

# **NORTHERN IRELAND ACT 2009**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Northern Ireland Act 2009 which received Royal Assent on 12 March 2009. They have been prepared by the Northern Ireland Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **SUMMARY AND BACKGROUND**

3. On 18 November 2008, the Northern Ireland First and deputy First Ministers announced that they had agreed a process to complete the devolution of policing and justice to the Northern Ireland Assembly. As part of that process, they proposed initial arrangements for the Ministerial oversight of a justice department. They also proposed that, on devolution, responsibilities relating to the appointment of judicial office holders should transfer to the Northern Ireland Judicial Appointments Commission. They agreed that all of these arrangements should be subject to review and that the Assembly should agree permanent arrangements by 1 May 2012.
4. This Act paves the way for that process to take effect by making a number of changes to the Northern Ireland Act 1998 (“the 1998 Act”), the Judicature (Northern Ireland) Act 1978 and the Justice (Northern Ireland) Act 2002. However, it does not give effect to devolution; before the devolution of policing and justice, further legislation will be required both in the Northern Ireland Assembly and at Westminster (in the form of subordinate legislation) to give effect to the transfer of policing and justice powers.
5. This Act provides for a new ministerial model for a justice department to be added to the menu of options already provided for by the 1998 Act. It allows the department to be headed by a single minister, nominated by any member of the Northern Ireland Assembly and elected by a cross-community vote, and allows this minister to be additional to the normal allocation of seats on the Executive Committee.
6. The Act also provides for certain functions relating to the appointment of judicial office holders to be exercised by the Northern Ireland Judicial Appointments Commission instead of by the First and deputy First Ministers as had previously been envisaged under the Justice (Northern Ireland) Act 2002. Removal of listed judicial office holders will become primarily the responsibility of the Lord Chief Justice, again rather than the First and deputy First Ministers.
7. As described above, the terms of the statement by the First and deputy First Ministers were that these initial arrangements – relating to the ministerial oversight of the department and to judicial appointments and removals – should be time limited and permanent arrangements put in place by 1 May 2012. The Act gives effect to this deadline by providing that the initial justice department will be dissolved on 1 May 2012

unless the Northern Ireland Assembly has previously agreed the future arrangements for ministerial oversight; by placing a duty on the Assembly to review the operation of the amendments made to the law governing judicial appointments and removals; and by placing a bar on the making of further appointments of new members to the Northern Ireland Judicial Appointments Commission from 1 May 2012, unless the Assembly has reached agreement on what the future arrangements for judicial appointments and removals should be.

8. The Act also makes two technical amendments. The first amends the Juries (Northern Ireland) Order 1996 to allow certain responsibilities relating to the disclosure of juror information to be exercised by both the Advocate General for Northern Ireland (in respect of national security and terrorism) and the Attorney General for Northern Ireland (in respect of all other matters). The second establishes the Director of Public Prosecutions for Northern Ireland (DPPNI) as a corporation sole. This will facilitate the holding of property, rights and liabilities by the DPPNI, reflecting the intention that, following devolution, the Public Prosecution Service for Northern Ireland should be a non-ministerial department, independent of a “parent” department within the Northern Ireland departmental system.
9. The Act also amends section 86 of the 1998 Act to allow the transfer of any function between UK and Northern Ireland authorities and the creation and removal of functions, in consequence of an Order under section 4 of that Act. This will, for example, allow executive functions relating to certain policing and justice matters to be transferred to the devolved administration in Northern Ireland by Order even where the legislative competence for that particular subject area remains reserved.

## **OVERVIEW OF THE STRUCTURE OF THE ACT**

10. The Act has five sections and six Schedules.
11. *Section 1* and *Schedule 1* are about the justice department (see paragraphs 5 and 7 above).
12. *Section 2* and *Schedules 2 to 6* are about judicial appointments and removals (see paragraphs 6 and 7 above).
13. *Section 3* makes two amendments (see paragraph 8 above).
14. *Section 4* amends section 86 of the 1998 Act (see paragraph 9 above).
15. *Section 5* deals with supplementary matters.

## **TERRITORIAL EXTENT AND APPLICATION**

16. The practical application of the Act is limited to Northern Ireland. However, some of the legislation it amends extends UK-wide and *section 5* provides that any amendment or repeal has the same extent as the provision which is amended or repealed. The provisions of the Act that operate otherwise than by amendment also have UK extent.

## **COMMENTARY ON SECTIONS**

### ***Section 1: Northern Ireland department with policing and justice functions***

17. *Section 1* introduces *Schedule 1*.

### ***Section 2: Judicial appointments and removals***

18. *Section 2* introduces *Schedules 2 to 6*.

### ***Section 3: Miscellaneous amendments***

19. *Section 3(1)* amends the arrangements for “jury check guidelines” contained in Article 26C(5) of the Juries (Northern Ireland) Order 1996. Currently the Attorney General for Northern Ireland may issue guidelines setting out the circumstances in which juror information may be disclosed for the purpose of carrying out additional checks on prospective jurors. Section 3(1) provides that, following the devolution of justice, these guidelines will be issued by the Advocate General for Northern Ireland in relation to cases in which national security or terrorism is involved. In relation to other cases the guidelines will be issued by the Attorney General for Northern Ireland. *Section 3(2)* amends the Justice (Northern Ireland) Act 2002 to make the Director of Public Prosecutions for Northern Ireland (DPPNI) a corporation sole. This will facilitate the holding of property, rights and liabilities by the DPPNI in his own right.

### ***Section 4: Amendments to section 86 of the Northern Ireland Act 1998***

20. This section amends section 86 of the 1998 Act to allow the transfer of any function between UK and Northern Ireland authorities and the creation and removal of functions, in consequence of an Order under section 4 of that Act. For example, when policing and justice matters are devolved, certain aspects of these matters will remain reserved in terms of the Northern Ireland Assembly’s legislative competence – such as where it remains important to retain a UK-wide framework in a particular area. However, within those areas, the most appropriate body or individual to carry out an executive function may be a devolved body. The amendment to section 86 allows executive functions within the reserved field to be conferred on a devolved body.

### ***Section 5: Final provisions***

21. *Section 5* deals with the short title, commencement and extent of the Act and it confers powers on the Secretary of State to make consequential and transitional provision.

### ***Schedule 1 – Northern Ireland department with policing and justice functions***

#### ***Part 1***

22. This Schedule makes amendments to the 1998 Act in relation to the power of the Northern Ireland Assembly to establish a justice department and the type of ministerial oversight that such a department may have.
23. *Paragraph 2* specifies that this Schedule is to be considered as being contained in Part 3 of the 1998 Act for the purposes of paragraph 22 of Schedule 2 to the 1998 Act. The provisions of the Schedule are an excepted matter under the 1998 Act. This does not affect the ability of the Northern Ireland Assembly to legislate about the department to the extent authorised by those provisions.

#### ***Part 2***

24. *Paragraph 3* inserts a new subsection (3A) into section 21A of the 1998 Act. This provides for a new ministerial model which the Northern Ireland Assembly can choose for a justice department. New subsection (3A) provides that the department may be in the charge of a minister who has been nominated by one or more members of the Assembly, and whose nomination is then approved by a resolution of the Assembly on a cross-community basis – that is, passed with the support of a majority of the members voting, a majority of designated unionists voting and a majority of designated nationalists voting.
25. *Paragraph 4* inserts a new Part 1A into Schedule 4A to the 1998 Act. New paragraph 3A of Schedule 4A provides for this Part of the Schedule to apply when the new model in section 21A(3A) is adopted.

*These notes refer to the Northern Ireland Act 2009  
(c.3) which received Royal Assent on 12 March 2009*

26. New paragraph 3B of Schedule 4A sets out the chronology of ministerial appointments following an Assembly election. It provides for the post of justice minister to be filled *after* the appointment of the First Minister and deputy First Minister (under section 16A) and the appointment of other ministerial posts (under section 18).
27. New paragraph 3C disapplies section 18 of the 1998 Act in relation to the justice minister. The effect of this is that the justice minister is not selected under the d'Hondt formula and does not count towards the parties' entitlements to ministerial offices for the purposes of the d'Hondt calculation.
28. New paragraph 3D sets out the arrangements for the appointment and replacement of the justice minister. New paragraph 3D(1), (2) and (11) provides for the justice minister to cease to hold office in specified circumstances. New paragraph 3D(1) and (14) provides for a vacant post to be filled by applying the process set out in paragraph 3D(4) to (8).
29. New paragraph 3D(4) provides for the justice minister to be nominated by one or more members of the Assembly. New paragraph 3D(5) provides for the nomination to be approved by a resolution of the Assembly on a cross-community basis – that is, passed with the support of a majority of the members voting, a majority of designated unionists voting and a majority of designated nationalists voting.
30. New paragraph 3D(6) and (7) provides that once a member of the Northern Ireland Assembly has been nominated, the Assembly has the opportunity to vote on that candidate and, if elected, the individual has the opportunity to take up office before a further nomination may be made. This must take place within a period specified in standing orders. New paragraph 3D(10) prevents the justice minister taking up office until they have affirmed the pledge of office.
31. New paragraph 3D(11)(c) provides for the justice minister to cease to hold office following a resolution of the Assembly. New paragraph 3D(13) provides that a motion for such a resolution may be moved only if it is put forward by the First Minister and deputy First Minister acting jointly or if it is supported by at least 30 members of the Northern Ireland Assembly. New paragraph 3D(12) provides that the resolution must be approved on a cross-community basis – that is passed with the support of a majority of the members voting, a majority of designated unionists voting and a majority of designated nationalists voting.
32. New paragraph 3D(15) and (16) prevents the nomination of any member of a party if that party is excluded from holding ministerial office under section 30(2) or 30A(5) of the 1998 Act.
33. *Paragraph 4(5)* makes clear that paragraphs 2 and 3 of Schedule 12A to the 1998 Act apply in relation to any justice minister appointed under a departmental model provided for in section 21A of the 1998 Act. Under those paragraphs, a minister whose party is excluded by a direction made by the Secretary of State under section 30A(5) is able to resume, immediately, his previous ministerial office if Parliament does not approve the direction.

### **Part 3**

34. As mentioned above, the agreement between the First and deputy First Ministers was that this ministerial model would apply for an initial period but the Assembly would be required to review the arrangements and to put in place permanent arrangements by 1 May 2012. This Part of the Schedule sets out the transitional arrangements that will apply until 1 May 2012 or, if earlier, the point at which the Assembly puts in place permanent arrangements for the department (“the transitional period”). *Paragraphs 6 to 8* apply only if the initial model chosen for the justice department is the one set out in Schedule 1 to this Act.
35. *Paragraph 6* sets aside the provisions of section 18(1)(b) of the 1998 Act when the first justice department is established. The effect of this is to remove the requirement

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– that would normally obtain when a determination is made under section 17(1) of the 1998 Act following the establishment of a new department – for all Northern Ireland Ministers to cease to hold office at the point that devolution of policing and justice occurs.

36. Section 32(3)(a) of the 1998 Act requires that, following an election, the Secretary of State is obliged to propose a date for a new Assembly election should a new Executive not be formed within seven days of the new Assembly first meeting. *Paragraph 7* provides that during the transitional period the Assembly may, if necessary, keep trying to elect a justice minister beyond the seven day deadline without triggering another Assembly election.
37. *Paragraph 8(1)* provides that the first justice department will be dissolved on 1 May 2012 unless the Assembly, by that date, either has passed a resolution to continue the department on the same basis beyond 1 May 2012 or has put in place alternative future arrangements for the ministerial oversight of that department. *Paragraph 8(2)* provides that any such resolution must be passed with cross-community support.
38. *Paragraph 8(3)* provides that a new Act of the Assembly under paragraph 8(1)(b) may provide for the department to continue operating. The effect of this is to avoid the need to dissolve the department and re-establish it. *Paragraph 8(4) and (5)* enables the Act to switch the ministerial model used to fill that ministerial office.
39. *Paragraph 8(9)* provides that the Assembly may choose to dissolve the department at any time. It may then set up a new department in line with the provisions of the 1998 Act.
40. *Paragraphs 9 and 10* make consequential amendments to sections 21B and 21C of the 1998 Act so that these sections apply only if the departmental model described in section 21A(5A), that is a minister supported by a deputy minister, is chosen for the first justice department at the time the department is established.

***Schedule 2: Sections 12 to 12C of the Judicature (Northern Ireland) Act 1978***

41. *Schedule 2* to the Act replaces section 12 of the Judicature (Northern Ireland) Act 1978 (*Appointment of judges*) with new sections 12 and 12A which make provision for the appointment of judges of the Northern Ireland Supreme Court.
42. New section 12 provides for the appointment of the Lord Chief Justice and Lords Justices of Appeal by Her Majesty on the recommendation of the Prime Minister. Before making a recommendation, the Prime Minister must consult the Lord Chief Justice (or, if that office is vacant or the Lord Chief Justice is not available, the senior Lord Justice of Appeal who is available) and the Northern Ireland Judicial Appointments Commission.
43. New section 12A provides for the appointment of High Court judges by Her Majesty. Such appointments will be made on the recommendation of the Lord Chancellor, following selection by the Northern Ireland Judicial Appointments Commission (Schedule 3 to the 2002 Act as substituted by *Schedule 3, paragraph 13 to the Act*).
44. *Schedule 2* also replaces section 12B of the Judicature (Northern Ireland) Act 1978 (*Tenure of office*) with new sections 12B and 12C.
45. New section 12B provides for the removal of the Lord Chief Justice by Her Majesty following an address by both Houses of Parliament. A motion for an address may be made in the House of Commons only by the Prime Minister and in the House of Lords only by the Lord Chancellor, or if the Lord Chancellor is not a member of the House of Lords, by another Minister at his request. Subsections (4) to (6) provide that no motion may be made unless a tribunal convened by the Prime Minister, after consulting the Lord Chancellor, has recommended removal from office on the ground of misbehaviour and a copy of the tribunal's report has been laid before Parliament. Section 12B also

provides that the Lord Chief Justice may be suspended from office if the Prime Minister and the Lord Chancellor are considering the making of motions.

46. New section 12B(9) to (13) makes provision regarding the procedure before, and constitution of, the removals tribunal. New section 12B(9) requires the tribunal to consist of a person who holds high judicial office (not including anyone who holds or has ever held the office of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court); a present or former judge of the Court of Appeal in England and Wales or the Inner House of the Court of Session; and a lay member of the Northern Ireland Judicial Appointments Commission.
47. New section 12C provides for the removal of Lords Justices of Appeal and also High Court judges appointed before section 7 of the 2002 Act (*Removal from listed judicial offices*) comes into force. It provides for removal by Her Majesty following an address by both Houses of Parliament. A motion for an address may be made in the House of Commons only by the Prime Minister and in the House of Lords only by the Lord Chancellor, or if the Lord Chancellor is not a member of the House of Lords, by another Minister at his request. By virtue of subsection (4), no such motion may be made unless a removals tribunal, convened by either the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman, has recommended that the office holder be removed on the ground of misbehaviour and the Lord Chancellor and the Prime Minister have consulted with the Lord Chief Justice or have been advised by the Lord Chief Justice to accept the recommendation. Subsections (7) and (8) provide that an office holder may, with the agreement of the Lord Chief Justice, be suspended from office if the Prime Minister and the Lord Chancellor are considering the making of motions.
48. Section 12C(9) to (13) makes provision for the procedure before, and constitution of, the removals tribunal.

***Schedule 3: Amendments to the Justice (Northern Ireland) Act 2002***

49. *Schedule 3* to the Act amends the appointment and removal provisions contained in the 2002 Act so as to transfer functions which were prospectively conferred on the First and deputy First Ministers.
50. Section 5 of and Schedule 3 to the 2002 Act prospectively transferred responsibility from the Lord Chancellor to the First and deputy First Ministers, acting jointly, for the appointment of persons, and for recommending persons to Her Majesty for appointment, as listed judicial office holders. *Paragraphs 3 and 13* to Schedule 3 substitute section 5 and Schedule 3 to provide that appointments made by Her Majesty will continue to be made on the recommendation of the Lord Chancellor following selection by the Northern Ireland Judicial Appointments Commission, post devolution. The Schedule further provides that, after devolution, office holders currently appointed by the Lord Chancellor who would, under the 2002 Act as originally passed, have been appointed by the First and deputy First Ministers acting jointly, will instead be appointed by the Northern Ireland Judicial Appointments Commission (but see *paragraph 4* of *Schedule 5* to the Act).
51. Part 1 of new Schedule 3 sets out the process for the appointment of those listed judicial office holders appointed by Her Majesty.
52. It provides that the appointments shall, as is currently the case, be made on the recommendation of the Lord Chancellor following selection by the Northern Ireland Judicial Appointments Commission (*paragraph 2*). The Commission must inform the Lord Chancellor of the person selected to be recommended for appointment (*paragraph 2(4)*). The Commission is also responsible for deciding the timing of any selection or selection process.
53. Part 2 of new Schedule 3 sets out the appointment process of listed judicial office holders currently appointed by the Lord Chancellor who, post devolution of justice



functions, will be appointed by the Judicial Appointments Commission. As with office holders appointed by Her Majesty, paragraph 4(1) provides that the Commission is responsible for deciding the timing of the selection process.

54. Part 1 and Part 2 of the new Schedule 3 do not include a provision for the Lord Chancellor to ask the Judicial Appointments Commission to reconsider their selection. Previously, the Judicial Appointments Commission made a selection for the Lord Chancellor to consider, who could ask them to review their choice. This amendment enhances the Commission's role.
55. Part 3 of the new Schedule 3 places a duty on the Commission to agree with the justice department the maximum number of persons who may hold a listed judicial office at any time.
56. Part 4 of the new Schedule 3 makes general provision in respect of the selection process. Replicating provision contained in section 5(8) to (10) of the 2002 Act, Part 4 provides that persons must be selected to be appointed, or recommended for appointment, solely on the basis of merit. Subject to that, the Commission must engage in a programme of action designed to secure, as far as reasonably practicable, that appointments to listed judicial offices are such that those holding listed judicial office will be reflective of the community in Northern Ireland.
57. The 2002 Act also anticipated that, following devolution, the First Minister and deputy First Minister would be responsible for the removal of listed judicial office holders. Section 7 of that Act prospectively provided that the power to remove or suspend a person from a listed judicial office (other than a High Court judge appointed before the section comes into force) would be exercisable by the First and deputy First Ministers after a tribunal convened under section 8 of the Act had recommended removal or suspension on the ground of misbehaviour or inability to perform the functions of the office.
58. *Paragraphs 5 to 7* of Schedule 3 amend sections 6 to 8 of the 2002 Act to provide that the First Minister and deputy First Minister will not have executive functions in relation to the removal of office holders as intended by the 2002 Act. Instead the Act provides that responsibility for the removal of listed judicial office holders will be conferred on the Lord Chief Justice as head of the judiciary in Northern Ireland. Removal of a listed judicial office holder will require a recommendation for removal to have been made by a tribunal drawn from the Judicial Appointments Commission's membership and convened by the Lord Chief Justice or the Judicial Appointments Ombudsman (after consulting the other).
59. *Paragraph 6(6)* inserts a new subsection (6A) into section 7 of the 2002 Act to place a duty on the Lord Chief Justice to explain to the tribunal, the listed judicial office holder whose removal was being considered and the Judicial Appointments Ombudsman (should the Ombudsman have convened the tribunal), where the Lord Chief Justice has decided not to give effect to a removals tribunal recommendation.
60. *Paragraph 7* of Schedule 3 substitutes section 8 of the 2002 Act which makes provision regarding the procedure and constitution of a removals tribunal. New section 8 provides that a tribunal must consist of a Lord Justice of Appeal or judge of the High Court, a person who holds office listed within section 3(6)(a) to (e) of the 2002 Act (that is, a Lord Justice of Appeal, a judge of the High Court, a county court judge, a district judge (magistrates' courts) or a lay magistrate), both of whom shall be selected by the Lord Chief Justice and must be members of the Judicial Appointments Commission (unless the Commission agrees otherwise) and a lay member of the Judicial Appointments Commission appointed by the Judicial Appointments Ombudsman. New section 8 also provides that the tribunal's procedure will be determined by the Lord Chief Justice.

***Schedule 4: Transfer of appointment and related functions***

61. *Schedule 4* transfers to the Northern Ireland Judicial Appointments Commission the power to appoint certain judicial office holders currently appointed by the Lord Chancellor and makes a number of consequential amendments to appointment-related provisions. Consequential amendments include provision for the Commission to agree with the justice department the terms and conditions of appointment for certain judicial office holders and provision about the payment of fees and allowances to office holders. *Schedule 4* also provides for certain offices to become listed judicial offices (see *paragraph 35*).

***Schedule 5: Consequential amendments and transitional provision***

62. *Part 1* of this Schedule makes a number of amendments in consequence of the transfers effected by *Schedule 4*.
63. *Part 2* of the Schedule makes transitional provision.
64. *Paragraph 10* provides that, where a person has been selected by the Prime Minister for recommendation as Lord Chief Justice or Lord Justice of Appeal but has not been appointed on commencement of the appointments procedure contained in the Act, the changes to section 12 of the Judicature (Northern Ireland) Act 1978 made by *Schedule 2* to this Act do not apply.
65. *Paragraph 11* addresses circumstances in which the removals procedure under section 134 of the Constitutional Reform Act 2005 (*Removal from listed judicial offices*) or section 12B of the Judicature (Northern Ireland) Act 1978 (*Removal from most senior judicial offices*) is initiated but not completed when the removals provisions contained in the Act are commenced, specifying the procedure which shall then apply.
66. *Paragraph 12* addresses circumstances in which the appointments procedure under section 5 of the 2002 Act (*Appointment to listed judicial offices*) is initiated but not completed on commencement of the appointments procedure contained in the Act, specifying the procedure which shall then apply to appointments.
67. *Paragraph 13* makes provision for the investigation of complaints of maladministration in the judicial appointments process alleged to have occurred before the Act comes into force, whether or not complaints have been made before that date.
68. *Paragraph 16* makes provision for the continued effect of transferred functions.

***Schedule 6: Review of arrangements for judicial appointments and removals etc***

69. *Paragraph 1* inserts a new section 29C into the 1998 Act. This places a duty on the Assembly to review the operation of the arrangements put in place by Schedules 2 to 5 to this Act and report on its findings by a date before 1 May 2012 specified in standing orders of the Assembly. Section 29C(c) requires that report to include a recommendation for any changes that are required to the way in which judicial office holders are appointed and removed.
70. *Paragraph 2* provides that from 1 May 2012, no new members may be appointed to the Judicial Appointments Commission in the absence of agreement on the permanent arrangements for judicial appointments and removals.

**COMMENCEMENT DATE**

71. Certain provisions (sections 1, 3(2), 4 and 5 and *Schedule 1*) came into force on Royal Assent (that is, on 12 March 2009). The remaining provisions will come into force by commencement order.



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(c.3) which received Royal Assent on 12 March 2009*

## **HANSARD REFERENCES**

72. The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard reference</i>
<b>House of Commons</b>		
Introduction	23 February 2009	Vol. 488 Col. 22
Second Reading	4 March 2009	Vol. 488 Cols. 886 - 920
Committee	4 March 2009	Vol. 488 Cols. 921 - 958
Third Reading	4 March 2009	Vol. 488 Col. 958
<b>House of Lords</b>		
Introduction	4 March 2009	Vol. 708 Col. 810
Second Reading	9 March 2009	Vol. 708 Cols. 955 - 994
Committee	11 March 2009	Vol. 708 Cols. 1174 - 1201
Report and Third Reading	11 March 2009	Vol. 708 Col. 1260
<b>Royal Assent – 12 March 2009</b>	<b>House of Lords Hansard Vol. 708 Col. 1382</b>	
	<b>House of Commons Hansard Vol. 489 Col. 541</b>	