendation accepted in part. The Minister has not accepted that AccessNI can be a one stop shop. It cannot give definitive advice on whether a post involves regulated activity
Recommendation 4	Children under 16 should not be subject to criminal record checks except in home based caring roles (for example fostering and adoption).	Recommendation accepted in full
Recommendation 5	The Government should commence section 56 of the Data Protection Act in NI as soon as possible. This would cease the practice of employers obtaining information about employees through Subject Access Checks from the police	The Department did not consult on this recommendation as it was a reserved matter for the Ministry of Justice and this section of the Act has not been commenced anywhere in the UK
Recommendation 6	A system of portable disclosures (checks should be portable within workforces) and updated online checking be introduced as quickly as possible in NI	Portability should be introduced and taken forward in the next Justice Strategy Bill, consultation sought views whether certificates should become portable within but not across workforces. The Minister already accepted a system of portable disclosures and updated online checking as soon as possible. Following the consultation the Minister decided that checks should be portable between workforces.

135 S Mason (2011) "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason."

136 DoJ Consultation on Part One of the Criminal Records Regime in Northern Ireland and summary of Responses and Way Forward, http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-review-of-the-criminal-records-regime-in-northern-ireland.htm

Recommendation	Detail	Department of Justice response [136]
Recommendation 7	The current system of issuing dual certificates to employer and employees be replaced by a single criminal record certificate that is issued to the applicant. The applicant will be responsible for the disclosure of the certificate.	The Minister accepted this recommendation and did not seek views in the consultation on this recommendation.
Recommendation 8 a	Police information should continue to be available on enhanced criminal record checks	Recommendation accepted in full
Recommendation 8b	The test used by PSNI to make disclosure decisions under s 113B (4) of the Police Act is amended from 'might be relevant to 'reasonably believes to be relevant'	Recommendation accepted in full
Recommendation 8c	A statutory code of practice is developed in Northern Ireland to assist police to decide what information should be released	Recommendation accepted in full
Recommendation 8d	Police information is provided in a consistent manner on criminal record checks and the reason for that information being disclosed is set out on the certificate	Recommendation accepted in full
Recommendation 8e	PSNI have a maximum of 60 days to decide if they have information that should be released	This recommendation has been accepted, However, the Minister has not agreed to the option set out in the consultation document that checks could be issued after 60 days without all the available police information
Recommendation 8f	The current additional information powers under section 113B (5) of the Police Act 1997 are repealed (these relate to the ability to issue information to employers) However, police can still use common law powers to give information to employers if it is on the public interest to do so	Recommendation accepted in full
Recommendation 8g	AccessNI establishes an independent representations process to deal with cases where individuals wish to dispute police information or criminal conviction information disclosed	View sought on the following options: • To ask a different PSNI officer to review the information subject of the complaint • To invite a chief police officer from another force to review the information • To set up a boy to look specifically at complaints; • To use an independent monitor of complaints

Recommendation	Detail	Department of Justice response [136]
Recommendation 9	AccessNI should routinely disclose informed warnings, cautions and details of diversionary youth conferences on standard and enhanced checks. Where this involves a young person, the information should only be disclosed if the offence is recent.	Recommendation consulted upon in Part Two Consultation, accepted in full by Minister [137]
Recommendation 10	The Department of Justice should bring forward proposals to filter out convictions which are both old and minor and criminal record information such as cautions for disclosure purposes. The Department should consult widely on this to ensure their proposals command appropriate support.	Recommendation consulted upon in Part Two Consultation, accepted in full by Minister [138]

137 DoJ consultation on Part Two and Recommendations Nine and Ten from Part One Report of the Northern Ireland Criminal Records Regime and Summary of Responses available at http://www.dojni.gov.uk/index/public-consultations/archive-consultations/review-of-criminal-records-regime-further-consultation.htm

138 DoJ consultation on Part Two and Recommendations Nine and Ten from Part One Report of the Northern Ireland Criminal Records Regime and Summary of Responses available at http://www.dojni.gov.uk/index/public-consultations/archive-consultations/review-of-criminal-records-regime-further-consultation.htm

Annex B: Recommendations made by Mrs Mason in "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland- Part Two"[139]

Recommendation	Detail	Department of Justice Response[140]
Recommendation 1	A Review of offences carried out as Recordable and Non Recordable should be carried out as a priority.	This has been deferred until a process for conducting a similar review for England and Wales has been conducted
Recommendation 2	An individual's criminal record should be clearly defined as all Recordable offences in respect of which an individual has been convicted or received a caution, informed warning or diversionary youth conference.	Recommendation has been accepted in full in principle subject to further consultation
Recommendation 3	The Causeway Data Sharing Mechanism should continue to be the central system for maintaining, managing and sharing records in Northern Ireland and that investment in the system should be maintained to ensure it evolves to meet future requirements.	Accepted without further need for consultation
Recommendation 4	An individual's record should be retained within the Northern Ireland Criminal Justice System for 100 years from the subject's date of birth.	Implementation does not require any changes in legislation and will be implemented with effect from 1 January 2014
Recommendation 5	I welcome the agreement reached with the Home Office concerning the routine updating of the Police National Computer with all Northern Ireland Criminal Records and recommend the new system is implemented as soon as possible.	New processes to be introduced at earliest opportunity, vires not sought in consultation
Recommendation 6	I welcome the current collaborative sharing arrangements for the sharing of individual crime record information between police services in the Republic of Ireland and Northern Ireland. I recommend that these arrangements should be appropriately enhanced to aid the protection for both jurisdictions.	Mrs Mason has been asked by the UK government to review its international strategy for sharing of information across the EU, the Department will continue to contribute towards that review, the Department are therefore not consulting on this recommendation.

139 S Mason (2012) "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland: Part Two."

140 DoJ consultation on Part Two and Recommendations Nine and Ten from Part One Report of the Northern Ireland Criminal Records Regime and Summary of Responses available at http://www.dojni.gov.uk/index/public-consultations/archive-consultations/review-of-criminal-records-regime-further-consultation.htm

Recommendation	Detail	Department of Justice Response[140]
Recommendation 7	Northern Ireland criminal record data should continue to be strictly controlled and that it should only be provided to the United Kingdom criminal justice and related government organisations that have a legal, necessary, valid and legitimate business need for access to fulfil their statutory duties that are required to be fulfilled.	The Minister is content that access to criminal information is strictly controlled and meets statutory requirements. The consultation is not seeking views on this recommendation
Recommendation 8	Any organisations that are provided access to the Northern Ireland criminal record data, now or in the future, must continue to maintain an auditable record of every record accessed the purpose for such access.	The Minister is content that access to criminal information is strictly controlled and meets statutory requirements. The consultation is not seeking views on this recommendation
Recommendation 9	The Department of Justice, in collaboration with other criminal justice organisations, should more clearly publicise the process for individuals to challenge perceived inaccurate information contained within their criminal record to ensure that erroneous information is corrected.	The Minister agreed with this recommendation and guidance on the process should be more clearly explained and publicised. The Consultation did not seek views on this recommendation
Recommendation 10	The development of comprehensive and easily understood guidance, tailored for individuals to fully explain the criminal record management process.	The Minister fully supported this recommendation and agreed that public awareness about the criminal record process should be enhanced.

Annex C- Proposed Wording of Attorney General's Amendment[141]

"X(1) The Attorney General may for the purposes of consideration of whether or not to direct an inquest under section 14 (1) require any person who in his opinion is able to provide information or produce documents relevant to his consideration to provide any such information or produce any such documents.

(2) A person may not be compelled for the purposes of subsection (1) to provide any information or produce any document which that person could not be compelled to provide or produce in civil proceedings in the High Court.

(3) Where any information or document required to be provided or produced under this section consists of, or includes, information held by means of a computer or in any other form, the Attorney may require any person having charge of, or otherwise connected with the operation of, the computer or other device holding that information to make the information available, or produce the information, in legible form.

(4)Every person who fails without reasonable excuse to comply with a requirement under subsections (1) or (3) shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

141 Taken from a letter from the Attorney General to the Justice Committee on 5 March 2014 available at http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/legislation---committee-stage-of-bills/the-justice-bill-committee-stage/details-of-the-call-for-evidence-on-the-justice-bill-and-the-proposed-amendments/

Annex D: Proposed Wording of Jim Wells, MLA Amendment[142]

Ending the life of an unborn child

11A.-(1) Without prejudice to section 58 and section 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945 and subject to subsection (2) any person who ends the life of an unborn child at any stage of that child's development shall be guilty of an offence and liable on conviction on indictment to a period of not more than ten years' imprisonment and a fine.

(2) It shall be a defence for any person charged with an offence under this section to show-

(a) that the act or acts ending the life of an unborn child were lawfully performed at premises operated by a Health and Social Care Trust, or

(b) that the act or acts ending the life of the unborn child were lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible.

(3) For the purposes of this section a person ends the life of an unborn child if that person does any act, or causes or permits any act, with the intention of bringing about the end of the life of an unborn child, and, by reason of any such act, the life o that unborn child is ended.

(4) For the purposes of this section 'lawfully' in subsection (2) means in accordance with any defence or exception under section 58 and section 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945.'

142 http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/legislation---committee-stage-of-bills/the-justice-bill-committee-stage/details-of-the-call-for-evidence-on-the-justice-bill-and-the-proposed-amendments/

Research and Information Service
Briefing Paper

Paper 000/00 6 February 2015 NIAR 048-15

Fiona O'Connell and Ray McCaffrey

The Attorney General's proposed amendment to the Justice Bill

This paper outlines the provisions of the Justice Bill and policy proposals underpinning the Bill

Key Points

- Power to direct an inquest - in Northern Ireland and currently in the Republic of Ireland, the Attorney General has a statutory power to direct inquests if there are circumstances which in his opinion would make the holding of an inquest advisable.
- A Bill in the Republic of Ireland proposes to maintain the power of the Attorney General to hold an inquest, however there is a proposed consultative role for the Chief Coroner.
- In England and Wales, the Attorney General applies to the High Court to order an inquest.
- In Scotland, applications for Fatal Accident Inquiries, including those which are discretionary but it appears to the Lord Advocate expedient in the public interest that one is held, are made to the Sheriff's Court by the Procurator Fiscal,.
- Power to obtain papers.-The research could not identify a statutory power in any of the jurisdictions examined to obtain papers that would be relevant to the exercise of the Attorney General's statutory power to direct an inquest.

1 Introduction

This paper has been produced in response to a research request by the Committee for Justice on whether the Attorney General in other jurisdictions (England and Wales, Scotland and the Republic of Ireland) have an equivalent power to that of the AGNI under the Coroners Act 1959 and whether they have a statutory power to obtain papers.

2 Northern Ireland

2.1 Role and Functions of the Attorney General for Northern Ireland in relation to inquests

Section 14 of the Coroners Act (Northern Ireland) 1959 provides the AGNI with a power to direct an inquest where it is advisable to do so. Section 14 (1) states:

> *Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death.*

At the time the provision was introduced, it was intended that it would enable a coroner where there was an inquest or a partial inquest, under the direction of the Attorney-General, to hold a further complete inquiry.[1] The debate of the Northern Ireland Senate in November 1959 indicated that the power would be used sparingly. Mr Topping, the Minister of Home Affairs stated the intention of the provision as follows:

> *This is a power which obviously would be used most sparingly and only in the most exceptional cases. I would suggest that in cases and they would be most unusual- where something comes to light a good while after an inquest, the sort of thing that leads to the exhumation of a body, it would be proper that an inquest should be held in public and that this power could be well entrusted to the Attorney-General as being the person who is custodian of the public liberty. I suggest that it would be quite right that he should have that power and that it would be in the public interest to have such as power to direct an inquest.*[2]

2.2 Proposed amendment by the Attorney General for Northern Ireland to the Justice Bill

The Attorney General has asked the Justice Committee to consider a proposal in the context of the Justice Bill 2014 which would amend section 14 of the 1959 Act by inserting additional provisions to enable him to obtain papers that may be relevant to the exercise of his power. The focus of the Attorney General's concern is primarily in relation to deaths that occur in hospital or where there is a suggestion that a medical error has occurred.[3] The Justice Committee is currently considering this in the context of the Justice Bill 2014. The proposed amendment is as follows:[4]

> *14A (1)- The Attorney General may, by notice in writing to any person who has provided health or social care to a deceased person, require that person to produce any document or*

1 Senate Debate (Northern Ireland) 3 November 1959, col 667

2 Senate Debate (Northern Ireland) 3 November 1959, col 667

3 Correspondence from the Attorney General to the Committee for Justice dated 5 March 2014

4 Correspondence from the Attorney General to the Committee for Justice dated 30 April 2014

give any other information which in the opinion of the Attorney General may be relevant to the question of whether a direction should be given by the Attorney General under section 14.

(2) A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings to the High Court.

(3) In this section

"document" includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in legible form;

(4) A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale."

Section 7 of the 1959 Act currently provides for a duty to give information to a coroner. It provides that a medical practitioner, registrar of deaths, funeral undertaker and every occupier of a house or mobile dwelling and every person in charge of an institution in which a deceased person was residing who has a reason to believe that the person died as a result of violence or misadventure, unfair means, negligence or misconduct or malpractice on the part of others shall notify the coroner of the facts and circumstances of the death. Every person who contravenes this section shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 2 on the standard scale.[5]

2.3 Case Law in Northern Ireland

There have been a number of cases in Northern Ireland relevant to the Attorney General's power to direct an inquest. In the case of Forde v Attorney General in 2009, the Court of Appeal held the Attorney General cannot direct the Coroner to conduct an inquest into a death outside Northern Ireland. The court held that the judge at first instance was correct in concluding that section 14 cannot be interpreted as investing the Attorney General with a power to effectively confer a jurisdiction on the Coroner that he does not have under section 13.[6]

In the case of McLuckie v Coroner for Northern Ireland in 2011, the Court of Appeal noted that in 2007 the Attorney General exercised her powers under section 14 of the Coroners Act (Northern Ireland) 1959 and ordered an inquest to be conducted into the death of the deceased. The Court of Appeal noted that no reason was given for this decision and nor had one emerged since her decision.[7]

In the case of the Attorney General for Northern Ireland and another v Senior Coroner for Northern Ireland in 2013, the Court of Appeal held that the coroner had jurisdiction to hold an inquest in the case of a stillborn child. The appeal was against a previous decision dismissing a judicial review challenge by the Attorney General to a decision of the Senior Coroner for Northern Ireland declining to comply with a direction given by the Attorney General under section 14 of the 1959 Act.[8]

5 Section 10 of the Coroners Act (Northern Ireland) 1959

6 Forde v Attorney General [2009] NICA 66

7 McLuckie v Coroner for Northern Ireland [2011] NICA 34

8 Attorney General for Northern Ireland and another v Senior Coroner for Northern Ireland [2013] NICA 68

3 England and Wales

3.1 Role and functions of the Attorney General for England and Wales in relation to inquests

Under the Coroners and Justice Act 2009 (Consequential Provisions) Order 2013, the Attorney General has a public interest function, independent of government, to decide whether to apply to the High Court for an inquest.[9] The Attorney General can apply to the High Court to order an inquest in circumstances where:

> *either a Coroner had previously refused or neglected to hold an inquest where it ought to have been held, or, where an inquest has been held, and it is in the interests of justice that another inquest should be held. (Examples include the Attorney's decision to request a new inquest for the victims that were killed at the Hillsborough Football Stadium in 1989; and, the decision not to apply for a new inquest into the 2003 death of Dr David Kelly, a government scientist.)*[10]

The website of the Attorney General's office further states that:

> *If somebody connected to the dead person thinks the inquest did not come to the correct conclusion, for example if new evidence emerges, they can ask the Attorney to consider asking the High Court to look at the evidence again. He will do this if he thinks a new inquest is necessary. He cannot order a new inquest himself.*

The Attorney General has no power to order a new coronial inquest; they can only be ordered by the High Court on application made either by the Attorney General or by a third party with consent of the Attorney General.[11]

The Coroners and Justice Act 2009 (Consequential Provisions) Order 2013 amends section 4A(8) (coroners districts in Wales)and section 13 of the Coroners Act 1988 (order to hold inquests). These amendments were to ensure that provisions are consistent with Part 1 of the Coroners and Justice Act 2009.There does not appear to be a statutory power for the Attorney General to obtain documents in these pieces of legislation. Schedule 5 of the Coroners and Justice Act 2009 makes provision for the powers of coroners to require evidence to be given or produced. Paragraphs 1 (b) and 2 (b) provide that a senior coroner may by notice require a person produce any documents in the custody or under the control of the person which relate to a matter which is relevant to the inquest.

9 http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

10 Crown Prosecution Service, Legal Guidance, Coroners: http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

11 http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

4 Republic of Ireland

4.1 Role and Functions of the Attorney General of Ireland in relation to inquests

Section 24 of the Coroners Act 1962 in the Republic of Ireland contains an almost identical provision to section 14 of the Coroners Act (Northern Ireland) 1959. Section 24 (1) of the 1962 Act provides:

> *Where the Attorney General has reason to believe that a person has died in circumstances which in his opinion make the holding of an inquest advisable, he may direct any coroner (whether or not he is the coroner who would ordinarily hold the inquest) to hold an inquest in relation to the death of that person, and that coroner shall proceed to hold an inquest in accordance with the provisions of this Act (and as if, not being the coroner who would ordinarily hold the inquest, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry, held any inquest in relation to or done any act in connection with the death.*

During the Second Stage debate of the Bill in 1961, the Minister for Justice Mr Haughey stated:[12]

> *The Attorney General stands in a special relationship to the general public and has a statutory duty of asserting and protecting public rights. For this reason it is in the public interest that he should have the power conferred on him by this section.*

The Coroners Act 1962 does not contain a statutory power to enable the Attorney General to obtain papers that would assist in the exercise of this function.

The Coroners Bill 2007 was published in 2007 to provide for coroners reform and is currently on the Order Paper of the Seanad.[13] Clause 37 of the Bill provides for a coroner or a coroner's officer to enter premises where there are reasonable grounds for believing that there are documents or information in any form relating to the investigation. The provision also provides coroners with powers to inspect any documents or information in any form on the premises and secure documents for later inspection. The coroner may also take copies of or extracts from documents or any electronic information on the premises and remove documents for later examination or copying.[14]

Clause 64(1) (c) empowers the coroner to direct the production by any person of any document, article, substance or thing in their possession or under their power or control.

Clause 45 (1) of the Coroners Bill 2007 proposes to maintain the current power of the Attorney General to direct an inquest but provides a consultative role for the Chief Coroner. The provision states:

> *Where the Attorney General has reason to believe that a person has died in circumstances which in his or her opinion make the holding of an inquest advisable, he or she may, for stated reasons following consultation with the Chief Coroner, direct that coroner to be nominated by the Chief Coroner (whether or not he or she is the coroner who would ordinarily hold the inquest) hold an inquest into the death of that person.*

The 2007 Bill does not make provision for a statutory power for the Attorney General to obtain documents relevant to the exercise of the power to direct an inquest.

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12 http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1961111600009?opendocument

13 Confirmed by a colleague in the Oireachtas via email on 02/02/15, see also http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupdail)/20141210~WRE?opendocument#WRE00200

14 http://www.oireachtas.ie/documents/bills28/bills/2007/3307/b3307s.pdf

5 Scotland

5.1 Role and Functions of the Lord Advocate and the Procurator Fiscal in relation to the investigations of deaths

The system in Scotland is very different to other jurisdictions in the UK and the Republic of Ireland. In Scotland, the Lord Advocate has responsibility for investigating any death which requires further explanation.[15] In other parts of the United Kingdom, the coroner may investigate such deaths.[16] The Lord Advocate is the Ministerial Head of the Crown Office and Procurator Fiscal Service (COPFS). He is a Minister of the Scottish Government and acts as a principal legal adviser. Decisions taken by him in relation criminal prosecutions are taken independently of any other person.[17]

Procurator Fiscals are qualified lawyers who are employed by the COPFS and act on the instructions of the Lord Advocate. The Procurator Fiscal's role is comparable to the Coroner as investigator, in the public interest, of certain deaths.[18] The Procurator Fiscal does not preside over the court hearings, those are conducted by the Sheriff in the district the death took place.[19]

The relevant legislation regulating an inquiry into fatal accidents and sudden deaths is the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977.

Section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 provides where:

(a) It appears that the sudden death resulted from an accident during the course of employment or occupation; or the person died while in legal custody; or

(b) It appears to the Lord Advocate to be expedient in the public interest in the case of death that an inquiry under the Act should be held into the circumstances of the death on the ground that it was suspicious, sudden or has occurred in unexplained circumstances to give rise to public concern.

(c) the procurator fiscal for the district with which the circumstances of the death appear to be most closely connected shall investigate those circumstances and apply to the sheriff for the holding of an inquiry under the act in these circumstances.

A report by the Rt Hon Lord Cullen on the Fatal Accident Inquiries (FAI) legislation in 2009, outlined the procedure to be followed in relation to an FAI as follows:

> *If an FAI appears to be mandatory the procurator fiscal will normally proceed to arrange for one without reference to Crown Office. The wide discretion given to the Lord Advocate permits the holding of an FAI in a wide variety of situations, such as an unexplained death in hospital or a death in circumstances suggesting a risk to public health or safety or a road accident on a bad stretch of road. Where there is a question of a discretionary FAI, the procurator fiscal has to report to the deaths unit which is part of the Crown Office, with the views of relatives of the deceased and his or her recommendations. It is for Crown Counsel, in consultation with the law officers where appropriate, to decide whether a discretionary FAI should be held and for the procurator fiscal to apply for one if so instructed. A decision*

15 http://www.crownoffice.gov.uk/about-us/who-we-are

16 http://www.copfs.gov.uk/investigating-deaths/our-role-in-investigating-deaths

17

18 Working Group Review of the Coroners Service, available at http://www.justice.ie/en/JELR/ReviewCoronerService.pdf/Files/ReviewCoronerService.pdf

19 Sheriff courts deal with the majority of civil and criminal cases in Scotland, see http://www.scotland-judiciary.org.uk/36/0/Sheriffs

of the Lord Advocate to decline to apply for the holding of a discretionary FAI is open to challenge by judicial review.[20]

The Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 makes provision for the procedure to be followed in relation to inquiries held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. Rule 5 makes provision for possession and inspection of documents:

The Sheriff may at the time of making an order for the holding of an inquiry at any time thereafter, upon application of the procurator fiscal, or of any other person entitled to appear at the enquiry or at his own instance, grant warrant to officers of the law to take possession of anything connected with the death which is the subject of the inquiry and which it may be considered necessary to produce at the inquiry and to hold any such thing in safe custody, subject to inspection by any persons interested.[21]

However there is nothing explicit in either the 1977 rules or the 1976 Act which provides a power for the Lord Advocate to obtain papers. Officers of the law in the 1977 rules are interpreted to include:[22]

- Any macer, messenger-at-arms, sheriff or other person having the authority to execute a warrant of the court;
- Any constable ;
- An officer of revenue and customs;
- A person employed under the Police (Scotland) Act 1967 for the assistance of constables of the police force;
- Where a person upon whom service is executed is in prison, any prison officer;
- Any person authorised for the time being by the Lord Advocate or by the Secretary of State.

The reference to the rules for ordinary civil causes enables the Sheriff to order the recovery of documents and the examination of witnesses and to request for the taking of the evidence of witnesses abroad.[23]

20 Lord Cullen "Review of Fatal Inquiry Legislation: The Report", pg 9

21 http://www.legislation.gov.uk/uksi/1977/191/pdfs/uksi_19770191_en.pdf

22 The Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 amended by the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Amendment Rules 2007, no 478, see

23 Lord Cullen "Review of Fatal Inquiry Legislation: The Report", pg 14

Northern Ireland Assembly

Appendix 9

Other Papers

Contents

Letter from the Public Prosecution Service providing clarification on evidence given on Part 2 of the Justice Bill – Committal for Trial

FAO Christine Darragh

Urgent
The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

10 March 2015.

Dear Madam

The Justice Bill and Proposed Amendments

Having regard to certain evidence given at recent meetings of the Justice Committee by representatives of the Department of Justice in relation to committal proceedings, the Director of Public Prosecutions, Barra McGrory QC, considered it necessary to arrange a series of private meetings with representatives of all the main parties represented on the Committee to clarify certain aspects of that evidence. As a result of those meetings, the Director has asked me to write to you to clarify two points. The Director has asked that this letter be put before the Committee in time for their meeting on 11th March to enable the content to be considered at that time.

1. Evidence to the Committee by the Department of Justice in respect of the number of cases not returned to the Crown Court on committal.

The Director wishes to clarify some of the information given in connection with the Bill's proposal to remove the right of the defence to call oral evidence at committal. I hope the Committee will find it of assistance if I provide some background information.

The ability to call evidence at Committal is a right which defendants exercise to establish whether the witness will turn up to give evidence or to use the evidence given by the witness to try and undermine their evidence at trial by highlighting differences between the two accounts, even where those differences may be minor. It is a layer in the criminal justice process that is additional to the fundamental right that an accused should be permitted to confront his accuser and to cross examine any witness against him. Under no circumstances are we asking that such fundamental rights be diluted but we are asking the committee to consider these reasonable proposals to confine the right to cross examine to the trial. This should be understood as a proportionate reform in the context of a changing criminal justice environment where there is now a greater understanding and recognition of the experiences of victims and witnesses within the criminal justice process.

There have been cases where the PPS has been required to call witnesses, often bringing them in from other countries which takes time and is costly, only for the defence to decide on the day that they do not require the witnesses. In other cases, committal can add a very considerable delay to the progress of the proceedings. For example, in the McDaid case, where the victim died as a result of a sectarian attack, committal papers were served on the defence in March 2012. Twenty eight witnesses were requested by the defence. A very small

number of these were required to give evidence and the case was eventually returned for trial in December 2013, over a year after the committal proceedings were first listed.

In another case, one involving allegations of child abuse, one of the witnesses requested by the defence had to be flown in from England. Her husband had to accompany her at his own expense. She left her home at 5am having arranged childcare for her young children. When she arrived at court she was nervous and exhausted. She had to wait all morning to be told at lunchtime that she would not be required by the defence to give evidence as they were conceding that there was a prima facie case against the defendant who was committed for trial. This is a classic example of the way in which the right to seek oral evidence by the defence impacts in a negative way upon the victim in a case.

The purpose of committal proceedings is for the District Judge to satisfy him / herself that there is sufficient evidence to commit the defendant for trial on the charges before the court. Very few cases are not returned for trial. In this regard we noted that at the Committee hearing on 18th February, the Department of Justice representative stated that in 2013 a total of 51 cases out of 1,743 were not committed to the Crown Court for trial . The Director was immediately concerned that these figures over represented the number of cases in which a District Judge decided that there was not a prima facie case to warrant committal to the Crown Court for trial. Having looked at our own figures they show that in 2013 out of a total of 2,289 defendants, only 6 were not committed for trial by a District Judge. This represents approximately 0.3% of defendants who were the subject of committal proceedings in 2013. Of these 6 cases, 2 were cases in which the defence called witnesses to give evidence and in both cases the witnesses did not attend. The cases against the remaining 4 defendants were decided on the basis of legal submissions on the evidence contained in the committal papers with no oral evidence being called.

The Committee might be interested to know that in 2014, of the 1938 defendants who were the subject of committal proceedings, only 4 were not committed for trial.

The reason for the figure of 51 cases referred to in evidence before the Committee appears to be that this figure includes cases which were withdrawn, where a caution was accepted by a defendant, where papers could not be served on a defendant and which were adjourned generally and where defendants did not attend for committal.

The current proposal contained in the Bill to remove the right of the defence to require the prosecution to call witnesses at committal, would not, in our view, occasion any detriment to the defence, particularly when the vast majority of cases are committed for trial whether or not prosecution witnesses are required to give evidence. Defendants will retain the right to challenge the sufficiency of the prosecution's evidence through the Crown Court's 'No Bill' procedure pre-trial or through the trial process itself.

The proposed amendment would rebalance this part of the process and provide greater protection for victims and witnesses. It would avoid them having to give evidence at the Magistrates' Court and the Crown Court and would prevent some withdrawing their support for the prosecution altogether because the prospect of having to give evidence twice is too onerous and distressing.

2. The Attorney General's proposed amendment to have rights of audience extended for the lawyers in his office.

The Director gave evidence on the Attorney General's proposed amendment and wrote to the Chairman of the Committee on 10th February 2015 clarifying that any increase in rights of audience of PPS would be limited to those senior lawyers in the recently established Higher Courts Advocacy unit of the PPS. The Director asks only that, in the event of the Attorney's request being favourably received, the PPS be included in the limited way outlined. It would be odd indeed that the only public legal office in respect of which court advocacy is a core

function should be excluded from any statutory changes to the normal regulations on rights of audience.

Should I be of any other assistance please do not hesitate to contact me and should the committee wish to hear from the Public Prosecution Service at their meeting tomorrow or on another occasion we will be pleased to attend.

Yours faithfully

Ciaran McQuillan
Assistant Director

Policy Section
Public Prosecution Service for Northern Ireland

Appendix 10

List of Witnesses

List of Witnesses

Tom Clarke	Access NI
Grainne Teggart	Amnesty International UK
John Larkin QC	Attorney General for Northern Ireland
Mark Baillie	CARE NI
John Patrick Clayton	Children's Law Centre
Natalie Whelehan	Children's Law Centre
Philippa Taylor	Christian Medical Fellowship
David Best	Department of Health, Social Services and Public Safety
Fergal Bradley	Department of Health, Social Services and Public Safety
Paddy Woods	Department of Health, Social Services and Public Safety
Angela Bell	Department of Justice
Paul Black	Department of Justice
Maura Campbell	Department of Justice
Gary Dodds	Department of Justice
Tom Haire	Department of Justice
Veronica Holland	Department of Justice
Ian Kerr	Department of Justice
Mary Lemon	Department of Justice
Kiera Lloyd	Department of Justice
Amanda Patterson	Department of Justice
Karen Pearson	Department of Justice
Graham Walker	Department of Justice
David Smyth	Evangelical Alliance Northern Ireland
Anne Kane	Health and Social Care Board
Alphy Maginness	Health and Social Care Board
Fionnuala McAndrew	Health and Social Care Board
Arleen Elliott	Law Society of Northern Ireland
Alan Hunter	Law Society of Northern Ireland
Peter O'Brien	Law Society of Northern Ireland
Julia Kenny	NIACRO
Olwen Lyner	NIACRO
Anne Reid	NIACRO
Les Allamby	Northern Ireland Human Rights Commission
Colin Caughey	Northern Ireland Human Rights Commission
Kyra Hild	Northern Ireland Human Rights Commission
David Russell	Northern Ireland Human Rights Commission
Bernadette Smyth	Precious Life
Barra McGrory QC	Public Prosecution Service
Ciaran McQuillan	Public Prosecution Service
Kathy Fodey	RQIA
Glenn Houston	RQIA
Liam Gibson	Society for the Protection of the Unborn Child

Sharon Burnett	Women's Aid Federation NI
Louise Kennedy	Women's Aid Federation NI
Caitriona Forde	Women's Network
Declan McGeown	Youth Justice Agency

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