

*These notes refer to the Northern Ireland (Monitoring Commission etc.)  
Act 2003 (c.25) which received Royal Assent on 18th September 2003*

# **NORTHERN IRELAND (MONITORING COMMISSION ETC.) ACT 2003**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Northern Ireland (Monitoring Commission etc.) Act which received Royal Assent on 18th September 2003. They have been prepared by the Northern Ireland Office in order to assist the reader of the Act and help inform debate on it. 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. The Act generally reflects the Agreement on Monitoring and Compliance between the British and Irish Governments, published on 1 May 2003 in the light of discussions between the two Governments and Northern Ireland political parties at Hillsborough in Spring 2003 and placed in the libraries of both Houses. That Agreement was part of a package of proposals published on 1 May aimed at rebuilding the trust and confidence in Northern Ireland necessary to permit the restoration of devolved institutions on a stable and inclusive basis and the full implementation of the Belfast (or Good Friday) Agreement of 10 April 1998. It envisaged the establishment of an Independent Monitoring Commission (“the Commission”) to monitor and report on the carrying out of various commitments deriving from the Belfast Agreement and its continuing implementation, and, where it considered that a party represented in the Northern Ireland Assembly (“the Assembly”) or a Minister of the devolved administration had breached those commitments, to recommend whatever measures it considered appropriate. The Agreement on Monitoring and Compliance also set out the procedures to be adopted following such a report and provided that the Northern Ireland Act 1998 (“the 1998 Act”) should be amended to provide the necessary powers for the Northern Ireland Assembly and the British Government to respond to the Commission’s recommendations.
4. It is proposed that the Commission will be established by means of an International Agreement between the British and Irish Governments (“the Treaty”). A draft of the Treaty was made publicly available on 4 September 2003, and a copy has been placed in the libraries of both Houses. It has yet to be signed and ratified by the two Governments in line with their respective procedures.
5. Under the draft Treaty, the Commission will have four, independent, members:
  - two appointed by the British Government (of whom one will be from Northern Ireland);
  - one appointed by the Irish Government; and

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- a member from the United States, jointly appointed by the British and Irish Governments.
6. The names of the Commissioners were made publicly available on 4 September 2003. A copy of the press release has been placed in the libraries of both Houses.
  7. The Commission's functions are set out in detail in Articles 4 to 7 of the draft Treaty. Articles 4 and 5 provide that the Commission will monitor the incidence of paramilitary activity and any programme of security normalisation undertaken by the British Government in the context of acts of completion by paramilitaries. It may also be invited by the British Government to report on normalisation (in terms set out in that invitation).
  8. Article 6 of the draft Treaty provides that the Commission<sup>1</sup> will have the capacity to investigate complaints by Assembly parties that:
    - a Minister or junior Minister in the Northern Ireland administration, or another party in the Assembly, is not committed to non-violence and exclusively peaceful and democratic means; or
    - that a Minister or junior Minister has failed to observe any other terms of the pledge of office; or
    - that a party represented in the Assembly is not committed to such of its members as are or might become Ministers observing the other terms of the pledge of office.
  9. When reporting in relation to its duties under Article 4 and 6 of the Treaty, the Commission will be able recommend what remedial action might be taken in response to its findings; and what measures it considers the Assembly might consider taking against the relevant Assembly party or Minister (Article 7). The Commission's reports will be submitted to the two Governments, or in the case of a report under Article 6(2), to the British Government (Article 9).

## **THE ACT**

10. The Act makes provision in three areas.
  - First, it makes provision associated with the Commission, including provision for its staffing etc and as to the manner in which its functions must be exercised.
  - Second, it amends the 1998 Act to expand the range of measures which the Assembly may impose in relation to parties and Ministers in the devolved administration.
  - Third, it provides for the Secretary of State to impose certain of those measures by direction, and for associated parliamentary procedures.

## **COMMENTARY ON SECTIONS**

### ***Section 1: The Monitoring Commission***

11. *Subsections (2) and (4)* enable the Secretary of State for Northern Ireland, by Order made by statutory instrument, to confer on the Commission the legal capacities of a body corporate and to confer immunities and privileges on the Commission and its members, its staff and other persons working for it, and their families. Such an order is subject to the negative resolution procedure.

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<sup>1</sup> In so far as a complaint under article 6(1) of the draft Treaty relates to the operation of the institutional arrangements under Strand One of the Belfast Agreement, the complaint shall be considered only by those members of the Commission appointed by the British Government, and the report of those members will be made to the British Government alone.

12. It is expected that the order to be made under section 1(2) will make provision similar to that contained in the [Northern Ireland Decommissioning Act 1997 \(Immunities and Privileges\) Order 1997 \(S.I. 1997/2231\)](#) and in the [Northern Ireland \(Location of Victims' Remains\) Act 1999 \(Immunities and Privileges\) Order 1999 \(S.I. 1999/1437\)](#). Those orders confer immunity and privileges on the Independent International Commission on Decommissioning, and on the Independent Commission for the Location of Victims' Remains, respectively.

#### **Section 4: Resolutions about exclusion**

13. This section amends section 30 of the 1998 Act. Section 30 currently enables the Assembly, by resolution, to exclude Ministers, junior Ministers or all members of a political party from holding ministerial office for a period of twelve months (subject to extension).
14. The amendments made by this Act impose a minimum duration on any exclusion, and distinguish in this respect between exclusion of individual Ministers, and exclusion of all members of a party. The test for exclusion remains the same.
15. The **procedural safeguards** provided for in section 30 at present will also continue to apply. These are –
- a motion for an exclusion resolution cannot (section 30(5)) be moved unless:
    - it is supported by at least 30 members of the Assembly;
    - it is moved by the First Minister and the deputy First Minister acting jointly; or
    - it is moved by the Presiding Officer in pursuance of a notice served by the Secretary of State; and
  - an exclusion resolution will require cross-community support in the Assembly (section 30(8)). *Cross-community support*, as defined in section 4(5) of the 1998 Act, can take two forms:
    - Parallel consent: a majority of the members voting, including a majority of designated nationalists voting and a majority of designated unionists voting; or
    - Weighted majority: the support of 60% of the members voting, including 40% of the designated Nationalists voting and 40% of the designated unionists voting.

#### **Exclusion of Individual Ministers**

16. In order to exclude an individual Minister or junior Minister from holding ministerial office, the Assembly will (as now) have to resolve that the individual concerned:
- is not committed to non-violence and exclusively peaceful and democratic means, or
  - has failed to observe any other terms of the pledge of office (section 30(1) of the 1998 Act).
17. The *pledge of office* is defined in section 16(10) of the 1998 Act as the pledge of office which, together with the Code of Conduct to which it refers, is set out in the Belfast Agreement. The text is set out in Schedule 4 to the 1998 Act. *Minister* means the First Minister, Deputy First Minister or a Northern Ireland Minister (section 7(3) of the 1998 Act).
18. *Subsection (2)* amends section 30(1) of the 1998 Act, with the effect that exclusion of an individual Minister must be for a minimum of three months. The maximum period remains at twelve months but will, as now, be capable of being renewed by further resolution (*subsection (3)*), inserting new subsection (1A) into section 30 of the

1998 Act). Any renewal must, however, be for a minimum of three and maximum of twelve months starting with the date of the resolution (new section 30(1A) inserted by *subsection (3)*).

### **Exclusion of members of a party**

19. In order to exclude the members of a party from holding ministerial office the Assembly will, as now, have to resolve that the party:
  - is not committed to non-violence and exclusively peaceful and democratic means; or
  - is not committed to such of its members as are or might become Ministers or junior Ministers observing other terms of the pledge or office (section 30(2)).
20. *Subsection (4)* amends section 30(2) of the 1998 Act to provide that exclusion of all members of a party must be for a minimum of six months. The maximum remains at 12 months as now but is subject to extension for a further period of between six and twelve months starting with the date of the resolution (section 30(3) as substituted by *subsection (5)*).
21. At present section 30 provides that the Secretary of State must take into account the four factors listed in section 30(7) when deciding whether to require the presiding officer to move an exclusion motion for the Assembly's consideration. New section 30(7) (substituted by *subsection (7)*) adds a fifth factor to the list, namely any recommendation contained in a Commission report about steps the Assembly might consider taking (paragraph (e)). The four factors listed in paragraphs (a) to (d) are unchanged.

### ***Section 5: Secretary of State's powers in relation to exclusion***

22. This section inserts new section 30A into the 1998 Act, conferring on the Secretary of State new powers to exclude Ministers, junior Ministers and all members of a political party from holding ministerial office. It also amends section 18 of the 1998 Act to provide for the running of the d'Hondt mechanism to fill Ministerial offices where the Secretary of State exercises his exclusion powers.
23. New section 30A(1) provides that the Secretary of State may only exercise his power to exclude if :
  - The Commission makes a report under the terms of the Treaty which contains a recommendation about the steps that the Assembly might consider taking; and
  - The taking of those steps requires the Assembly to pass a resolution under section 30(1), (1A), (2) or (3); and
  - The first motion for a resolution to take those recommended steps does not attract cross-community support.

### **Exclusion of individual Ministers**

24. The Secretary of State is given power to exclude a Minister or junior Minister from holding ministerial office for a period of between three and twelve months (new section 30A(2)). The power is exercisable by direction. The parliamentary procedure which must be followed is set out in section 9 of the present Act (see below). He is also given power to extend a period of exclusion for a further period of between three and twelve months (new section 30A(3)). The same test as is applied by the Assembly (see paragraph 1616 above) applies to the exercise of these powers by the Secretary of State (new section 30A(4)).

## **Exclusion of parties**

25. The Secretary of State is given power by direction to exclude members of a political party from holding ministerial office for a period of between six and twelve months (new section 30A(5)). Again, he may extend a period of exclusion of members of a party (for a further period of between six and twelve months (new section 30A(6))). In order to impose or to extend a period of exclusion the Secretary of State must be satisfied that either of the conditions for exclusion set out at paragraph 1919 above is met (new section 30A(7)).

## **Filling of vacancies in ministerial office**

26. *Subsection (2)* makes consequential amendments to section 18 of the 1998 Act, to provide for the running of d'Hondt mechanism to fill Ministerial offices following the exercise of the Secretary of State's new powers. The d'Hondt mechanism is designed to allocate ministerial positions to parties in turn in the light of the number of seats they hold following an Assembly Election.
27. New section 18(1)(d) and (da), inserted by *subsection (2)*, add the following two cases to the list:
- When the Secretary of State directs that all members of a political party are excluded from holding office under section 30A(5) and the direction causes ministerial offices to become vacant (new section 18 (1)(d)) ; and
  - On the coming to an end of a period of exclusion imposed on a political party by a direction given by the Secretary of State under section 30A(5) or an Assembly resolution under section 30(2) (new section 18(1)(da)).
28. *Subsection (5)* provides that regardless of how a period of exclusion may have been extended, it is treated as a period of exclusion under the original excluding provision. For example, if a period of exclusion is initially imposed by a resolution of the Assembly under section 30(1) and is later extended by direction of the Secretary of State under section 30A(3), it is still regarded as an exclusion under section 30(1). This ensures that the d'Hondt procedure is only triggered when a period of exclusion, however extended, finally runs out.

## ***Section 6: Secretary of State's powers in exceptional circumstances***

29. This section is in the Act following a vote in the House of Lords on an Opposition amendment and it inserts a new section 30B into the 1998 Act. The section states that it confers power on the Secretary of State, exercisable only in exceptional circumstances, to exclude Ministers or junior Ministers. Such an exclusion would be limited in duration to a maximum of two weeks.

## ***Section 7: Reduction of remuneration***

30. This section inserts new sections 47A, 47B and 47C into the 1998 Act to authorise the Assembly, or the Secretary of State, to provide for the withholding of the whole or a specified part of the salaries payable to a Minister or Junior Minister, or to all members of a particular party. These measures are not presently available under the 1998 Act.

## **New section 47A- Resolutions about reduction of remuneration**

31. The Assembly, if satisfied that either of the limbs of the test set out at paragraph 1616 above is met, may resolve to reduce in whole or part, for a specified time, a Minister or junior Minister's salary (new section 47A(1)). Similar provision is made in relation to the salaries of all members of an Assembly political party (new section 47A(2)). In either case, the period for which salary is reduced must not exceed 12 months (new section 47C(1)). The Assembly may extend the period for which remuneration

is reduced, but the amount by which the period is extended on any occasion may not exceed twelve months (new section 47A(3) and 47C(2)).

32. The same procedural safeguards apply as in the case of an exclusion resolution (see paragraph 1515 above) (new section 47A(6) and (9)).

### **New section 47B - Secretary of State's powers in relation to reduction of remuneration**

33. The Secretary of State's powers in relation to the reduction of remuneration mirror those available to the Assembly.
34. New section 47B(1) provides that the Secretary of State may only exercise his power to provide for reduction of salary if :
- The Commission makes a report under the terms of the Treaty which contains a recommendation about the steps that the Assembly might consider taking; and
  - The taking of those steps requires the Assembly to pass a resolution under section 47A(1),(2),(3) or (4); and
  - The first motion for a resolution to take those recommended steps does not attract cross-community support.
35. By direction, the Secretary of State may reduce in whole or part, for a specified period of time, a Minister or junior Minister's salary (if satisfied that either of the limbs of the test set out at paragraph 1616 above is met) (new section 47B(2) and (4)). He may also, by direction, reduce or withhold the salaries of all members of an Assembly political party (if satisfied that either of the limbs of the test set out at paragraph 1919 above is met) (new section 47B(5) and (7)).
36. The Secretary of State is also given power to extend, by direction, a period of reduced remuneration which he has imposed, or which the Assembly has imposed (new section 47B(3) and (6)).
37. The Secretary of State's powers to direct that remuneration be reduced for a specified period, and to extend that period, are subject to the same 12 month maximum as applies to the exercise of these powers by the Assembly (see paragraph 3131 above) (new section 47C).

### ***Section 8: Reduction of financial assistance***

38. This section inserts new sections 51A, 51B and 51C into the 1998 Act. These new sections provide for the reduction in whole or part of the financial assistance payable to Assembly parties under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 ("the 2000 Act"). Allowances are paid to parties under the terms of a scheme made by the Assembly Commission under section 2 of the 2000 Act, for the purpose of assisting members of the Assembly who are connected with such parties to perform their Assembly duties.

### **New section 51A - Resolutions about reduction of financial assistance**

39. New section 51A(1) provides that if the Assembly resolves that for a specified period the whole or a specified part of any financial assistance payable under the 2000 Act to a particular political party shall not be payable, because either of the conditions set out at paragraph 1919 above is met, then the allowance shall be reduced accordingly. The period specified by the Assembly may not exceed 12 months (new section 51C(1)).
40. The Assembly may resolve to extend a period of reduced financial assistance which it has imposed under section 51A(1)(new section 51A(2)) or which the Secretary of State has imposed under section 51B(2)(new section 51A(3)). The amount by which a period is extended on any occasion may not exceed 12 months (new section 51C(2)).

41. The same procedural safeguards apply as in the case of an exclusion resolution (see paragraph 1515 above) (new section 51A(5) and (8)).

**New section 51B - Secretary of State's powers in relation to the reduction of financial assistance.**

42. New section 51B(1) enables the Secretary of State to direct that for a specified period the whole or a specified part of any financial assistance payable under the 2000 Act to a particular political party shall not be payable because either of the conditions set out at paragraph 1919 above is met.
43. New section 51B(1) provides that the Secretary of State may only exercise his power to provide for the non-payability of financial assistance if :
- The Commission makes a report under the terms of the Treaty which contains a recommendation about the steps that the Assembly might consider taking; and
  - The taking of those steps requires the Assembly to pass a resolution under section 51A(1),(2) or (3); and
  - The first motion for a resolution to take those recommended steps does not attract cross-community support.
44. Provision is made for the Secretary of State, by direction, to impose a period of reduced financial assistance (new section 51B(2)) and to extend a period of reduced financial assistance that the Assembly has imposed under new section 51A(1) (new section 51B(3)) or that he has imposed under new section 51B(2) (new section 51B(4)). The exercise of these powers by the Secretary of State is subject to the same 12 months maximum time limit as applies when the Assembly reduces financial assistance (new section 51C).

***Section 9: Censure resolutions***

45. This section inserts new section 51D into the 1998 Act, attaching procedural safeguards to the passing of censure resolutions in the Assembly.
46. New section 51D(1) describes two types of censure resolution. First, a resolution censuring a Minister or junior Minister because either of the limbs of the test set out at paragraph 1616 above is not met (new section 51D(1)(a)). Second, a resolution censuring a political party because either of the limbs of the test set out at paragraph 1919 above is not met (new section 51D(1)(b)).
47. New section 51D(2) and (5) provide that such a censure resolution may be moved, and passed, only if the same procedural safeguards as apply in the case of an exclusion resolution are satisfied (see paragraph 1515 above).

***Section 10: Secretary of State's directions: procedure etc***

48. This section inserts new section 95A into the 1998 Act. This provides for the parliamentary procedure to be followed when the Secretary of State exercises his powers of direction under new sections 30A (exclusion), 47B (reduction of remuneration) or 51B (reduction of financial assistance).
49. The following directions cannot be made unless they are first approved in draft by each House of Parliament (new section 95A(3)):
- A direction excluding an individual Minister or junior Minister, or all members of a party, from holding Ministerial office;
  - A direction reducing the remuneration payable to an individual Minister or junior Minister, or to all members of a party;

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- A direction reducing the financial allowance payable to a political party under the 2000 Act.
50. Special provision is, however, made by new section 95A(4) to (8) for those cases where the Secretary of State considers it expedient for a direction listed in the preceding paragraph to take effect without first being approved in draft. In such a case the document containing the direction must be laid before Parliament after being made and will cease to have effect if it is not approved by each House within 40 days. If a motion to approve the direction is rejected by either House of Parliament, the direction ceases to have effect at the end of the day on which the rejection occurs.
51. New section 95A(9) prevents a document, or a draft of a document, containing a direction listed in paragraph 4949 above being treated as a hybrid instrument under the standing orders of either House. The effect is to prevent such an instrument being subject, for example, to a special procedure before the Hybrid Instruments Committee in the House of Lords.
52. *Subsection (2)* amends section 18 of the 1998 Act so as to provide that the d'Hondt mechanism for filling ministerial offices is not triggered where a direction excluding all members of a political party from holding Ministerial office, and which in reliance on new section 95A(4) took effect without first being approved, ceases to have effect because it fails to gain the approval of both Houses of Parliament under new section 95A(6) or (7). Instead, special provision for the consequences of the direction failing to gain that approval is made by new Schedule 12A to the 1998 Act (new section 95A(10) and subsection (3)).
53. The procedure is different for directions which have the effect of bringing to an end a period of exclusion from ministerial office (section 30A(8)(a)), a period of reduction of remuneration (section 47B(8)(a)) or a period of reduced financial assistance (section 51B(6)(a)). These directions must be laid before Parliament after they are made (new section 95A(2)).
54. The Documentary Evidence Act 1868 ("the 1868 Act") is applicable to any direction made by the Secretary of State under new sections 30A, 47B and 51B (new section 95A(11)). It is necessary for the present Act to make provision for directions to have the benefit of the 1868 Act to enable them to be proved in civil proceedings in the same manner that proclamations, orders and regulations are proved.

## **New Schedule 12A**

55. Paragraphs 1 to 8 of new Schedule 12A make consequential provision for the case where a direction under new section 30A(5), which excludes all members of a party from holding Ministerial office and in reliance on new section 95A(4) is made without first being approved, fails to gain parliamentary approval. In the case of paragraphs 5 to 8 provision is also made for the case where a direction made under new section 30A(2), which excludes a First Minister or Deputy First Minister from office and which in reliance on new section 95A(4) is made without first being approved, fails to gain parliamentary approval. The effect is, so far as is possible, to reconstitute the Executive in the form it was prior to the direction taking effect.
56. **Paragraphs 2 to 4** deal with the position of **Northern Ireland Ministers and junior Ministers**. Those Northern Ireland Ministers or junior Ministers who lost office as a result of being excluded by the direction shall resume office if they remain eligible to do so. If an excluded Northern Ireland Minister is no longer eligible to hold office, the nominating officer of that Minister's party will be able to nominate a replacement under section 18(10) of the 1998 Act. Provision made in Assembly standing orders for the filling of junior Ministerial vacancies will apply if an excluded junior Minister is not eligible to resume office.

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57. Paragraphs 5 to 8 make provision for the case where a direction under new section 30A(2) or 30A(5), which in reliance on new section 95A(4) has been made without first being approved and has resulted in either **the First Minister or Deputy First Minister** being excluded from holding Ministerial office, subsequently fails to gain Parliamentary approval. The intention once again is, so far as possible, to restore the position as it was prior to the direction being given. Provided the two individuals who held the offices at the time of the exclusion remain eligible to hold office, the two of them will again be the holders of the two offices. They will resume office regardless of whether in the interim there has been an election or the offices have remained vacant (any election will have been to both offices since, where only one of them was excluded, the other's office will have become vacant by operation of section 16 of the 1998 Act). If the offices are not filled in this way, because, for example, either or both of the individuals are no longer eligible, then the six weeks for the election of a new First Minister and deputy First Minister under section 16(8) will run from the date when the direction ceases to have effect.

## COMMENCEMENT DATE

58. Section 12 provides that sections 1 to 11 come into force on a day to be specified by the Secretary of State (who may specify different commencement dates for different provisions). Section 12 came into force on Royal Assent.

## HANSARD REFERENCES

59. 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 Lords</b>		
Introduction	8 September 2003	Vol 652 Col 9
Second Reading	12 September 2003	Vol 652 Cols 580-603
Committee	15 September 2003	Vol 652 Cols 665-687
Report and Third Reading	15 September 2003	Vol 652 Col 737
<b>House of Commons</b>		
Second Reading	17 September 2003	Vol 410 Cols 900-985
Committee	17 September 2003	Vol 410 Cols 986-1010 and 1015-1017
Report and Third Reading	17 September 2003	Vol 410 Cols 1017-1020
<b>Royal Assent – 18 September 2003</b>		House of Lords Hansard Vol 652 Col 1139
		House of Commons Hansard Vol 410 Col 1122