

JUSTICE (NORTHERN IRELAND) ACT 2002

EXPLANATORY NOTES

COMMENTARY

Part 1: the Judiciary

General

9. The Review recommended a number of changes to the appointment, removal and structure of the judiciary in Northern Ireland. The current arrangements revolve around the role of the Lord Chancellor – he is responsible for making or advising on all judicial appointments in Northern Ireland, has responsibility for removing judges up to Supreme Court level on grounds of incapacity or misbehaviour and holds the pivotal position as the head of all tiers of the judiciary in Northern Ireland. There is the need to secure a transparent process for appointment and removal following devolution and to replace the Lord Chancellor with the Lord Chief Justice as head of the judiciary in Northern Ireland. Other changes which are explained below include broadening of eligibility criteria for appointments and a new oath. More information on the current system and recommended changes can be found in Chapters 5, 6 and 7 of the Review.

Section 1: Guarantee of continued judicial independence

10. This section places those with responsibility for the administration of justice in Northern Ireland under a duty to uphold the continued independence of the judiciary, regardless of what structures might be put in place for administering justice matters in the future.

Appointment and Removal

Section 2: Introductory

11. This section sets out the offices which are covered by the sections dealing with judicial appointment and removal. These include the offices of Lord Chief Justice, Lords Justices of Appeal and any other office listed in Schedule 1. *Subsection (2)* provides for the First Minister and deputy First Minister, acting jointly, to be able to amend this list of offices (although they cannot add the offices of the Lord Chief Justice or Lord Justice of Appeal). The list may only be amended with the agreement of the Lord Chief Justice (*subsection (3)*).

Section 3: Judicial Appointments Commission

12. The Lord Chancellor is currently responsible for making or advising on all judicial appointments in Northern Ireland.
13. The Review recommended that on devolution a Judicial Appointments Commission should be set up to enhance public confidence in the judicial appointments system. This section provides for the creation of a Judicial Appointments Commission (which would be put in place on devolution of justice functions). The Commission will be responsible for making recommendations to the First Minister and deputy First Minister on judicial appointments from the level of High Court judge downwards.

14. The Commission will have 13 members, including the Lord Chief Justice as chairman (*subsections (2) and (4)*). *Subsection (4)* provides for the senior Lord Justice of Appeal to act as chairman in the Lord Chief Justice's absence. As well as the chairman, there will be five judicial members (*subsection (5)(a)*). These will be drawn from the judicial tiers listed in *subsection (6)*. In addition, there will be a barrister, a solicitor and five lay members appointed by the First Minister and deputy First Minister (*subsection (5)(b) and (c)*). *Subsection (7)* requires lay members of the Judicial appointments Commission to declare in writing their commitment to non-violence and exclusively peaceful and democratic means before being appointed. *Subsection (8)* requires the First Minister and deputy First Minister to ensure, so far as possible, that the lay membership is representative of the community in Northern Ireland in overall terms.
15. *Subsection (3)* gives effect to Schedule 2 which provides for the Commission's status, staff, funding and procedural arrangements.

Section 4: Appointment to most senior judicial offices

16. This section replaces section 12 of the Judicature (Northern Ireland) Act 1978. It requires the Prime Minister to consult the First Minister and deputy First Minister and the Lord Chief Justice (or the senior Lord Justice of Appeal in his absence) before making recommendations to Her Majesty The Queen as to who should fill the posts of Lord Chief Justice and Lords Justices of Appeal. As recommended by the Review (para 6.109), new section 12(4) provides for the Commission to advise the First Minister and deputy First Minister over the procedure they should adopt for formulating their response to the Prime Minister. This procedure will be submitted to the Prime Minister for approval (new section 12(5)).
17. **Section 4** also amends the Judicature (Northern Ireland) Act 1978 to provide that the First Minister and deputy First Minister must advise Her Majesty The Queen on appointments to the post of High Court judge based on the Commission's recommendation (new section 12A and section 5(2)).

Section 5: Appointment to listed judicial offices

18. *Subsection (1)* gives effect to Schedule 3 which transfers to the First Minister and deputy First Minister the power to make appointments, or recommendations for appointment, to offices listed in Schedule 1. *Subsection (2)* provides that only a person selected by the Commission can be appointed, or recommended for appointment, to an office listed in Schedule 1. The section also sets out the procedure to be adopted by the Commission and the First Minister and deputy First Minister for filling those offices.
19. Once the Commission is informed by the First Minister and deputy First Minister of a vacancy it must select a person to be appointed or recommended for appointment, solely on the basis of merit (*subsection (9)*). The Commission is required (*subsection (4)*) to inform the First Minister and deputy First Minister of the person selected and provide them with a report explaining why that candidate was selected. If the First Minister and deputy First Minister do not (within a reasonable time after receiving the report) appoint, or recommend for appointment, the person selected by the Commission they must require the Commission to reconsider its decision once (*subsection (5)*), giving their reasons for doing so. The Commission can either reaffirm its selection or select a different person, reporting the reason for its decision to the First Minister and deputy First Minister (*subsection (6)*). The First Minister and deputy First Minister must appoint, or recommend for appointment, the person selected by the Commission after its reconsideration (*subsection (7)*). The Commission must, so far as it is practicable to do so, secure a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office (*subsection (8)*).

Section 6: Removal from most senior judicial offices

20. This section amends the Judicature (Northern Ireland) Act 1978 to provide for the removal of the Lord Chief Justice or a Lord Justice of Appeal or of a judge of the High Court appointed before section 7 comes into force. It requires the Prime Minister and the Lord Chancellor to consult the First Minister and deputy First Minister before making a motion for an address to Her Majesty The Queen by both Houses of Parliament recommending removal of a person from office, and no such motion may be presented in respect of any person unless a tribunal convened by the First Minister and deputy First Minister under section 8 has recommended that the person be removed from the office and reported this recommendation to the First Minister and deputy First Minister.
21. The First Minister and deputy First Minister must send a copy of this report, together with any response of their own, to the Lord Chancellor and Prime Minister to be laid before both Houses of Parliament before the Lord Chancellor and Prime Minister make a motion for removal. New section 12B(8) provides for the suspension of the Lord Chief Justice, Lord Justice of Appeal or judge of the High Court while the Lord Chancellor and Prime Minister consider making any such motion.
22. New section 12B(10) provides that removal and suspension of judges of the High Court appointed after the coming into force of section 7 are dealt with under section 7 of the Act instead of under the Judicature (Northern Ireland) Act 1978.

Section 7: Removal from listed judicial offices

23. This section gives the First Minister and deputy First Minister the power to remove a person holding a judicial office listed in Schedule 1 for misbehaviour or inability to perform the functions of the office, but only on the basis of the recommendation of a tribunal convened under section 8 and only with the agreement of the Lord Chief Justice.
24. This section also provides for the First Minister and deputy First Minister to suspend persons from judicial offices pending a decision on their removal, if a tribunal recommends this and the Lord Chief Justice agrees.

Section 8: Tribunals for considering removal

25. This section provides for the creation of tribunals for the purpose of considering the removal of the Lord Chief Justice, a Lord Justice of Appeal or a holder of any of the offices listed in Schedule 1. A tribunal to consider the removal of the Lord Chief Justice may only be convened by the First Minister and deputy First Minister (acting jointly) after consulting the Prime Minister (*subsections (1) and (3)*). A tribunal to consider the removal of a Lord Justice of Appeal may be convened by the First Minister and deputy First Minister after consulting the Lord Chief Justice and the Prime Minister or by the Lord Chief Justice after consulting the First Minister and deputy First Minister and the Prime Minister (*subsections (2) and (3)*). Tribunals to consider the removal of any other listed judicial office-holder may be convened by the First Minister and deputy First Minister (after consulting the Lord Chief Justice) or by the Lord Chief Justice (after consulting the First Minister and deputy First Minister) (*subsection (2)*).
26. Three members are to be appointed to the tribunal (*subsections (4) and (5)*). These are a chairman, a judicial member and a lay person. The chairman and judicial member are to be selected by the Lord Chancellor or the Lord Chief Justice (*subsections (7) and (8)*) and the lay person is to be selected by the First Minister and deputy First Minister (*subsection (9)*).
27. *Subsection (10)* provides for the Lord Chief Justice or, in the Lord Chief Justice's absence or when the Lord Chief Justice is under consideration for removal by a tribunal, the tribunal chairman to determine the procedure of the tribunal.

Magistrates

Section 9: Lay magistrates

28. The Review recommended that the criminal justice functions of Justices of the Peace and the office of lay panellist should be undertaken by holders of the new office of lay magistrate. This section creates the office of lay magistrate and provides for the Lord Chancellor to appoint lay magistrates to each county court division in Northern Ireland (“county court division” is defined in *subsection (14)*).
29. *Subsection (2)* provides that a person may not be appointed as a lay magistrate unless he has either completed a course of training approved by the Lord Chancellor or has undertaken in writing to attend such a course of training. *Subsection (3)* requires all appointees to the office of lay magistrate to complete their training within a year of appointment, unless given leave by the Lord Chancellor to take longer.
30. The Lord Chancellor can make further provision about eligibility to be appointed as a lay magistrate by regulations, including that a person may not be appointed if he is a bankrupt or lives more than a prescribed distance outside the county court division to which the appointment relates (*subsections (4) and (5)*). *Subsection (10)* provides for the Lord Chancellor to be able to remove a lay magistrate. On devolution, this provision will be repealed and lay magistrates will be removed under section 7 by the First Minister and deputy First Minister on the recommendation of a tribunal.

Section 10: Transfer of functions of justices of the peace

31. This section provides for certain functions to transfer from justices of the peace to lay magistrates and gives effect to Schedule 4. Schedule 4 lists those functions which will remain with justices of the peace or be transferred to resident magistrates. Functions which may be exercised by either justices of the peace or resident magistrates are also listed. *Subsections (2) and (3)* provide that lay magistrates, when sitting out of petty sessions, may only exercise functions of magistrates’ courts relating to proceedings for the issuing of a warrant or summons, proceedings for the remand of an accused who has not previously been remanded for the offence or binding over proceedings, together with a number of ancillary powers, such as powers to deal with misbehaviour in court and certain powers to grant legal aid. The Lord Chancellor can amend this list of functions by order (*subsection (4)*).

Section 11: Transfer of functions of lay panellists

32. This section provides for the functions of lay panellists to be discharged by lay magistrates. Lay magistrates will replace lay panellists, sitting as part of a juvenile court and sitting as assessors in a county court dealing with appeals from juvenile courts. *Subsection (3)* allows provision to be made by rules of court authorising lay magistrates to discharge those functions of a court of summary jurisdiction which at present can be discharged by a lay panellist.

Lord Chief Justice

Section 12: Role of the Lord Chief Justice

33. The Review recommended that the Lord Chief Justice should have a clearly defined position as head of the judiciary in Northern Ireland (para 6.141). This section states that the Lord Chief Justice is president of the Court of Appeal, the High Court, the Crown Court, the county courts and the magistrates’ courts and head of the judges and magistrates who sit in them. *Subsection (2)* gives effect to Schedule 5 which transfers certain functions in relation to the operation of the courts from the Lord Chancellor to the Lord Chief Justice. *Subsection (3)* provides for the Lord Chancellor to amend any enactment or instrument for effecting further transfers of functions.

Sections 13-15: Presiding judges

34. The Review also recommended that each tier of the judiciary should have a representative or President in order to facilitate the co-ordination and management of court business and provide a figurehead. These sections provide for the Lord Chief Justice to appoint a Presiding county court judge, Presiding resident magistrate and Presiding lay magistrate to represent each tier of the courts. These appointees will hold their office in accordance with their terms of appointment.

Section 16: Complaints about holders of judicial office

35. This section requires the Lord Chief Justice to prepare and publish a code of practice relating to the handling of complaints against any person who holds the office of Lord Chief Justice or Lord Justice of Appeal or any of the offices listed in Schedule 1.

Section 17: Secretaries to Lord Chief Justice

36. This section removes the offices of Principal Secretary and Legal Secretary from Schedule 3 to the Judicature (Northern Ireland) Act 1978 (i.e. the list of statutory offices). As a consequence, appointment to these offices will not fall within the Commission's remit and the post-holders will not be required to take the judicial oath. It also provides for the Principal Secretary to the Lord Chief Justice and a person designated by the Lord Chancellor to be joint secretaries to certain court Rules Committees.

Other Provisions

Section 18: Qualification for appointment

37. This section provides for changes to the appointment criteria for Lords of Appeal in Ordinary, the Lord Chief Justice, Lords Justices of Appeal, High Court Judges, county court judges (and deputy county court judges), resident magistrates and coroners and statutory officers listed in Schedule 3 of the Judicature (Northern Ireland) Act 1978 (including district judges). Currently many of these posts are only open to barristers or to solicitors and appointment depends on 'practice' (the period spent actively working as a barrister or solicitor) or 'standing' (the period since being called to the Bar or admitted as a solicitor). The section makes these posts (apart from that of Official Solicitor (*subsection (8)*)) available to both barristers and solicitors and makes the qualifying criterion 'standing' alone. *Subsection (10)* makes it clear that a person is qualified to be appointed as the Crown Solicitor if he is a solicitor or a barrister.

Section 19: Judicial oath or affirmation

38. This section extends the number of posts required to take a judicial oath and provides for a new form of oath or affirmation and declaration. This oath is to be taken by appointees to the judicial offices listed in Schedule 6, which can be amended by the Lord Chancellor (*subsection (4)*). It replaces the current Oath of Allegiance and the Judicial Oath set out in the Promissory Oaths Act 1868. These oaths are set out in full in paragraph 6.24 of the Review.

Section 20: Crown Solicitor

39. This section amends the Northern Ireland Constitution Act 1973 to redefine the functions of the Crown Solicitor. This reflects the changed role of the Crown Solicitor in relation to the devolved administration as well as to the United Kingdom government.

Section 21: Judicial Pensions: pension sharing

40. The Welfare Reform and Pensions (Northern Ireland) Order 1999 provided for pension sharing on divorce or nullity of marriage. Article 40 of this Order allows for subordinate

*These notes refer to the Justice (Northern Ireland) Act 2002 (c.26)
which received Royal Assent on 24th July 2002*

legislation to be made to ensure that various judicial pensions schemes are able to accommodate the new pension sharing regime. The corresponding power in England and Wales has been used to direct transfer payments away from older judicial pension schemes, which are closed to new members, and into the pension scheme constituted under the Judicial Pensions and Retirement Act 1993. Section 21 allows for a similar approach to be adopted in Northern Ireland by amending Article 40 of the 1999 Order to include a reference to the Judicial Pensions Act 1981 and the Judicial Pensions and Retirement Act 1993.