NORTHERN IRELAND (MONITORING COMMISSION ETC.) ACT 2003*

(2003 c. 25)

CONTENTS

Monitoring Commission

SECT.

An Act to make provision in connection with the establishment under international law of an independent commission with monitoring functions in relation to Northern Ireland; to make further provision about exclusion from Ministerial office in Northern Ireland; to make provision about reduction of remuneration of members of the Northern Ireland Assembly; to make provision about reduction of financial assistance under the Financial Assistance for Political Parties Act (Northern Ireland) 2000; to make provision about censure resolutions of the Northern Ireland Assembly; and for connected purposes. [18th September 2003]

PARLIAMENTARY DEBATES

Hansard, H.L. Vol. 652 col. 9 (1R); Vol. 652 col. 580 (2R); Vol. 652 col. 665 (Comm.); Vol. 652 col. 737 (Rep. & 3R). H.C. Vol. 410 col. 881 (Timetable Motion); Vol. 410 col. 900, 933 (2R); Vol. 410 col. 986 (Comm.); VOl. 410 col.1017 (Rep. & 3R).

INTRODUCTION AND GENERAL NOTE

Summary

The Northern Ireland (Monitoring Commission etc.) Act 2003 (c.25) ("the Act")—a statute of only 12 sections—makes provisions regarding the Independent Monitoring Commission ("IMC"). It also amends the exclusion provisions of the Northern Ireland Act 1998 (c.47) ("NIA 1998"). Further sanctions are created; in descending order of severity: reduction of remuneration; reduction of financial assistance; and censure resolutions. The Secretary of State for Northern Ireland is given new powers to make directions.

Relevant Documents

The Act stems indirectly from the Belfast Agreement of April 10, 1998 ("the Belfast Agreement") (Cm 4705 (2000)), a much misunderstood political and legal agreement (see further below).

The political inspiration was a London/Dublin joint declaration of May 1, 2003 ("the Joint Declaration"), consequent upon the abortive Hillsborough conference of March 3–4, 2003, including an agreement between the two governments on monitoring and compliance.

* Annotations by Austen Morgan, Barrister-at-law, 3 Temple Gardens, London.

Of immediate legal relevance was a draft international agreement between the United Kingdom ("UK") and Irish states, believed to date from April 2003: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing the Independent Monitoring Commission ("the IMC international agreement"), published by the Northern Ireland Office ("NIO") on September 4, 2003.

Finally, the NIO published Explanatory Notes ("EN") on the Northern Ireland (Monitoring Commission etc.) Bill ("the Bill").

The Legislative Process

The Bill—though it was not emergency legislation—was rushed through Parliament in the fortnight after the summer recess, and before the party conferences. It was introduced in the House of Lords on Monday, September 8, 2003; Second Reading was on September 12, 2003, and the remaining stages on September 15, 2003. It went to the House of Commons the same day. All stages were taken on Wednesday, September 17, 2003, following a timetable motion restricting debate to nine hours (which meant that most clauses, and tabled amendments, were not considered). Royal Assent followed immediately, on September 18, 2003. It had taken ten days.

This haste cannot have been to keep in step with the legislature and executive in Dublin. The Oireachtas was not due to return from its summer recess until September 30, 2003. An Irish Bill had then to be enacted. It was envisaged that the two governments would sign the IMC international agreement subsequently, in October 2003.

The Government was concerned to strengthen politically the Rt. Hon. David Trimble MP, leader of the Ulster Unionist Party ("UUP"). The IMC, to which Sinn Féin objected, was intended to provide public reassurance about Irish Republican Army ("IRA") disarmament and even disbandment. There was speculation about an election to the Northern Ireland ("NI") Assembly being held in November 2003. The Prime Minister, the Rt. Hon. Tony Blair MP, stated at his press conference in Downing Street on September 4, 2003: "The fact that we are introducing legislation next week and publishing the agreement on the International Monitoring Commission today is an indication that we intend to move this thing [that is, elections] forward."

David Trimble MP, and two of his party colleagues, voted with the government. Three others—Jeffrey M. Donaldson MP, the Rev. Martin Smyth MP and David Burnside MP, who had resigned the whip in protest at the joint declaration of May 1, 2003—co-operated with the Democratic Unionist Party ("DUP") of the Rev. Dr. Ian Paisley MP, MEP in proposing amendments.

The Belfast Agreement of April 10, 1998

This comprises two agreements: the Multi-Party Agreement ("the MPA") voted upon by Northern Ireland political parties and the two governments on Good Friday, 1998; and the British-Irish Agreement ("the BIA"), signed by the United Kingdom and Irish heads of government in Belfast. The political face of the Belfast Agreement is the MPA, to which is annexed the BIA; the legal face is the BIA, with the MPA as Annex 1.

It is binding upon the two states parties in international law, and incorporated variously in Northern Ireland and Irish law. Its effect upon other natural and legal persons is indirect.

The Belfast Agreement was presented three times to Parliament: by the Secretary of State for Northern Ireland in April 1998, as the Belfast Agreement (1998, Cm 3883); by the foreign secretary in March 1999, in the Ireland series (1999, Cm 4292); and again by the foreign secretary, after entry in force, in May 2000, in the treaty series (2000, Cm 4705). It is explained further in my book, *The Belfast Agreement: a practical legal analysis*, London 2000, available through: http://www.austenmorgan.com.

The Principles of Inclusion and Exclusion

The 1998 Belfast Agreement, which led to devolution in NI, is perceived as being about the inclusion of all political, including paramilitary, parties. This is an over-simplification.

Paragraph 1 of Strand One of the MPA states: "This Agreement [that is, the MPA] provides for a democratically elected Assembly . . . which is inclusive in its membership . . . and subject to safeguards to protect the rights and interests of all sides of the community."

Paragraph 2, however, refers to the election of a 108–member Assembly by proportional representation. Eighteen members of Sinn Féin were elected in June 1998, and so also were two members of the Progressive Unionist Party. Another loyalist party, the Ulster Democratic Party, failed to secure the election of any of its candidates.

Significantly, paragraphs 14 to 25 of Strand One, providing for executive authority, include, in paragraph 16: "Following the election of the First Minister and Deputy First Minister [under paragraph 15], the posts of Ministers will be allocated to parties on the basis of the d'Hondt

system by reference to the number of seats each party has in the Assembly." To this extent, the executive was inclusive of the larger parties—but only on the basis of electoral democracy.

However, paragraph 25 of Strand One contains the principle of exclusion of ministers: "An individual may be removed from office following a decision of the Assembly taken on a cross-community basis, if (s)he loses the confidence of the Assembly, voting on a cross-community basis, for failure to meet his or her responsibilities, inter alia, those set out in the Pledge of Office [in Annex A of Strand One]. Those who hold office should use only democratic, non-violent means, and those who do not should be excluded or removed from office under these provisions." The principle of exclusion, I would submit, was drawn widely: covering non-appointment in the first place; as well as subsequent removal.

I argued in 2000, in the book referred to above: "This is the most important paragraph of Strand One, indeed of the three sections of the Belfast Agreement dealing with institutions. It guarantees the rule of law, that those with private armies should not be allowed to become, or remain, members of the executive committee." (para.12.90) I went on to refer to the letter from the Prime Minister to David Trimble MP, sent shortly before the signing of the Belfast Agreement by Tony Blair (and Mo Mowlam) and Bertie Ahern TD, the Irish head of Government (or taoiseach) (and David Andrews TD). This letter refers to paragraph 25 of Strand One. And it may be used for the purposes of interpretation under the 1969 Vienna Convention on the Law of Treaties. The letter was reported widely in the press, including (in part) in the *Irish Times* of April 11, 1998. The chairman of the 1996–98 talks has published it: George Mitchell, *Making Peace*, London 1999, pp. 179–80.

Section 30 of the Northern Ireland Act 1998

The principle of exclusion was legislatively provided for in the devolution Act: "Exclusion of Ministers from office." Section 30 provides for: (1) an exclusion resolution supported initially by at least 30 members, or moved by the First Minister and the deputy First Minister, or moved by the speaker as the result of a notice from the Secretary of State (subss.(5) and (6)); (2) considerations governing the Secretary of State's opinion (subs.(7)); (3) removal of ministers from office (referred to as exclusion) and exclusion of members of a party from holding office (subss.(1) and (2)); (4) extension of the period of 12 months before the expiry of the first exclusion (subs.(3)); and (5) the requirement of cross-community support (as defined in s.4(5)) (subs.(8)).

Exclusion in Practice

Section 30 of the NIA 1998 never worked. While 30 Assembly members signed a motion on at least three occasions, each resolution failed to secure cross-community support. The First Minister and the deputy First Minister never acted jointly. And the Secretary of State never served a notice on the speaker of the NI Assembly.

Exclusion was a policy of the DUP; it was resorted to on one occasion by the Trimble unionists.

The details of the Sinn Féin exclusion resolutions (before and after devolution) are: (1) a motion in the names of Dr. Paisley MP and Peter Robinson MP before devolution, which failed to get the support of 30 members on July 15, 1999 (there were 28 signatures); (2) a similar motion also before devolution, which failed to get the support of 30 members on November 29, 1999 (there were 29 signatures) (3) a similar motion after devolution, which failed to get the support of 30 members on February 8, 2000 (there were 29 signatures); (4) a resolution proposed by the same two members on July 4, 2000 (having obtained at least 30 signatures), and carried by 32 votes to 14 (but negatived as a cross-community vote); (5) a no-confidence resolution proposed by David Trimble (with a Paisley exclusion motion on the order paper) on October 8, 2001, the former being carried by 54 votes to 45 and the latter by 56 votes to 45, but both being negatived as cross-community votes; (6) a resolution proposed seemingly by Dr. Paisley MP and Peter Robinson MP on March 6, 2002, and carried by 33 votes to 3 (but negatived as a cross-community vote) (there was also a no confidence resolution, proposed by Peter Robinson MP and Nigel Dodds (later MP), mentioning Martin McGuinness of Sinn Féin, on May 8, 2001, which was lost by 31 votes to 45).

The Conduct of the Republicans after Devolution

A number of issues propelled the UUP, and the wider unionist community, to withdraw consent from the NI administration. All involved the IRA, with which Sinn Féin is deemed to be inextricably linked. The incidents, and ensuing legal proceedings, came to be referred to by place names:

- Florida (from where the IRA was importing arms in 1999, when it was meant to be decommissioning under the Belfast Agreement. This Irish connection was revealed in resultant criminal trials in the United States);

- Columbia (where three Irish republicans were arrested in August 2001. They were tried in the summer of 2003 on charges of assisting local narco-terrorists, the FARC);
- Castlereagh, near Belfast (the temporary headquarters of police special branch). On March 17, 2002, several men burgled these premises, assaulted an officer on duty, and stole police intelligence and other material. The Police Service of Northern Ireland has attributed the crime to the IRA);
- Stormontgate, after Stormont outside Belfast (three suspected republicans are awaiting trial in Belfast. One, a former porter in Castle Buildings, is accused of spying on the Secretary of State. Another defendant is Sinn Féin's former head of administration in Parliament Buildings, who is accused of performing a similar function as regards the devolved administration).

Florida, Colombia and Castlereagh undermined David Trimble as First Minister (this was acknowledged by Seamus Mallon MP, the former deputy First Minister: *Hansard*, H.C. Vol. 410 cols. 917–8). Stormontgate was the straw that broke the camel's back. All except the first were to be referred to by the Prime Minister in a statement on May 1, 2003 (see further below).

Suspension of Devolution, October 15, 2002

As a result of the failure of exclusion in practice, devolution was suspended on October 15, 2002: Northern Ireland Act 2000 (Suspension of Devolved Government) Order 2002 (SI 2002/2574). This suspension was to be 11 months old when the Bill came before Parliament.

The Position of the Prime Minister?

A belated attempt had been made to preserve devolution in October 2002, and only punish Sinn Féin. According to Mark Durkan MLA, then the deputy First Minister, the Prime Minister asked him, and his Social Democratic and Labour Party ("SDLP"), to support David Trimble and the UUP. The SDLP leader refused to exclude Sinn Féin, initially by jointly moving an exclusion resolution, and then by voting for it. Mark Durkan argued that the Secretary of State had the power to issue a notice to the speaker to move such a resolution.

It had been thought hitherto that UK government policy on NI meant that the Prime Minister would not countenance the exclusion of Sinn Féin. (Sir David Goodall, an architect of the 1985 Anglo-Irish Agreement, had described this option as an "overreaction": *Financial Times*, October 9, 2003.) Unfortunately, Mark Durkan—who revealed this on Radio Ulster's *Inside Politics* programme on November 1, 2002, before his party conference—is the only public source for this major departure in UK policy. Downing Street, however, declined to deny the report.

The Prime Minister's Belfast Harbour Commissioners' Speech, October 18, 2002

Following suspension, the Prime Minister came to NI to make a speech at the Belfast Harbour Commissioners. It was to be the most memorable in his then five years conduct of NI policy. Unfortunately, the tone of anti-terrorism was to give way, in the following months of republican obduracy, to the idea that the UK government had to continue implementing the Belfast Agreement virtually unilaterally.

The Prime Minister referred to the period since the Belfast Agreement as "four and a half years of hassle, frustration and messy compromise ... Each negotiation in each office or stately home, accompanied by each ritual press conference, has often been groundhog day, for you, for me, for all of us ... All the way through, there has been one fundamental issue ... I think I have the duty and the right, from the very time I have spent on this issue, to give you my frank view."

This was: "The fork in the road has finally come. Whatever guarantees we need to give that we will implement the Agreement we will ... But we cannot carry on with the IRA half in, half out of this process. Not just because it isn't right any more. It won't work anymore."

Later, he animadverted to Sinn Féin's constitutional exclusion in Dublin: "To this blunt question: 'how come the Irish Government won't allow Sinn Féin to be in Government in the south until the IRA ceases its activity but unionists must have them in Government in the North?', there are many sophisticated answers. But no answer as simple, telling and direct as the question." Further, "the concept of republicans becoming police officers, while maintaining an active paramilitary organisation, outside the law, only needs to be stated, to be seen as an absurdity."

The Prime Minister concluded: "Another inch by inch negotiation won't work. Symbolic gestures, important in their time, no longer build trust. It's time for acts of completion. We will do our best to carry on implementing the Agreement in any event. But, should real change occur, we can implement the rest of the Agreement, including on normalisation, in its entirety and not in stages but together. And we are prepared to do what is necessary to protect the institutions against arbitrary interruption and interference. But that means also commitment from others. Unionism to make the institutions secure and stable. Nationalists to act if violence returns. Republicans to make the commitment to exclusively peaceful means, real, total and permanent. For all of us: an end to tolerance of paramilitary activity in any form."

The Hillsborough Conference of March 3–4, 2003

Within months, the Prime Minister reverted to the type he had so ably analysed in Belfast, with the Hillsborough conference of March 3–4, 2003.

The conference comprised the UK and Irish Governments, plus (what had come to be called) the pro-Agreement parties. The prime minister and taoiseach were present throughout at Hillsborough Castle, outside Belfast, the Queen's official residence in Northern Ireland.

New Assembly elections were due on May 1, 2003: NIA 1998 s.31 (though the Government legislated in two days, March 17 and 19, 2003, to change this to May 29, 2003, with dissolution on April 28, 2003: Northern Ireland Assembly Elections Act 2003 (c.3)).

While there was no legal requirement to end suspension before dissolution, and/or the date of the poll, it was considered politically desirable to restore the NI Assembly before April 28, 2003; electors might be less likely to vote for a suspended assembly.

The Hillsborough conference was not an immediate success. The UUP wanted sanctions in the eventuality of restoration. Sinn Féin insisted that the proposed multi-national verification commission was outside the Belfast Agreement. However, it had presented a 57-page list of demands to the two governments; this included provision for the so-called "on the runs" ("OTRs"), IRA members who had never been arrested much less convicted (and were not covered by the early release provisions in the Belfast Agreement).

The UK and Irish Governments had shown a set of papers to the political parties, dealing with the purported outstanding issues under the Belfast Agreement. These were reported to have covered: policing; criminal justice; demilitarisation; equality, human rights and language; and OTRs. The papers formed a 28–page document.

The Prime Minister and taoiseach announced, early on Wednesday, March 5, 2003, that there would be no more negotiation with the political parties. The elections would be postponed to May 29, 2003. One official was quoted as saying, with reference to the UUP and Sinn Féin, and the respective issues of the OTRs and the verification commission: "There is a rather nice symmetry of discomfort here." (*Irish Times*, March 6, 2003) London and Dublin would be presenting their final proposals to the political parties at a reconvened meeting at Hillsborough in several weeks time.

Hillsborough, April 10, 2003

The fifth anniversary of the Belfast Agreement was Thursday, April 10, 2003. However, the UK and Irish governments, having seen a draft IRA statement, and considered it to be inadequate, called off the expected meeting of the pro-Agreement parties at Hillsborough, after which they had been expected to publish their document on the outstanding implementation of the Belfast Agreement.

The Joint Declaration of May 1, 2003

Publication occurred separately in London and Belfast, on May 1, 2003 (though the date April 2003 remained on the texts). Three documents were published: (1) a 22–page Joint Declaration, including three Annexes, by the two governments; (2) a four-page Agreement, including Annex, by the two governments; and (3) a three-page Proposals in Relation to On the Runs (OTRs), by the UK government alone. These three documents have come to be referred to collectively as the Joint Declaration.

It was announced simultaneously that the Assembly elections, due on May 29 2003, would again be postponed. This was done by primary legislation (to November 15, 2003): Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003 (c.12); thereafter, the Secretary of State could delay further by order. The Secretary of State made a statement to the House of Commons; and the Prime Minister made a separate, and simultaneous, statement to the media in Downing Street.

The Joint Declaration proper, one of the wordiest document in the history of the NI problem, dealt principally with security normalisation, the devolution of policing and justice, and rights, equality, identity and community. There were only six paragraphs on paramilitarism, including the sentence: "We need to see the immediate, full and permanent cessation of all paramilitary activity, including military attacks, training, targeting, intelligence gathering, acquisition or development of arms or weapons, other preparations for terrorist campaigns, punishment beatings and attacks and involvement in riots." (para.13).

The Agreement (the second document) refers to monitoring and compliance, and the Annex contains the terms of reference of an Independent Monitoring Body ("IMB"). It is the first official reference to what became the IMC. This separate—unsigned—agreement, if binding in international law, would implicitly confirm—as Sinn Féin maintains—that the IMC is outside the Belfast Agreement. The UK, however, maintains that it is not binding. The IMB, according to this Agreement, "will carry out its activities with a view to promoting public confidence and ensuring that any serious non-compliance with these acts of completion is identified and reported." The intention was clearly naming and shaming, and not exclusion, or any less severe sanction.

The terms of reference in the Annex suggest that the draft IMC international agreement may well have already been in existence. There is an argument that the Agreement of May 1, 2003 (as I will refer to it) was more important, during the passage of the Bill, than the draft IMC international agreement; policy changes had been incorporated in the May 1, 2003 Agreement, at the suggestion seemingly of David Trimble MP.

The Proposals on OTRs refer to "a context of acts of completion". The document, however, states: "This paper outlines the proposals for the British legislation ... The Irish Government would address similar cases in its jurisdiction." The paper envisages: a body to establish eligibility for the OTRs scheme; and a special judicial tribunal to hear cases.

The IMC International Agreement

This instrument—which remained in draft when published on September 4, 2003—is the crucial legal document on the IMC. Nevertheless, despite a number of precedents in recent years, MPs and peers, and commentators, continued to refer to the Bill as the decisive legal text.

It was impossible to understand the Bill without the IMC international agreement and the NIA 1998. MPs and peers had access to the earlier Act being amended, but few appear to have consulted it. More worryingly, the EN stated that 'a copy [of the international agreement] has been placed in the libraries of both Houses.' There is no evidence that MPs and peers engaged on the Bill made any significant use of the IMC international agreement.

The precedents for a Bill on foot of an international agreement (or *vice versa*) in the NI context are:

- the Northern Ireland Arms Decommissioning Act 1997 (c.7) ("NIADA"), followed by a London/Dublin agreement establishing the Independent International Commission on Decommissioning ("IICD");
- a London/Dublin agreement establishing the Independent Commission for the Location of Victims' Remains ("ICLVR"), followed by the Northern Ireland (Location of Victims' Remains) Act 1999 (c.7) ("NILVRA").

Ministers in charge of the Bill never explained the reason for the international agreement being in draft.

The agreement was not for Parliament to decide, or even comment upon (given the Ponsonby rule on treaties to be ratified). Nor was the draft to spare the blushes of MPs and peers legislating in a sovereign Parliament. The status of the agreement was due to the Irish. Their Oireachtas was not due to return until September 30, 2003. They had yet to consider their Bill. Under Art.29.5.1 of the Irish constitution, the Irish government was only required to lay an international agreement before Dáil Éireann after the state had become a party to it. However, under Art.29.5.2, Dáil Éireann approval is necessary if the agreement involves a charge upon public funds. That is the reason why the international agreement remained in draft.

Though the EN referred to the IICD and the ICLVR, there was no reference to the sequence of international agreement followed by Act in the case of the latter. The agreement providing for the ICLVR had been signed on April 27, 1999 (with entry into force later); the NILVRA 1999 received the Royal Assent on May 26, 1999.

Could MPs and peers have amended the draft international agreement? This raises major constitutional issues. It would have been a matter for the speaker, and standing orders, as to whether the House of Commons (not considering the House of Lords), could even have debated the draft. Parliament cannot amend such an instrument. However, political pressure could have been brought to bear on the executive about the terms of the draft agreement.

The EN stated of the draft international agreement: "it has yet to be signed and formally ratified by the two Governments." There is no problem about signing. Article 15(1) reads: "The Agreement shall enter into force on the date on which the two Governments exchange notifications of their acceptance of it". However, the reference to entry into force means that, as is normal with bilateral international agreements, there is no ratification provision. It remains perplexing why the EN referred to formal ratification, and why ministers in charge in both Houses also used this phrase. It would appear that ratification, a process in international law, was being confused with domestic law provisions regarding international agreements.

The agreement has 16 Articles. The title makes clear that the IMC is established by the international agreement.

The preamble refers to the Belfast Agreement (both the MPA and the BIA), and the Agreement of May 1, 2003. The second of three recitals reads: "Reiterating their shared commitment

to the transition to a peaceful society in Northern Ireland and the establishment of the institutions of the multi-party agreement on a stable and inclusive basis". The concept of a transition, and its closure, was first articulated, following the Prime Minister's Belfast Harbour Commissioners' speech, in the Joint Declaration: "it must be clear that the transition from violence to exclusively peaceful and democratic means is being brought to an unambiguous and definitive conclusion." (para.7) The reference to inclusion is of course to the MPA. However, it is significant that exclusion is not mentioned in this or another recital.

Articles 1 and 2 establish the IMC in international law, and require it to be given the capacity of a body corporate in UK and Irish law.

Article 3 is the most important. It refers to the functions in Arts 4, 5, 6 and 7. More importantly, the IMC is to carry out these functions "with a view to promoting the transition to a peaceful society and stable and inclusive devolved Government in Northern Ireland." Again, there is no reference to exclusion.

Article 4 follows closely para.1 of the terms of reference in the Agreement of May 1, 2003. An interesting distinction is made between the leaderships and paramilitary organisations, suggesting that the former may be exonerated for acts of the latter.

Article 5 follows closely para.2. Interestingly, "in Northern Ireland" has been added to three of the five instances.

Article 6 considerably expands para.3: (1) at the request of the two governments has been dropped; (2) the breach of the MPA has been specified in terms of the pledge of office; (3) ministers have been added to parties; (4) the idea of the two UK commissioners acting separately is introduced (see further below); (5) as is the idea of reporting only to the UK government. It is believed that David Trimble MP was largely responsible.

Article 7 expands para.4. The two UK commissioners reporting to the UK government is also added here; as is, the power to make recommendations also to the NI Assembly.

Article 8 requires the commission to be accessible and to consult. This is quite different from para.5, which referred to the IMC having access to information.

Article 9 also modifies paragraph 6 (as regards Arts 4, 5 and 6). Originally, the IMC was to publish its reports. Now, that is for the two Governments. Also, "shall take steps to make those reports public" suggests something less than direct publication.

Articles 10–14 provide for the IMC: members (Art.10); privileges etc. (Art.11); resources (Art.12); disclosure and prejudice (Art.13); and accounts (Art.14).

Articles 15 and 16 provide for entry into force (there is no ratification), and termination.

The Independent Monitoring Commission

The names of the members were announced on September 4, 2003: (1) John Grieve, formerly of the Metropolitan Police; (2) Lord Alderdice, the former speaker of the NI Assembly, both appointed by the UK; (3) Joseph Brosnan, former secretary in the department of justice in Dublin, appointed by the Irish government; and (4) Richard Kerr, a former deputy director of the Central Intelligence Agency, appointed by London and Dublin on the nomination of Washington.

Issues

Two principal issues arose in the debates on the Bill. Unfortunately, MPs and peers, and especially ministers, should have referred more extensively to the IMC international agreement as well.

The first issue was the alleged loss of UK sovereignty. The Prime Minister, at his press conference on September 4, 2003 denied this: "[The IMC] doesn't in any way transgress our constitutional boundaries with the Republic of Ireland [ROI] ...".

A number of points need to be made: (1) the IMC is an advisory body; (2) assuming the UK government had received such advice domestically hitherto, there is to some extent the alienation of an executive function; (3) but this applies equally to the Republic of Ireland, there being shared sovereignty through the international agreement (allowing the IMC to operate in both states equally); (4) there is no loss of territorial sovereignty, since the Republic of Ireland has made an agreement with the United Kingdom of Great Britain and Northern Ireland; (5) nor was Parliamentary sovereignty circumscribed, since Westminster could have (and could still) established a quango in NI, and/or in the UK, to perform the same or similar functions; (6) there is a point in the Strand One precedent from the 1996–98 political talks, but only insofar as the Belfast Agreement is not working fully. Sinn Féin is responsible for the UK having to consult the ROI (outside the Belfast Agreement) about the workings of the settlement; (7) it is true that Irish ministers were excluded from Strand One. However, the exclusion of paramilitary parties from the talks, on two occasions, was done by all the participants, including the Irish government; (8) the issue is less an Irish commissioner on a body of four, and more the foregrounding of decommissioning as an issue (with the consequence specified in point [6] above); (9) the legal way to pose the question is as follows: is the Secretary of State's discretion fettered by the existence of the Irish commissioner. This was not done by s.30(7) of the NIA 1998. The amendment in s.4(7) of this Act, which includes reference to the IMC, does not fetter that discretion. Nor do ss. 7 and 8 of the Act (see further below).

The second, and significant, issue may be posed as a question: could the two UK-appointed commissioners recommend that Sinn Féin should be excluded from the NI executive?

The Lord President of the Council, the Rt. Hon. Lord Williams of Mostyn QC, suggested this during Second Reading in the Lords on September 12, 2003, dealing with an intervention from Lord Kilclooney (formerly John Taylor, deputy leader of the UUP). Lord Kilclooney said: "Does [the international agreement] not mean that the entire commission will comment on the role of the Members of the Northern Ireland Assembly and thus be involved in strand one?" Lord Williams replied: "My Lords, I do not come to that conclusion. Let us turn to the draft agreement, which I touched on briefly in my opening remarks." He then went on to quote Arts 6(2) and 10(1)(a). (*Hansard*, H.L. Vol. 652 col. 601).

Lord Glentoran for the Conservatives appeared to have been convinced by the Lord President of the Council; according to Lord Williams: "[he] particularly urged that view to me in our conversations [that the operation of Strand One is a matter for the UK] before the publication of the agreement, and I hope that he is reassured by looking at Articles 6.2 and 10.1.a of the agreement, which make it plain that strand one matters are to be dealt with as I have indicated. I was grateful to him for expressing his views so vigorously to me. The agreement therefore fully respects that position." (*Hansard*, H.L. Vol. 652 col. 582) (The Lord President of the Council was to die suddenly two days after Royal Assent).

The answer to the hypothetical question about whether the two UK commissioners could exclude Sinn Féin from government in NI—which was never asked of a minister—is most definitely no. It all depends upon the construction of the international agreement. The idea of the two UK commissioners acting on their own was added to the IMC international agreement after the Agreement of May 1, 2003. They act under the international agreement as commissioners, but not on behalf of the IMC. That explains the torturous drafting. The functions of the IMC are in Arts 4, 5, 6 and 7. Article 4 deals essentially with paramilitary ceasefires. Article 6 (following the NIA 1998 provisions on exclusion) deals with ministers and parties in the NI Assembly. However, a distinction is made between Art.6(1)(a) and (b) (following s.30(1)(a) and (b) and (2)(a) and (b)). That only becomes crucial in Art.6(2)—which introduces the idea of two commissioners—where there is reference back only to para.1(b) and not also para.1(a).

The idea of the two UK commissioners amounts, at best, to a shield for David Trimble and the DUP, preventing the Irish commissioner trying to exclude unionists (which is unlikely). It is not a sword—assuming the two UK commissioners would be any more robust in the absence of the Irish commissioner—to be used against Sinn Féin because of the conduct of the IRA. A Parliamentary wag was heard to say *sotto voce* during the passage of the Bill: "I don't know whether the Independent Monitoring Commission will get the Trimble unionists back into government. I do know that the two UK commissioners will never get Sinn Féin out of office."

The Structure of the Act

The Act comprises 12 sections. There are no numbered parts. However, there are four *de facto* parts. The first deals with the IMC, established under the international agreement. The second and third amend the NIA 1998, the second dealing with the existing exclusion provision and the third with additional sanctions. The fourth part is general.

COMMENCEMENT

Royal Assent was on September 18, 2003, the day after it went through all stages in the House of Commons. Section 12 (Short title, commencement and repeals) came into force on that date. Sections 1–11 are due to come into force by Secretary of State order.

Unusually, and because the IMC is an international organisation which may come to an end, there is provision for ss.1–3 and 11, and some of the amendments to the NIA 1998, to cease to have effect. This will be done by Secretary of State order.

ABBREVIATIONS

"BIA"	:	British-Irish Agreement (part of the Belfast Agreement of April 10, 1998)
"DUP"	:	Democratic Unionist Party
"ECHR"	:	European Convention on Human Rights
"EN"	:	Explanatory Notes [HL Bill 102 - EN of September 8, 2003 & Bill 158—EN of September 15, 2003]
"FAPPANI"	:	Financial Assistance for Political Parties Act (Northern Ireland) 2000 (c.1)
"ICLVR"	:	Independent Commission for the Location of Victims' Remains
"IICD"	:	Independent International Commission on Decommissioning
"IMB"	:	Independent Monitoring Body
"IMC"	:	Independent Monitoring Commission
"IRA"	:	Irish Republican Army
"MLA"	:	Member of the NI Assembly
"MPA"	:	Multi-Party Agreement (part of the Belfast Agreement of April 10, 1998)
"NI"	:	Northern Ireland
"NIA 1998"	:	Northern Ireland Act 1998 (c.47)
"NIADA"	:	Northern Ireland Arms Decommissioning Act 1997 (c.7)
"NILVRA"	:	Northern Ireland (Location of Victims' Remains) Act 1999 (c.7)
"NIO"	:	Northern Ireland Office
"OTRs"	:	On the runs
"ROI"	:	Republic of Ireland
"SDLP"	:	Social Democratic and Labour Party
"the Act"	:	Northern Ireland (Monitoring Commission etc.) Act 2003 (c.25)
"the Assembly"	:	Northern Ireland Assembly (literally, member of the legislative assembly)
"the Belfast Agreement"	:	Belfast Agreement of April 10, 1998 (2000, Cm 4705)
"the Bill"	:	Northern Ireland (Monitoring Commission etc.) Bill [HL Bill 102 of September 8, 2003 & Bill 158 of September 15, 2003]
"the IMC international agreement"	:	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing the Independent Monitoring Commission (draft of September 4, 2003)
"the Joint Declaration"	:	three London/Dublin documents of May 1, 2003 entitled: Joint Declaration by the British and Irish Governments (22 pages); Agreement between the British and Irish Governments (4 pages); and Proposals in Relation to On the Runs (OTRs) (3 pages)
"UK"	:	United Kingdom of Great Britain and Northern Ireland
"UUP"	:	Ulster Unionist Party

Monitoring Commission

1 The Monitoring Commission

(1) In this Act, "the Monitoring Commission" means an independent organisation established, by an agreement made in connection with the affairs of Northern Ireland between Her Majesty's Government in the United Kingdom and the Government of Ireland, to carry out functions which include—

(a) monitoring activity by paramilitary groups,

(b) monitoring security normalisation, and

(c) reporting on claims relating to commitment to the observing of terms of the pledge of office set out in Schedule 4 to the Northern Ireland Act 1998 (c.47).

(2) The Secretary of State may by order—

(a) confer on the Monitoring Commission the legal capacities of a body corporate;

(b) confer on the Monitoring Commission, in such cases, to such extent and with such modifications as the order may specify, any of the privileges and immunities set out in Part 1 of Schedule 1 to the International Organisations Act 1968 (c. 48);

(c) confer on members and servants of the Monitoring Commission and members of their families who form part of their households, in such cases, to such extent and with such modifications as the order may specify, any of the privileges and immunities set out in Parts 2, 3 and 5 of that Schedule;

(d) make provision about the waiver of privileges and immunities.

(3) The reference in subsection (2)(c) to servants of the Monitoring Commission includes agents of, and persons carrying out work for or giving advice to, the Monitoring Commission.

(4) An order under subsection (2)—

(a) may make different provision for different cases (including different provision for different persons), and

(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) The Secretary of State—

(a) may make payments to the Monitoring Commission or to members of the Monitoring Commission, and

(b) may provide for the Monitoring Commission such premises and facilities, and the services of such staff, as he thinks appropriate.

General Note

The First Part of this Act

Sections 1–3 deal with the IMC, and are consequential upon the international agreement. Section 1 deals with the establishment of the IMC.

Subs.(1)

This defines the IMC: "An agreement made in connection with the affairs of Northern Ireland" does not appear in the international agreement. It is statutory language. The IMC exists in the UK and the ROI. The international agreement does not restrict it to NI. Nor does this phrase in this subsection. "Her Majesty's Government in the United Kingdom" is also statutory language. It is to be distinguished from Her Majesty's Government in Northern Ireland, a phrase no longer used by Parliamentary counsel. However, there is an argument that the domestic law name of the state is the United Kingdom of Great Britain and Northern Ireland: Royal and Parliamentary Titles Act 1927 s.2; Royal Titles Act 1953 s.1. "The Government of Ireland" is not a domestic law name. It is the Republic of Ireland: Ireland Act 1949 s.1(3). This has not been repealed, expressly or by implication: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2002] 3 WLR 247. The NIO has been using Government of Ireland since 1998, and intruding it in domestic law. The reason is an arrangement between London and Dublin. However, the Irish Government has not been reciprocating and referring to the Government of the United Kingdom of Great Britain and Northern Ireland.

Paragraphs (a), (b) and (c) refer, respectively, to Arts 4, 5 and 6 of the international agreement.

Subss.(2)–(4)

Paragraph (a) of subs.(2) follows from Art.2(2) of the international agreement. Paragraphs (b), (c) and (d) follow from Art.11 (where, in the phrase, "the relevant legislation of Ireland and of the United Kingdom", the order of states is reversed). No draft order was available at the time of enactment. Subsection (3) includes persons giving advice to the IMC.

Subs.(5)

Very little was said about practicalities during enactment. Four members, only one of whom lives in NI, had been referred to on September 4, 2003. The functions in Arts 4, 5, 6 and 7 of the international agreement are potentially considerable. The EN referred to a shared London and Dublin cost of "in the region of £2 million in the first year" (para.57). Lord Williams of Mostyn said during Second Reading in the Lords on September 12, 2003: "Accommodation is in place. During the interim period, a retired senior civil servant from the Home Office is working with the commission. Administrative support is in place. Inevitably, staffing levels will develop on the basis of the amount of work for the commission, how it sets the parameters of its working methods and, indeed, in the light of further experience ... The Irish Government will also provide accommodation and a staffer, but of course the precise details will be a matter for that government." (*Hansard*, H.L. Vol. 652 col. 602)

2 Commission's duty to avoid prejudicial effects

(1) The Monitoring Commission shall not do anything in carrying out its functions which might—

(a) prejudice the national security interests of the United Kingdom or Ireland,

(b) put at risk the safety or life of any person, or

(c) have a prejudicial effect on any present or future legal proceedings.

(2) The duty under subsection (1) is owed to Her Majesty's Government in the United Kingdom.

General Note

This Section

This section is consequential upon Art.13(2) of the international agreement.

Subs.(1)

This subsection has no legal effect. Article 13(2) imposes a duty upon the IMC, when it performs its functions in the UK and in the ROI. Parliament is here simply referring to the duty. The first possible prejudicial effect—"the national security interests of the United Kingdom or of Ireland"—is interesting. It is not unreasonable to put this in the international agreement. However, it means that both states parties consider their national security interests to be parallel. This has certainly been the view of the UK since at least 1985, when the Anglo-Irish Agreement was negotiated. Presumably, the ROI believes that its national security interest dovetailed with the UK's at the time of the Belfast Agreement in 1998. The phrase quoted above reads strangely in a statute. How can Parliament require the IMC, when it is functioning in the UK, not to prejudice the national security interests of a neighbouring state? The answer is as stated above: this subsection has no domestic legal effect.

The three prejudicial effects, especially the third, could seriously circumscribe the work of the IMC.

Subs.(2)

This subsection does have legal effect, and that is why subs.(1) has been inserted in the Act. The IMC has a duty to the UK. It also has a duty to the ROI, though that is not stated in this legislation.

3 Laying of Commission reports before Parliament

Where a report of the Monitoring Commission, or a report made by members of the Commission under the agreement establishing the Commission, is delivered by the Commission, or by members of the Commission, to Her Majesty's Government in the United Kingdom, the Secretary of State shall lay a copy of the report before each House of Parliament.

General Note

This Section

This section is consequential upon Art.9 of the international agreement. That states: "Where the Commission reports to either or both of the two Governments under Articles 4, 5 and 6 of this Agreement, the Government or Governments to whom the report is submitted shall take steps to make those reports public." Article 9 provides for publication, but does not specify any form. That is the purpose of this section. It specifies laying before Parliament. The distinction between a report of the IMC (four commissioners), and the two UK commissioners, flows from

Art.6(2) of the international agreement. This was added to the Agreement of May 1, 2003. The torturous drafting of the international agreement, now reflected in this section of the Act, is because it originated as an amendment.

Exclusion from Ministerial office

4 Resolutions about exclusion

(1) Section 30 of the Northern Ireland Act 1998 (c. 47) (exclusion of Ministers from office) is amended as follows.

(2) In subsection (1) (exclusion of individual Minister), for "a period of twelve months beginning with the date of the resolution" there is substituted "such period of not less than three months, and not more than twelve months, beginning with the date of the resolution as the resolution may provide".

(3) After that subsection there is inserted—

"(1A) The Assembly may, before a period of exclusion under subsection (1) comes to an end, by resolution extend it until the end of such period of not less than three months, and not more than twelve months, beginning with the date of the resolution as the resolution may provide."

(4) In subsection (2) (exclusion of members of party from holding office as Ministers or junior Ministers), for "a period of twelve months beginning with the date of the resolution" there is substituted "such period of not less than six months, and not more than twelve months, beginning with the date of the resolution as the resolution may provide".

(5) For subsection (3) there is substituted—

"(3) The Assembly may, before a period of exclusion under subsection (2) comes to an end, by resolution extend it until the end of such period of not less than six months, and not more than twelve months, beginning with the date of the resolution as the resolution may provide."

(6) In subsection (4) (ending exclusion), after "A period of exclusion" there is inserted "under subsection (1) or (2)".

(7) For subsections (6) and (7) there is substituted—

"(6) If the Secretary of State is of the opinion that the Assembly ought to consider a resolution under this section, he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution.

(7) In forming an opinion under subsection (6), the Secretary of State shall in particular take into account—

(a) whether the person or party concerned is committed to the use now and in the future of only democratic and peaceful means to achieve his or its objectives;

(b) whether he or it has ceased to be involved in any acts of violence or of preparation for violence;

(c) whether he or it is directing or promoting acts of violence by other persons;

(d) whether he or it is co-operating fully with any Commission of the kind referred to in section 7 of the Northern Ireland Arms Decommissioning Act 1997 in implementing the Decommissioning section of the Belfast Agreement; and

(e) any recommendation about steps the Assembly might consider taking which is contained in a report—

(i) made by the Commission mentioned in section 1 of the Northern Ireland (Monitoring Commission etc.) Act 2003, or

(ii) made under the agreement establishing that Commission by members of that Commission."

(8) At the end there is inserted—

"(9) In this section a reference to a period of exclusion under any provision is, in the case of a period of exclusion under that provision which has been extended, a reference to that period as extended."

GENERAL NOTE

The Second Part of this Act

Though there are no part numbers, exclusion from ministerial office is dealt with in ss.4–6. The starting point is s.30 of the NIA 1998. This section amends s.30. Section 5 adds a new s.30A. And s.6 adds a new s.30B. The latter is the only non-governmental amendment made to the Bill during enactment.

Section 30 is radically amended by this section. Only subss.(5) and (8)—dealing with the cross-community exclusion resolution—remain unamended.

Subss.(2)–(6)

Section 30(1)–(4) contained the powers to: exclude a minister from office, and members of a political party from holding office; for a period of 12 months; renewable for further 12-month periods; the Assembly having the power to end the exclusion. Subsection (2) introduces a variation, of between three and 12 months, for ministers. Subsection (3) introduces a new subs.(1A) in s.30, relating to the extension of that exclusion period. The power in s.30(3) is being specified separately for ministers and political parties, because of a material difference—three to 12 months for ministers, and six to 12 months for political parties. Thus, subs.(4), by which the 12-month period in subs.(2) of s.30 is amended to between six and 12 months. Subsection (5) makes a similar amendment to subs.(3) of s.30. Subsection (6) simply follows the separate treatment for ministers and political parties.

Subs.(7)

This subsection replaces subsections (6) and (7) of s.30. The new subs.(6) simplifies the drafting. The new subs.(7) is of importance regarding the Secretary of State's discretion. Under new subs.(6), the Secretary of State forms an opinion. New subs.(7) requires him to take in account a number of factors. Taking into account does not fetter his discretion. The new subs.(7) adds, in paragraph (e), any recommendations of the IMC, or alternatively the two UK commissioners. (The recommendations are specified in Art.7 of the international agreement.)

Given the complete replacement of subss.(6) and (7), it is surprising that Parliamentary counsel did not simply redraft s.30 of the NIA 1998. The reason would seem to be the number of cross-references in others sections to subsections of s.30.

Subs.(8)

This adds a definitional subs.(9) to s.30, making clear that a period of exclusion includes all extensions.

5 Secretary of State's powers in relation to exclusion

(1) After section 30 of the Northern Ireland Act 1998 (c. 47) there is inserted—

"30A Secretary of State's powers in relation to exclusion

(1) This section applies if—

(a) the Monitoring Commission has, or members of that Commission have under the agreement establishing it, made a report containing a recommendation about steps the Assembly might consider taking;

(b) the taking of those steps by the Assembly requires the passing by it of a resolution under section 30(1), (1A), (2) or (3) in relation to a Minister, junior Minister or political party; and

(c) the first motion for a resolution under that provision in relation to the Minister, junior Minister or political party concerned that is put to the vote after the making of the report does not attract cross-community support.

(2) Where this section applies because of the failure of a motion for a resolution under section 30(1), the Secretary of State may by direction exclude the Minister or junior Minister concerned from holding office as a Minister or junior Minister for such period of not less than three months, and not more than twelve months, beginning with the date of the direction as the direction may provide (subject to subsection (4)).

(3) Where this section applies because of the failure of a motion for a resolution under section 30(1A), the Secretary of State may, before the period of exclusion to which the motion related comes to an end, by direction extend it until the end of such period of not less than three months, and not more than twelve months, beginning with the date of the direction as the direction may provide (subject to subsection (4)).

(4) The Secretary of State may exercise the power under subsection (2) or (3) only if he is satisfied that the Minister or junior Minister concerned—

(a) is not committed to non-violence and exclusively peaceful and democratic means; or

(b) has failed to observe any other terms of the pledge of office.

(5) Where this section applies because of the failure of a motion for a resolution under section 30(2), the Secretary of State may by direction exclude members of the political party concerned from holding office as Ministers or junior Ministers for such period of not less than six months, and not more than twelve months, beginning with the date of the direction as the direction may provide (subject to subsection (7)).

(6) Where this section applies because of the failure of a motion for a resolution under section 30(3), the Secretary of State may, before the period of exclusion to which the motion related comes to an end, by direction extend it until the end of such period of not less than six months, and not more than twelve months, beginning with the date of the direction as the direction may provide (subject to subsection (7)).

(7) The Secretary of State may exercise the power under subsection (5) or (6) only if he is satisfied that the political party concerned—

(a) is not committed to non-violence and exclusively peaceful and democratic means; or

(b) is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office.

(8) A period of exclusion under subsection (2) or (5) shall come to an end if—

(a) the Secretary of State by direction so provides; or

(b) the Assembly is dissolved.

(9) In subsection (1)(a) "the Monitoring Commission" means the Commission mentioned in section 1 of the Northern Ireland (Monitoring Commission etc.) Act 2003.

(10) In this section a reference to a period of exclusion under any provision is, in the case of a period of exclusion under that provision which has been extended, a reference to that period as extended."

(2) In section 18 of that Act (which provides for the filling of Ministerial offices), in subsection (1) (occasions when offices are to be filled in accordance with the section), for paragraph (d) there is substituted—

"(d) a direction which causes one or more Ministerial offices to become vacant is given under section 30A(5);

(da) a period of exclusion under section 30(2) or 30A(5) comes to an end; or."

(3) In subsection (12)(b) of that section (application of section where party excluded under section 30(2)), after "party's period of exclusion" there is inserted "under that provision".

(4) In that section, after subsection (12) there is inserted—

"(12A) Where—

(a) the Secretary of State has given a direction under section 30A(5) in respect of a political party; and

(b) the party's period of exclusion under that provision has not come to an end,

the party shall be disregarded for the purposes of any application of subsections (2) to (6)."

(5) At the end of that section there is inserted—

"(14) In this section, a reference to a period of exclusion under any provision is, in the case of a period of exclusion under that provision which has been extended, a reference to that period as extended."

(6) In section 30 of that Act (exclusion of Ministers from office by resolution of the Assembly)—

(a) in subsection (1A) (power to extend period of exclusion under subsection (1)), after "subsection (1)" there is inserted "or section 30A(2)", and

(b) in subsection (3) (power to extend period of exclusion under subsection (2)), after "subsection (2)" there is inserted "or section 30A(5)".

General Note

This Section

Subsection (1) adds a new s.30A to the NIA 1998. Subsections (2)–(6) make consequential amendments.

Section 30A—as I shall refer to it—provides for a new power. Under the under specified s.30 of the NIA 1998, the role of the Secretary of State was simply to act on an opinion by requiring the speaker to move an exclusion resolution. The problem was the failure of the Assembly to exclude, because of the cross-community vote requirement. The NIA 1998 gave the Secretary of State no powers in that circumstance, and imposed no statutory duty. Section 30A is not mandatory; it is empowering. It is another matter whether a Secretary of State would do what the Assembly, because of the cross-community vote requirement, had failed to do.

Closing the Second Reading debate in the Commons on September 17, 2003, Jane Kennedy MP, the minister, said (evidently reading from a civil service brief) in reply to David Trimble MP: "I stress again very firmly that we should act in th[e]se circumstances. Where an IMC report includes recommendations for action and where the process outlined in the Hillsborough text does not lead to resolution of the issue, we envisage no circumstances in which we would not exercise the power in a manner consistent with the IMC recommendations." (*Hansard,* H.C. Vol. 410 col. 982)

Subs. (1)

Section 30A(1) specifies three conditions precedent. These do not fetter the Secretary of State's discretion. He is being given a limited power. Section 30A(2) and (3) provide for the exclusion of ministers. The Secretary of State has the same power as the Assembly. Section 30A(4) is another condition precedent. This does not fetter discretion. It specifies what is required to make the exercise of the power lawful. This is also the position as regards the Assembly. Section 30A(5)–(7) deal with political parties. Section 30A(8) is similar to s.30(4), as amended by this Act. Section 30A(9), referring back to subs.(1)(a), introduces the definition of the IMC into the NIA 1998, by which the Belfast Agreement was implemented principally. Section 30A(10) is similar to s.30(9), after amendment.

Subss.(2)–(5)

These amend s.18 of the NIA 1998. Section 18, which has 13 subsections, deals with the appointment of NI ministers under the d'Hondt rule. Subsection (2) amends subs.(1) of s.18 (occasions when offices are to be filled) to take account of the new exclusion powers. Section 30A(5) is a Secretary of State direction to exclude members of a political party. Section 18(1)(c) provides for a ministerial office becoming vacant, following the exclusion of a political party (from holding office). The new para.(d), introduced by subs.(2) here, provides for a Secretary of State direction to the same effect. The new para.(da) replaces the former para.(d), taking account of exclusion by Secretary of State direction. There is no change to the position that d'Hondt is not run when a minister or ministers are excluded from office (this is provided for separately in ss.18(10)–(11)). Subsection (3) is a drafting amendment. Subsection (4) introduces a new subs.(12A), in terms similar to subs.(12) (exclusion of a party from a rerunning of d'Hondt), to take account of the new Secretary of State power. Subsection (5) is again definitional, similar to ss.30(9) and 30A(10), as inserted by this Act.

Subs.(6)

This further amends s.30 of the NIA 1998. This of course was amended by s.4 above. However, this section adds a new s.30A. Because of two provisions—s.30A(2) and (5) dealing with Secretary of State directions—these have now to be added to the provisions on extending periods of exclusion.

6 Secretary of State's powers in exceptional circumstances

After section 30A of the Northern Ireland Act 1998 (c. 47) there is inserted—

"30B Secretary of State's powers in exceptional circumstances

(1) Notwithstanding the provisions of section 30A, under exceptional circumstances the Secretary of State may by direction temporarily exclude a Minister or junior Minister.

(2) An exclusion under subsection (1) shall only remain in effect until either—

(a) a report from the Commission has been made; or

(b) the Assembly has considered a resolution under section 30(1) or (2); or

(c) a period of two weeks has elapsed.

(3) In subsection (1) "exceptional circumstances" include where—

(a) there is insufficient time for the Commission to make a report; and

(b) there is insufficient time for the Assembly to consider a resolution under section 30(1) or (2).

(4) A direction made under this section shall be in writing and shall be laid before Parliament after the direction is given."

General Note

This Section

This section was not in HL Bill 102. It originated in a Liberal Democrat amendment in the Lords on September 15, 2003, which had the support of Lord Glentoran of the Conservatives.

The UUP had sought to amend what is now s.30A(1)–(7) of the NIA 1998, as inserted by s.5 above. The amendment would have given the Secretary of State a discretionary power to direct exclusion, of a minister or a political party, and the renewal of that exclusion; it would have allowed him to act before the Assembly failed because of a cross-community vote requirement. The Liberal Democrats had announced that they would not support such an attempt to strengthen the Bill. "However", said Lord Smith of Clifton during Second Reading on September 12, 2003, "we recognise that there is something of a gap in the Bill as it stands that needs to be plugged in order fully to ensure confidence in the proposals." (*Hansard,* H.L. Vol. 652, col. 595)

The UUP amendment was lost by 158 votes to 89. The Liberal Democrats, with the support of the Conservatives, won the vote by 129 to 117. The UUP also voted for this amendment. The government, keen to get the Bill through quickly, chose not to oppose this in the Commons. This may prove to be significant, given the poor drafting of the amendment.

Section 30B—as I shall refer to it—provides for the Secretary of State acting in exceptional circumstances. Subsection (1) allows for temporary exclusion of a minister "in exceptional circumstances". No provision is made for a political party. Subsections (2) and (3) purport to define these exceptional circumstances. Under s.30A of the NIA 1998, as inserted by s.5 above, the three precedents amount to: a report containing a recommendation for the Assembly to exclude; and a failure to exclude because of the cross-community requirement. Subsections (2) and (3) here define exceptional circumstances, first as including insufficient time (subs.(3)), and second as being only of a temporary nature (subs.(2)). Subsection (4) provides for the laying of a direction before Parliament. Section 10 below, dealing with directions, does not apply.

Other provisions

7 Reduction of remuneration

(1) After section 47 of the Northern Ireland Act 1998 there is inserted—

"47A Resolutions about reduction of remuneration

(1) If, in relation to the salary payable under section 47 to a Minister or junior Minister, the Assembly resolves that the whole or a specified part of the salary payable for a specified period shall not be payable—

(a) because he is not committed to non-violence and exclusively peaceful and democratic means, or

(b) because of any failure of his to observe any other terms of the pledge of office,

the salary payable to him under that section shall be reduced accordingly.

(2) If, in relation to the salaries payable under section 47 to members of the Assembly who are members of a particular political party, the Assembly resolves that the whole or a specified part of the salaries payable for a specified period shall not be payable—

(a) because that party is not committed to non-violence and exclusively peaceful and democratic means, or

(b) because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office,

the salaries payable to them under that section shall be reduced accordingly.

(3) The Assembly may, before the end of the period by reference to which a reduction under subsection (1) or (2) falls to be made, by resolution extend that period.

(4) The Assembly may, before the end of the period by reference to which provision for non-payability under section 47B(2) or (5) applies, by resolution extend that period.

(5) The period by reference to which a reduction under subsection (1) or (2) falls to be made shall come to an end if the Assembly—

(a) is dissolved; or

(b) resolves to bring the reduction to an end.

(6) A motion for a resolution under this section shall not be moved unless—

(a) it is supported by at least 30 members of the Assembly;

(b) it is moved by the First Minister and the deputy First Minister acting jointly; or

(c) it is moved by the Presiding Officer in pursuance of a notice under subsection (7).

(7) If the Secretary of State is of the opinion that the Assembly ought to consider a resolution under this section, he shall serve

a notice on the Presiding Officer requiring him to move a motion for such a resolution.

(8) In forming an opinion under subsection (7), the Secretary of State shall in particular take into account the matters listed in section 30(7).

(9) A resolution under this section shall not be passed without cross-community support.

(10) In this section a reference to—

(a) the period by reference to which a reduction under subsection (1) or (2) falls to be made, or

(b) the period by reference to which provision for non-payability under section 47B(2) or (5) applies,

is, where the period has been extended, a reference to the period as extended.

47B Secretary of State's powers in relation to reduction of remuneration

(1) This section applies if—

(a) the Monitoring Commission has, or members of that Commission have under the agreement establishing it, made a report containing a recommendation about steps the Assembly might consider taking;

(b) the taking of those steps by the Assembly requires the passing by it of a resolution under section 47A(1), (2), (3) or (4) in relation to a Minister, junior Minister or political party; and

(c) the first motion for a resolution under that provision in relation to the Minister, junior Minister or political party concerned that is put to the vote after the making of the report does not attract cross-community support.

(2) Where this section applies because of the failure of a motion for a resolution under section 47A(1), the Secretary of State may, in relation to the salary payable under section 47 to the Minister or junior Minister concerned, by direction provide that the whole or a specified part of the salary payable for a specified period shall not be payable (subject to subsection (4)).

(3) Where this section applies because of—

(a) the failure of a motion for a resolution under section 47A (3) to extend a period by reference to which a reduction under section 47A(1) falls to be made, or

(b) the failure of a motion for a resolution under section 47A (4) to extend a period by reference to which provision for non-payability under subsection (2) applies,

the Secretary of State may, before the end of that period, by direction extend that period (subject to subsection (4)).

(4) The Secretary of State may exercise the power under subsection (2) or (3) only if he is satisfied that the Minister or junior Minister concerned—

(a) is not committed to non-violence and exclusively peaceful and democratic means; or

(b) has failed to observe any other terms of the pledge of office.

(5) Where this section applies because of the failure of a motion for a resolution under section 47A(2), the Secretary of State may, in relation to the salaries payable under section 47 to members of the Assembly who are members of the political party concerned, by direction provide that the whole or a specified part of the salaries payable for a specified period shall not be payable (subject to subsection (7)).

(6) Where this section applies because of—

(a) the failure of a motion for a resolution under section 47A(3) to extend a period by reference to which a reduction under section 47A(2) falls to be made, or

(b) the failure of a motion for a resolution under section 47A(4) to extend a period by reference to which provision for non-payability under subsection (5) applies,

the Secretary of State may, before the end of that period, by direction extend that period (subject to subsection (7)).

(7) The Secretary of State may exercise the power under subsection (5) or (6) only if he is satisfied that the political party concerned—

(a) is not committed to non-violence and exclusively peaceful and democratic means; or

(b) is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office.

(8) The period by reference to which provision for non-payability under subsection (2) or (5) applies shall come to an end if—

(a) the Secretary of State by direction so provides; or

(b) the Assembly is dissolved.

(9) In subsection (1)(a) "the Monitoring Commission" means the Commission mentioned in section 1 of the Northern Ireland (Monitoring Commission etc.) Act 2003.

(10) In this section a reference to—

(a) the period by reference to which provision for non-payability under subsection (2) or (5) applies, or

(b) the period by reference to which a reduction under section 47A(1) or (2) falls to be made,

is, where the period has been extended, a reference to the period as extended.

47C Sections 47A and 47B: specified periods and extensions

(1) A period specified under section 47A(1) or (2) or 47B(2) or (5)—

(a) shall begin no earlier than the end of the day when the resolution or direction specifying it is passed or given;

(b) shall begin no later than the end of the period of one month beginning with that day; and

(c) shall not be longer than 12 months.

(2) The power under section 47A(3) or (4) or 47B(3) or (6) to extend a period is a power to extend it until the end of such period of not more than 12 months beginning with the date of the resolution, or direction, by which the power is exercised as the resolution or direction may provide."

(2) In section 48 of that Act (pensions of members), after subsection (2) there is inserted—

"(2A) Where any salary payable to a person under section 47 is not payable because of either or both of sections 47A and 47B, any provision made under this section for the payment of pensions which has effect in relation to him shall apply as if the salary were payable."

General Note

The Third Part of this Act

This deals with further sanctions, short of exclusion. They are: (1) reduced remuneration; (2) reduced financial assistance; and (3) censure. Sections 7–9 add seven new sections to the NIA 1998.

The government stated in EN, as regards ministerial office, and salaries and financial allowances, that these were political rights. They were not to be regarded as civil rights for the purposes of Art.6 of the European Convention on Human Rights: "Article 6 is therefore not engaged by either the Assembly's or the Secretary of State's determination in these matters. Neither does the Government consider that the right to future salary comes within Article 1 of the First Protocol to the ECHR." (para.59)

This Section

This section deals with reduced remuneration, the first new sanction.

Subs.(1)

This adds three new ss.—47A, 47B and 47C—to the NIA 1998. Part IV of the latter deals with the NI Assembly. Sections 47 and 48 deal respectively with remuneration and pensions. That sub-part is now greatly expanded.

Section 47A—as I shall refer to it—provides for the sanction of reduced remuneration. This is unrelated to exclusion, or any other sanction. Subsections (1) and (2), which deal respectively with ministers and parties, allow for the whole of a salary to be not paid. Subsections (3) and (4) allow for the extension of the sanction. Unlike exclusion in ss.4–6 above, no periods are specified. The NI Assembly has the power to set any period (within the lifetime of an assembly). Subsection (4) refers forward to new s.47B (powers of the Secretary of State regarding remuneration). The NI Assembly may in effect extend a direction of the Secretary of State. Subsections (6) to (9) are similar to ss.30(5)–(8). Indeed, subs.(8) refers to s.30(7), which of course has been amended by s.4(7) above. Subsection (10) is definitional.

If the problem with exclusion in s.30 was cross-community support, then reduced remuneration does not solve that problem. However, reduced remuneration is clearly a lesser sanction than exclusion. On the other hand, reducing a minister's salary to nothing is clearly a significant gesture.

Section 47B follows from s.5 above, which introduces a new s.30A. Section 47B gives the Secretary of State the power to direct a reduction in remuneration. It applies to ministers and political parties. Each of subss.(1) to (10) generally tracks the subsections in s.30A. Subsection (1)(b)–(c) restricts the power to when a NI Assembly resolution has failed because of the cross-community support requirement. Subsection (3) deals with the extension of a period, related to the failure of the NI Assembly to do so.

Section 47C defines periods and extensions in ss.47A and 47B. This is not necessary in s.30A, because the three to 12 months rule is included in subss.(2) and (3). Subsection (1) of this section allows for up to a month's delay. While this might allow for cooling off, it is probably to allow the reduction to take effect on the next salary day. The subsection also limits the reduction in remuneration to 12 months. Subsection (2) of this section permits extensions of only 12 months.

Subs.(2)

This contains an important principle. Section 48 of the NIA 1998 deals with pensions for members of the NI Assembly (known as MLAs). This subsection excludes pensions from the effects of any reduction in remuneration. This is in spite of s.48(2), providing for contributory pension schemes. The reason given by ministers was: pension contributions are assessed as a fixed percentage of a MLA's salary, and must still be paid at the full rate, while pension entitlement is calculated on the basis of the final salary, and must still be paid regardless of any actual reductions; as a result, pension rights, but not future salary, are protected under the ECHR.

8 Reduction of financial assistance

After section 51 of the Northern Ireland Act 1998 (c. 47) there is inserted—

"51A Resolutions about reduction of financial assistance

(1) If the Assembly resolves that the whole or a specified part of any financial assistance payable for a specified period under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 to a particular political party shall not be payable—

(a) because it is not committed to non-violence and exclusively peaceful and democratic means, or

(b) because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office,

the financial assistance payable to it under that Act shall be reduced accordingly.

(2) The Assembly may, before the end of the period by reference to which a reduction under subsection (1) falls to be made, by resolution extend that period.

(3) The Assembly may, before the end of the period by reference to which provision for non-payability under section 51B(2) applies, by resolution extend that period.

(4) The period by reference to which a reduction under subsection (1) falls to be made shall come to an end if the Assembly—

(a) is dissolved; or

(b) resolves to bring the reduction to an end.

(5) A motion for a resolution under this section shall not be moved unless—

(a) it is supported by at least 30 members of the Assembly;

(b) it is moved by the First Minister and the deputy First Minister acting jointly; or

(c) it is moved by the Presiding Officer in pursuance of a notice under subsection (6).

(6) If the Secretary of State is of the opinion that the Assembly ought to consider a resolution under this section, he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution.

(7) In forming an opinion under subsection (6), the Secretary of State shall in particular take into account the matters listed in section 30(7).

(8) A resolution under this section shall not be passed without cross-community support.

(9) In this section a reference to—

(a) the period by reference to which a reduction under subsection (1) falls to be made, or

(b) the period by reference to which provision for non-payability under section 51B(2) applies,

is, where the period has been extended, a reference to the period as extended.

51B Secretary of State's powers in relation to reduction of financial assistance

(1) This section applies if—

(a) the Monitoring Commission has, or members of that Commission have under the agreement establishing it, made a report containing a recommendation about steps the Assembly might consider taking;

(b) the taking of those steps by the Assembly requires the passing by it of a resolution under section 51A(1), (2) or (3) in relation to a political party; and

(c) the first motion for a resolution under that provision in relation to the political party concerned that is put to the vote after the making of the report does not attract cross-community support.

(2) Where this section applies because of the failure of a motion for a resolution under section 51A(1), the Secretary of State may

by direction provide that the whole or a specified part of any financial assistance payable for a specified period under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 to the political party concerned shall not be payable (subject to subsection (5)).

(3) Where this section applies because of the failure of a motion for a resolution under section 51A(2) to extend the period by reference to which a reduction under section 51A(1) falls to be made, the Secretary of State may, before the end of that period, by direction extend that period (subject to subsection (5)).

(4) Where this section applies because of the failure of a motion for a resolution under section 51A(3) to extend the period by reference to which provision for non-payability under subsection (2) applies, the Secretary of State may, before the end of that period, by direction extend that period (subject to subsection (5)).

(5) The Secretary of State may exercise the power under subsection (2), (3) or (4) only if he is satisfied that the political party concerned—
  (a) is not committed to non-violence and exclusively peaceful and democratic means; or
  (b) is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office.

(6) The period by reference to which provision for non-payability under subsection (2) applies shall come to an end if—
  (a) the Secretary of State by direction so provides; or
  (b) the Assembly is dissolved.

(7) In subsection (1)(a) "the Monitoring Commission" means the Commission mentioned in section 1 of the Northern Ireland (Monitoring Commission etc.) Act 2003.

(8) In this section a reference to—
  (a) the period by reference to which provision for non-payability under subsection (2) applies, or
  (b) the period by reference to which a reduction under section 51A(1) falls to be made,

is, where the period has been extended, a reference to the period as extended.

51C Sections 51A and 51B: specified periods and extensions

(1) A period specified under section 51A(1) or 51B(2)—
  (a) shall begin no earlier than the end of the day when the resolution or direction specifying it is passed or given;
  (b) shall begin no later than the end of the financial year in which that day falls; and
  (c) shall not be longer than 12 months.

(2) The power under section 51A(2) or (3) or 51B(3) or (4) to extend a period is a power to extend it until the end of such period of not more than 12 months beginning with the date of the resolution, or direction, by which the power is exercised as the resolution or direction may provide."

General Note

This Section

This section deals with reduced financial assistance to political parties, the second new sanction. Part IV of the NIA 1998 provides for the NI Assembly. There is a miscellaneous sub-part, comprising ss.49–51, none of which deals with financial assistance to political parties. This sections adds three new sections to the end: ss.51A, 51B and 51C. They follow the structure of

ss.47A, 47B and 47C. The relevant NI legislation is the Financial Assistance for Political Parties Act (Northern Ireland) 2000 (c. 1) ("FAPPANI"). This was the first legislative measure of the NI Assembly following devolution on December 2, 1999.

Section 51A—as I shall refer to it—tracks s.47A. However, there is no reference to ministers. It deals only with political parties. Subsection (1) specifies the parent NI legislation: the FAPPANI. This was a transferred matter, under s.4 of the NIA 1998. Just as s.30 (exclusion of ministers) is an excepted matter, so—it may be inferred—are the three new sanctions in ss.7, 8 and 9.

If the problem with exclusion in s.30 was cross-community support, then reduced financial support does not solve that problem. However, reduced financial support is clearly a lesser sanction than exclusion. On the other hand, reducing support to nothing is clearly a significant gesture.

Section 51B tracks s.47B. However, there is no reference to ministers. It deals only with political parties. Subsection (2) again specifies the parent NI legislation: the FAPPANI.

Section 51C tracks s.47C. Subsection (1)(b) is similar to s.47C(1)(b). It also allows flexibility, though here it is the end of the current financial year. Again, the period is 12 months, and also for extensions.

9 Censure resolutions

After section 51C of the Northern Ireland Act 1998 (c. 47) there is inserted—

"51D Censure resolutions

(1) This section applies to the following resolutions of the Assembly—
  (a) a resolution censuring a Minister or junior Minister—
    (i) because he is not committed to non-violence and exclusively peaceful and democratic means; or
    (ii) because of any failure of his to observe any other terms of the pledge of office;
  (b) a resolution censuring a political party—
    (i) because it is not committed to non-violence and exclusively peaceful and democratic means; or
    (ii) because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office.

(2) A motion for a resolution to which this section applies shall not be moved unless—
  (a) it is supported by at least 30 members of the Assembly;
  (b) it is moved by the First Minister and the deputy First Minister acting jointly; or
  (c) it is moved by the Presiding Officer in pursuance of a notice under subsection (3).

(3) If the Secretary of State is of the opinion that the Assembly ought to consider a resolution to which this section applies, he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution.

(4) In forming an opinion under subsection (3), the Secretary of State shall in particular take into account the matters listed in section 30(7).

(5) A resolution to which this section applies shall not be passed without cross-community support."

General Note

This Section

This section deals with censure resolutions, the third new sanction. It is inserted in the miscellaneous sub-part, as s.51D. Sections 30, 30A and 30B, and 47A, 47B and 47C, and 51A, 51B and 51C, and now 51D could be considered a part on exclusion and sanctions in the NIA 1998.

The original s.30 of the NIA 1998 had referred to ministers or political parties no longer enjoying the confidence of the NI Assembly. A no confidence resolution, however, led to exclusion (or, because of the cross-community vote requirement, no exclusion). This section is designed to censure short of excluding.

Section 51D—as I shall refer to it—refers back to s.30. Subsection (1) empowers the NI Assembly to pass censure resolutions, referring to ministers and/or political parties. There is no such provision in the standing orders of the Assembly, dated September 10, 2001. Subsection (2) is similar to s.30(5). Subsections (3) and (4) are similar to s.30(6) and (7); indeed, subs.(4) expressly refers to s.30(7), which has been amended by s.4(7) above. Subsection (5) is similar to s.30(8).

If the problem with exclusion in s.30 was cross-community support, then a censure resolution does not solve that problem. However, a censure resolution is clearly a lesser sanction than exclusion. But it is a sanction with only moral force.

General

10 Secretary of State's directions: procedure etc

(1) After section 95 of the Northern Ireland Act 1998 (c. 47) there is inserted—

"95A Directions under sections 30A, 47B and 51B

(1) A direction under section 30A, 47B or 51B shall be in writing.

(2) A copy of the document containing a direction under section 30A(8)(a), 47B(8)(a) or 51B(6)(a) shall be laid before Parliament after the direction is given.

(3) A direction under section 30A, 47B or 51B, other than one to which subsection (2) above applies, shall not be given unless a draft of the document containing it has been laid before and approved by resolution of each House of Parliament.

(4) Subsection (3) does not apply to a direction if the direction declares that the Secretary of State considers it expedient for the direction to be made without the approval mentioned in that subsection, but subsections (5) to (7) apply to the direction instead.

(5) A copy of the document containing the direction shall be laid before Parliament after the direction is given.

(6) If the direction is not approved by each House of Parliament before the end of the period of 40 days beginning with the date of the direction, it shall cease to have effect at the end of that period if it has not already ceased to have effect under subsection (7).

(7) If on any day during that period of 40 days either House of Parliament, in proceedings on a motion that (or to the effect that) the direction be approved, comes to a decision rejecting the direction, the direction shall cease to have effect at the end of that day.

(8) In calculating a period of 40 days for purposes of subsections (6) and (7), no account is to be taken of any time during which—

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(9) If the document, or a draft of the document, containing a direction under section 30A, 47B or 51B would, apart from this subsection, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument, it shall proceed in that House as if it were not such an instrument.

(10) Schedule 12A (effect of application of subsection (6) or (7)) shall have effect.

(11) The Documentary Evidence Act 1868 shall apply to a direction given by the Secretary of State under section 30A, 47B or 51B as it applies to an order made by him."

(2) In section 18 of that Act (which provides for the filling of Ministerial offices), after subsection (12A) there is inserted—

"(12B) Where a direction under section 30A(5) ceases to have effect under section 95A(6) or (7), its so ceasing to have effect shall for the purposes of subsection (1)(da) be taken not to involve the coming to an end of a period of exclusion under section 30A(5)."

(3) After Schedule 12 to that Act there is inserted—

"SCHEDULE 12A **Section 95A(10)**

EFFECT OF APPLICATION OF SECTION 95A(6) OR (7)

Directions under section 30A(5): Northern Ireland Ministers and junior Ministers

1 (1) Paragraphs 2 to 4 apply where a direction under section 30A(5) ceases to have effect under section 95A(6) or (7).

(2) In those paragraphs "the relevant time" means the time when the direction so ceases to have effect.

2 (1) A person who holds office as a Northern Ireland Minister or junior Minister immediately before the relevant time shall cease at the relevant time to hold that office if another person—

(a) held that office immediately before the direction was given, but

(b) ceased to hold it by reason of his being excluded by the direction.

(2) That other person shall fill the vacancy if he remains eligible to hold that office.

3 If—

(a) an office of Northern Ireland Minister or junior Minister is vacant immediately before the relevant time, and

(b) immediately before the direction was given that office was held by a person who ceased to hold it by reason of his being excluded by the direction,

that person shall fill the vacancy if he remains eligible to hold that office.

4 Section 18(10) (and section 18(11)), and any provision made under section 19(3)(a) for the filling of vacancies, shall have effect subject to paragraphs 2 and 3.

Directions under section 30A(2) or (5): the First Minister and deputy First Minister

5 (1) Paragraphs 6 to 8 apply where a direction under section 30A(2) or (5) ceases to have effect under section 95A(6) or (7).

(2) In those paragraphs—

"the relevant time" means the time when the direction so ceases to have effect;

"the relevant offices" means the office of First Minister and the office of deputy First Minister.

6 (1) Sub-paragraphs (2) to (4) apply where—

(a) as respects each of the relevant offices, the person who holds that office immediately before the relevant time did not hold it immediately before the direction was given, and

(b) as respects at least one of the relevant offices, the person who held that office immediately before the direction was given ceased to hold it by reason of his being excluded by the direction.

(2) The persons holding the relevant offices immediately before the relevant time shall cease at that time to hold those offices.

(3) As respects each of the relevant offices, the person (if any) who held that office immediately before the direction was given shall fill the vacancy in that office if—

(a) he remains eligible to hold that office, and

(b) the person who held the other of the relevant offices immediately before the direction was given remains eligible to hold it.

(4) If the vacancies in the relevant offices are filled under sub-paragraph (3), section 16(8) shall not apply by reason of the operation of sub-paragraph (2).

7 (1) Sub-paragraphs (2) to (4) apply where—

(a) as respects one of the relevant offices, the person who holds it immediately before the relevant time held it immediately before the direction was given, and

(b) as respects the other of the relevant offices—

(i) the person who holds it immediately before the relevant time did not hold it immediately before the direction was given, and

(ii) the person who held it immediately before the direction was given ceased to hold it by reason of his being excluded by the direction.

(2) The person who holds the office mentioned in sub-paragraph (1)(b) immediately before the relevant time shall cease at that time to hold that office.

(3) The person who held that office immediately before the direction was given shall fill the vacancy in that office if he remains eligible to hold that office.

(4) If the vacancy in that office is filled under sub-paragraph (3), section 16(7) shall not apply by reason of the operation of sub-paragraph (2).

8 (1) Sub-paragraphs (2) to (4) apply where—

(a) each of the relevant offices is vacant immediately before the relevant time as a result of having become vacant within the six weeks ending with that time, and

(b) as respects at least one of the relevant offices, the person who held it immediately before the direction was given ceased to hold it by reason of his being excluded by the direction.

(2) As respects each of the relevant offices, the person (if any) who held that office immediately before the direction was given shall fill the vacancy in that office if—

(a) he remains eligible to hold that office, and

(b) the person who held the other of the relevant offices immediately before the direction was given remains eligible to hold it.

(3) If the vacancies in the relevant offices are filled under sub-paragraph (2), no proceedings, or further proceedings, shall be taken under section 16 for the purpose of filling them.

(4) If those vacancies are not filled under that sub-paragraph, the proceedings for an election under section 16 for the purpose of filling them shall be started afresh with the period of six weeks mentioned in section 16(8) being taken for the purposes of this Act to begin with the relevant time.

Directions under section 47B or 51B

9 (1) Sub-paragraphs (2) and (3) apply where a direction under section 47B or 51B ceases to have effect under section 95A(6) or (7).

(2) After the direction has so ceased to have effect, any determination—

(a) of the sums payable under section 47 or under the Financial Assistance for Political Parties Act (Northern Ireland) 2000, or

(b) of when any such sums become due,

shall be made as though the direction had never had effect.

(3) Payment shall be made of any sums which would have been paid but for the direction.

General

10 Where a direction under section 30A, 47B or 51B ceases to have effect under section 95A(6) or (7), its so ceasing to have effect does not prejudice—

(a) anything done in reliance on the direction while it had effect;

(b) the making of a new direction."

GENERAL NOTE

This Part of this Act

This unnumbered part is headed general. It deals with the final matters of a statute.

This Section

Section 10 flows from the new power of a Secretary of State direction in ss.5 (exclusion), 7 (reduction of remuneration) and 8 (reduction of financial assistance) above. It does not cover s.6 (exceptional circumstances). Nor is there any provision for such a direction in s.9 (censure resolutions). This section adds a new s.95A to the NIA 1998 plus a new sch.12A.

Subs.(1)

This adds the new s.95A to the NIA 1998. Section 95 is the first section of Pt.IX, headed supplemental. Section 95 deals with savings for existing laws, and s.96 with orders and regulations. The intention is clearly to have directions provided for before orders and regulations. Section 96 provides for positive and negative resolution orders and regulations.

Section 95A—as I shall refer to it—provides for the directions in what are now ss.30A, 47B and 51B of the NIA 1998. The Secretary of State is required to put all direction in writing: subsection (1). Subsection (2) distinguishes directions; those specified relate to the Secretary of State ending sanctions, whether a period of exclusion, a reduction of remuneration or a reduction of financial assistance. Subsection (2) requires the directions to be laid before Parliament after they are given. The effect of subs.(3), which refers to all other directions other than those relating to the ending of sanctions, is that the Secretary of State has to lay a draft direction (in a document) before Parliament and obtained resolutions of both Houses. Subsection (4) allows the Secretary of State to avoid a draft directive, if he considers it expedient. In this eventuality, subss.(5)–(7) apply: subs.(5) is not an over-prescription given subs.(2); subss.(6) and (7) provide for a negative resolution procedure. Subsection (10), which follows from subss.(6) and (7), gives effect to sch.12A (inserted by subs.(3) below). The reference to the Documentary Evidence Act 1868 in subs.(11) is to allow directions to be proved in civil proceedings in the same manner as proclamations, orders and regulations.

Subs.(2)

This refers to the NIA 1998, which is amended by subs.(1) of this section. It does not refer to the Documentary Evidence Act 1868. Subsection (12A) is inserted by s.5(4) above. It provides for the disregarding of a political party excluded under s.30A, as a result of a Secretary of State direction, in the running of d'Hondt. This subsection inserts a new subs.(12B) in s.18 of the NIA 1998. A direction under s.30A(5) refers to the exclusion of members of a political party. Section 95A(6) and (7) refer to Parliament not approving a direction within 40 days (either by not voting for it or by voting against it). Though it then ceases to have effect, subs.(1)(da) of s.18 (inserted by s.5(2) above) is to be read as not triggering d'Hondt in this context.

Subs.(3)

This inserts sch.12A, to which effect is given by s.95A(10). It deals with the position when the Secretary of State's direction fails under the positive resolution procedure, after he has considered it expedient to avoid the draft direction procedure. Schedule 12 deals with construction of references in existing laws, and sch.13 with minor and consequential amendments. The schedule is divided into: ministers and junior ministers (paras 1–4); First Minister and deputy First Minister (paras 5–8); directions under ss.47B or 51B (para.9); and general (para.10). In the case of ministers and junior ministers, those excluded may return to their former offices. This also applies to the First Minister and deputy First Minister. Directions under s.47B or s.51B refer respectively to the reduction of remuneration and the reduction of financial assistance. The effect of sch.12A is that money withheld shall now be paid. The general provision in para.(10) could have been placed after s.95A(7) and not in sch.12A.

11 Secretary of State's duty to prepare reports

(1) The Secretary of State shall report on the operation of—
- (a) the agreement mentioned in section 1(1), and
- (b) so much of this Act as amends the Northern Ireland Act 1998 (c. 47).

(2) The first report under this section shall be in respect of the period of twelve months beginning with the passing of this Act.

(3) Subsequent reports under this section shall be in respect of the period of twelve months beginning with the end of the previous reporting period.

(4) Each report under this section shall be prepared as soon as practicable after the end of the period to which it relates.

(5) A report under this section shall include any additional information which the Secretary of State thinks it appropriate for the report to include.

(6) The Secretary of State shall—
- (a) lay a copy of each report under this section before each House of Parliament, and
- (b) publish each such report in such manner as he thinks fit.

General Note

This Section

This section was not in HL Bill 102. It is one of only two new sections added to the Bill. It originated as a government manuscript amendment during the Committee stage in the Lords on September 15, 2003. The reason was a Liberal Democrat amendment (with Conservative support) suggesting a bi-annual (six monthly) report by the Secretary of State.

Subs.(1)

Paragraph (a) requires the Secretary of State to report to Parliament on the workings of the IMC international agreement. This covers more than this Act. Paragraph (b) refers to all the amendments to the NIA 1998 in ss.4, 5, 6, 7, 8, 9 and 10. This covers all the sanctions, and any actions of the NI Assembly as well as of the Secretary of State.

Subss.(2)–(4)

These provide for annual reporting from the date of Royal Assent, the Secretary of State being required to produce each report as soon as practicable.

Subs.(6)

Paragraph (a) provides for a command paper. Paragraph (b) presumably is publication through The Stationery Office Limited.

12 Short title, commencement and repeals

(1) This Act may be cited as the Northern Ireland (Monitoring Commission etc.) Act 2003.

(2) This Act, other than this section, comes into force on such day as the Secretary of State may by order made by statutory instrument appoint, and different days may be so appointed for different purposes.

(3) Sections 1 to 3 and 11 of this Act, and sections 30A, 47B and 51B of the Northern Ireland Act 1998 (c. 47), shall cease to have effect at the end of such day as the Secretary of State may by order made by statutory instrument appoint.

(4) An order under subsection (3) may include such consequential provision (including provision amending or repealing an enactment) and such transitional provision as the Secretary of State thinks fit.

General Note

Subs.(2)

Royal Assent was on September 18, 2003. This section came into force on that date. There were no commencement orders by the end of that month.

Subs.(3)

This is an unusual provision in a statute. However, the IMC is envisaged as being terminated by agreement at some point in the future. At that point, all references to the IMC and its reports in this Act would become redundant. This subsection empowers the Secretary of State by order, not to repeal sections of the Act, but to bring their effect to an end. Sections 1–3 and 11 all refer to the IMC. Sections 30A, 47B and 51B all refer to Secretary of State powers. This is an important issue of principle. The IMC was established because of the role of the Irish government in the multi-party talks of 1996–98. The NIA 1998 gave the Assembly a power of exclusion in s.30. That remains, and has been augmented by the sanctions in this Act. However, the Secretary of State is here divesting himself of powers of direction. It would seem that these are related to the involvement of the Irish government through the IMC.

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