



**Memorandum to the Northern Ireland Affairs
Committee**

Post-Legislative Scrutiny

**Northern Ireland (St Andrews Agreement) Act 2007
Justice and Security (Northern Ireland) Act 2007**



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Presented to Parliament
by the Secretary of State for Northern Ireland
by Command of Her Majesty

July 2012

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Memorandum to the Northern Ireland Affairs Committee

Introduction

This memorandum provides a preliminary assessment of the Northern Ireland (St Andrews Agreement) Act 2007 and the Justice and Security (Northern Ireland) Act 2007 and has been prepared by the Northern Ireland Office for submission to the Northern Ireland Affairs Committee. It is published as part of the process set out by the previous Government in the document *Post-Legislative Scrutiny – The Government’s Approach* (Cm 7320). The current Government has accepted the need to continue with the practice of post-legislative scrutiny as it supports the coalition aim of improving Parliament’s consideration of legislation.

Detail

1. THE NORTHERN IRELAND (ST ANDREWS AGREEMENT) ACT 2007

Introduction

The Northern Ireland (St Andrews Agreement) Act 2007 received Royal Assent on 27 March 2007. The purpose of this Act was to extend the deadline for the restoration of the Northern Ireland Assembly and the formation of a power-sharing Executive, as set by the Northern Ireland (St Andrews Agreement) Act 2006, from 26 March to 8 May 2007.

Background

The Northern Ireland Act 1998 enshrined in legislation the fundamental principles of the Belfast Agreement and made provision for the institutions necessary to deliver them. These included a devolved Northern Ireland Assembly and an Executive Committee.

These new institutions came into being on 2 December 1999. However, following a breakdown in trust between the Northern Ireland political parties, devolution was suspended in October 2002.

The main purpose of the Northern Ireland (St Andrews Agreement) Act 2006 was to deliver the legislative aspects of the St Andrews Agreement of 13 October 2006. These included the creation of a 'Transitional Assembly' to sit from 24 November 2006. It also set out arrangements to facilitate a return to devolved government within Northern Ireland with a functioning Assembly and power-sharing Executive.

The 2006 Act set the date of 26 March 2007 for the power-sharing Executive to be fully restored. If this did not happen, the Secretary of State would have been duty bound under the terms of the 2006 Act to make an order revoking the Transitional Assembly, and Schedule 3 to the 2006 Act would (but for the 2007 Act) have come into force on 28 March 2007. Had Schedule 3 come into force, the Northern Ireland Assembly would have been dissolved, the next election postponed indefinitely and most of the changes to the devolved institutions effected by the 2006 Act repealed.

Following a further commitment between the Northern Ireland political parties to participate in the power-sharing arrangements agreed at St Andrews, a decision was taken to amend the timetable for the restoration of the institutions. On that basis, this Act amended the deadlines made under the 2006 Act from 26 March 2007 to 8 May 2007.

Objectives

The purpose of this Act was to facilitate the full restoration of the Northern Ireland Assembly and power sharing Executive, in line with what was agreed at St Andrews and legislated for under the Northern Ireland (St Andrews Agreement) Act 2006, through amending the deadlines from 26 March 2007 to 8 May 2007.

Implementation

The Act simply extended the deadline for the full restoration of the Northern Ireland Assembly by deeming that the date of restoration set out in the 2006 Act to be, and to always have been, 8 May 2007. It specifically did not alter the validity of already settled matters.

Conclusion

The steps set out in the Northern Ireland (St Andrews Agreement) Act 2006 to provide for the full restoration of the Northern Ireland Assembly were delivered to the revised timetable of the 2007 Act. There have been no further suspensions to the operation of the Assembly and institutions since and Northern Ireland has enjoyed its best period of political stability in a generation.

2. Justice and Security (Northern Ireland) Act 2007

Objectives

The Justice and Security (Northern Ireland) Act 2007 (the “2007 Act”) delivered measures to bring about normalisation in Northern Ireland consistent with the level of threat. It followed a statement made by the then Secretary of State on 1st August 2005 announcing a programme of security normalisation, subject to an enabling environment. A key part of the normalisation programme was the repeal of counter-terrorist legislation particular to Northern Ireland (that is, Part 7 of the Terrorism Act 2000) by July 2007. The Government recognised that, notwithstanding the repeal of these powers and ongoing progress towards security normalisation, certain arrangements were required to deal with the residual terrorist threat in Northern Ireland.

Sections 1 – 9

Sections 1 – 9 of the 2007 Act made provision for non jury trials, replacing the Diplock Court system under Part 7 of the Terrorism Act 2000 in which certain offences were automatically dealt with by a judge alone. Under the new provisions, the Director of Public Prosecutions for Northern Ireland (DPP) has the discretion to issue a certificate stating that a non jury trial is to take place. He may only do so if he is satisfied that there is a risk that the administration of justice might be impaired and certain conditions linking the defendant or the offence to proscribed organisations or religious or political hostility are met. Unlike the Diplock Court system, the presumption is for a jury trial in all cases, while the small number of exceptional cases requiring non jury trial is handled in accordance with the requirements of the legislation. Schedule 1 makes consequential amendments. In conjunction with the non jury trial system, the Act (in sections 10-13) also amended the Juries (Northern Ireland) Order 1996. This put in place reforms to help reduce the risk of juror intimidation and partisan juries by achieving greater anonymity for jurors and by promoting greater randomness in jury selection.

Sections 10 – 13

Sections 10 – 13 and Schedule 2 were designed to ensure that jurors in Northern Ireland are protected from intimidation, by putting in place reforms to help reduce the risk of juror intimidation and partisan juries.

Sections 14 – 20

Reflecting the St Andrews Agreement, sections 14 – 20 extended the powers of the Northern Ireland Human Rights Commission (the 'Commission'). It amended the Northern Ireland Act 1998 by granting three new powers to the Commission: to compel the provision of information or a document, or for a person to give oral evidence; to access places of detention; and to instigate or intervene in judicial human rights proceedings in the Commission's own right, and when doing so to rely upon the European Convention on Human Rights.

Additionally, the Act required the Commission to make such recommendations as it thinks fit to the Secretary of State on the effectiveness of these new powers within two years of their commencement. The use of these powers is governed by safeguards to help ensure that they are used appropriately by the Commission and complied with by public authorities.

These safeguards are as follows:

- prohibiting the Commission from compelling evidence relating to prosecution decisions;
- prohibiting the Commission from compelling evidence with national security implications, including that which is held by the PSNI;
- barring the Commission from using its new statutory powers to investigate issues that occurred before 1 January 2008 (including a ban on compelling all evidence from before this date); and
- allowing 15 days to pass before accessing places of detention, to allow public authorities the opportunity to appeal against the terms of reference.

In the main, these safeguards replicate provisions in the Equality Act 2006, which established the Commission for Equality and Human Rights in Great Britain. These safeguards were placed in the context of 'dual responsibility'. They were legislated for to ensure that the powers are used responsibly by the Commission and also to ensure that public bodies respond appropriately, with new criminal offences created for non-compliance.

Sections 21 – 33

Commensurate with the threat, sections 21 – 33 and Schedule 3 provided powers for the police including powers of entry, search and seizure in addition to existing common law and statutory powers. The armed forces continue to provide support to the police, but as they have no statutory powers above those of ordinary members of the public, the Act also makes specific provision

for powers including arrest and search. The Secretary of State and the armed forces were also provided with powers to close roads.

Sections 34 – 42

Sections 34 – 36 provide that the Secretary of State may make Codes of Practice on the exercise of powers conferred by the Act and the seizure and retention of property found by police officers when exercising powers of search conferred by the Act. Section 37 requires the PSNI to make records of each exercise of powers under sections 21 – 26 in so far as it is reasonably practicable to do so and a record is not required to be made under another enactment. Section 38 and Schedule 4 make provision for the payment of compensation for certain action taken under sections 21 – 32 of the Act. Section 39 requires the DPP to consent to the prosecution of certain offences under the Act and requires the Advocate General for Northern Ireland to give his permission before that consent can be provided where the DPP considers the offence is not connected with the affairs of the United Kingdom. Section 40 requires the Secretary of State to appoint an independent reviewer to review the operation of the powers in sections 21 to 32 of the Act and the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to complaints. Section 41 allows the Secretary of State to repeal by affirmative order sections 21 – 40 of the Act and Section 42 sets out the interpretation.

Sections 43 – 47

Sections 43 – 47 and Schedule 5 deal variously with matters that are now the responsibility of the Department of Justice in Northern Ireland, which was established in April 2010. Sections 48 and 49 and Schedule 6 established interim arrangements for regulating private security services in Northern Ireland and provided for the eventual regulation of services in accordance with the Private Security Industry Act 2001, which is also now a matter for the Department of Justice.

Sections 48 - 49

Sections 48 to 49 set out the pattern of transitional arrangements for the Private Security Industry and the regulation of the Security Industry Authority.

Sections 50 – 54

Sections 50 to 54 and Schedule 7 provide supplemental provision including provision regarding extent, commencement and repeals and revocations.

Implementation

Sections: 9, 51, 52, 53 and 54 came into force on Royal Assent on 24th May 2007.

Sections: 1-8, 10-20, 21 to 40, 41 to 43, 46, 47, 48 (partially) and 50 (partially) (and Schedules 1, 2, 3 and 4) came into force on 1st August 2007.

Section: 45 came into force on 7th November 2007.

Sections: 48 (partially) and 49 (and Schedule 6) came into force on 8th March 2009.

Section: 44 (and Schedule 5) came into force on 11th March 2009.

Secondary legislation

Non Jury Trials

In accordance with section 9 of the Act the Secretary of State has on two occasions, by affirmative order, extended the non jury trial provisions for a period of two years.

Code of Practice

A code of practice in relation to the exercise of Stop and Search powers under section 34(1)(a) of the Act is due go out for consultation in the summer of 2012 in advance of going through normal parliamentary procedures.

It applies to the exercise by the Police Service of Northern Ireland of the following powers under the 2007 Act:

- Section 21: Stop and question
- Section 23: Entry
- Section 24/Schedule 3: Search for Munitions and Wireless Apparatus
- Section 26: Premises: Vehicles &c.

Annex C to this Code of Practice is made in accordance with section 34(2) of the 2007 Act and deals with the exercise of the powers at sections 21-28 of the 2007 Act by the armed forces.

Legal issues

The provisions of sections 10 and 13 of the Act were subject to a judicial review brought by Patrick and John McParland, who were criminal defendants. They argued that Article 6 of the ECHR, the right to a fair trial, was breached by the removal of the right of peremptory challenge and by making juries anonymous. In its judgment of the 9th January 2008 the High Court ruled that these changes did not compromise the right to a fair trial.

The issuing of a certificate for non jury trial by the Director of Public Prosecutions under section 1 of the 2007 Act was subject to judicial review by Brian and Paula Arthurs, who were criminal defendants. In its ruling of 30th June 2010 the High Court dismissed the applicants' arguments that the

issuing of a certificate was in breach of Article 6 of ECHR and that it violated common law fairness.

The Protection of Freedoms Act 2012 amended the power to stop and search without reasonable suspicion for munitions or wireless apparatus at section 24 of paragraph 4 of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007. The new paragraph 4A allows constables to stop and search without reasonable suspicion where a senior officer has made an authorisation in relation to a specified area. Before making an authorisation, the senior officer of at least Assistant Chief Constable (ACC) rank must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus, and reasonably considers the authorisation is necessary to prevent such danger. Such authorisations must be confirmed by the Secretary of State within 48 hours, and may last no longer than 14 days in total.

These changes were made without any ruling that paragraph 4 was unlawful but were made since it was recognised that changes made to section 44 of the Terrorism Act 2000 (TACT 2000) (necessitated by the ECtHR judgment in Gillan) should be mirrored here.

There have been two judicial reviews of the compatibility of sections 21 (stop and question) and 24 (stop and search for munitions and wireless apparatus) of the 2007 Act with Article 8 of the European Convention on Human Rights (Fox, McNulty, and Canning). These judicial reviews pre-date the changes to the 2007 Act made by the Protection of Freedoms Act 2012. The judgment in both cases (9th July) upheld the powers of stop and search under the 2007 Act.

The Protection of Freedoms Act 2012 also introduced a power to stop and search, whether in public or private, if a constable reasonably suspects that an individual has munitions unlawfully with him or wireless apparatus.

Other reviews

In line with section 40 of the 2007 Act, Mr Robert Whalley CB was appointed as the Independent Reviewer of the operation of sections 21 – 32 of the Act and the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to complaints. The Independent Reviewer reports to the Secretary of State on an annual basis and has submitted 4 annual reports to date.

In his latest report, which was his fourth, the Independent Reviewer concluded that these powers should continue for at least another year. The programme of work for his fifth report has also commenced and will be published at the end of this calendar year.

Preliminary Assessment of the Act

Trials on indictment without a jury

Prior to the introduction of the 2007 Act, non jury trials took place in all cases where a person had been charged with a scheduled offence. The default position now is for jury trial in all cases, unless the Director of Public Prosecutions issues a certificate for a non jury trial.

Non-jury trial provisions remain necessary to address paramilitary and community-based pressures on jurors that create a risk to the administration of justice. These risks are more significant in Northern Ireland than elsewhere in the UK. Nevertheless, the number of non jury trials under the 2007 Act is significantly lower than the number of Diplock trials: there was an average of 62 cases per year over the last 5 years of the Diplock system, compared with an average of 19 non jury trials per year since the 2007 Act took effect.

The provisions are due to expire on 31st July 2013, unless renewed by affirmative order for a further two years.

Juries

Section 10 amended the Juries (Northern Ireland) Order 1996. Article 26A of the amended order makes it a criminal offence to disclose juror information without lawful authority. Article 26B sets out what constitutes lawful authority, whilst article 26C sets out the relevant interpretation provisions.

The Northern Ireland Courts & Tribunals Service (NICTS) is responsible for the operation of the Juries (Northern Ireland) Order 1996. There have been no instances of unlawful disclosures reported to NICTS, nor have there been any difficulties in the implementation and operation of the amended disclosure procedures, or the interpretation thereof.

Section 11 makes various amendments to Articles 4 & 6 of The Juries (Northern Ireland) Order 1996. These amendments specify the information that must be provided to the Juries Officers and how that information is used in the preparation of the Jurors Lists, and gives details as to the form of a panel of names taken from the Jurors List. Section 12 inserts a new paragraph 1A into Article 8 of The Juries (Northern Ireland) Order 1996 providing that a Juries Officer shall not issue a jury summons to any individual they identify, following a check by a court officer, as being either disqualified for jury service or not qualified for jury service. The Northern Ireland Courts & Tribunals Service is not aware of any operational issues arising with these amendments.

Section 13 amends Article 15 of The Juries (Northern Ireland) Order 1996 to remove the right of peremptory challenge by the defendant during jury selection in criminal trials. The Northern Ireland Courts & Tribunals Service had no operational difficulties implementing this amendment. The removal of peremptory challenge facilitated the administration of a jury panel by reducing the number of individuals summoned to attend court, and the associated jurors' expenses.

Human Rights Commission

The Human Rights Commission was given new powers by sections 14-18 of the 2007 Act, amending the Northern Ireland Act 1998. Section 19 amended section 69(2) of the Northern Ireland Act to require the Commission to make recommendations to the Secretary of State relating to the adequacy and effectiveness of its new powers. The Commission did this in July 2009. In respect of the power of the Commission to take cases in its own name, the Commission had not at the time of writing had occasion to test the powers, and had considered doing so in only one matter. They did not therefore make any comments. The Commission reported that having the statutory powers conferred by the Northern Ireland Act, as amended by the 2007 Act, was largely responsible for an improved degree of co-operation with government agencies, which contrasted with their experience in earlier investigations; clearly demonstrating the positive impact of having access to statutory powers.

The Commission's recommendations were to scale back the safeguards put in place by the amendments to the Northern Ireland Act made by the 2007 Act. The Commission requested that they should be given the ability to; -

- **Make unannounced access to places of detention** – in order to carry out their statutory functions more effectively and respond in emergencies.
- **Be given greater scope to investigate national security issues** – the Commission accepted that national security must be protected, but believed that it should not be used as a reason to prevent questions about the human rights implications of national security being considered.

In 2009 the previous Labour Government considered reviewing the Commission's powers with regard to the recommendations the Commission had made. However,

without specific evidence that authorities had been uncooperative with the Commission in carrying out its duties it was decided that there was no reason to seek legislative amendments to the Commission's existing powers.

Powers

Sections 21 to 33 and Schedule 3 of the 2007 Act provide the police and Armed Forces with a range of security related powers. These powers are used in the context of the residual security threat in Northern Ireland: the threat level from Northern Ireland Related Terrorism in Northern Ireland currently stands at Severe.

The Government considers that these powers are important tools for the police in dealing with security related incidents. The operation of the powers is reviewed on an annual basis by the Independent Reviewer who in his latest report concluded that the powers should continue to be available for at least a further year.

These powers are one of the key parts of the 2007 Act. The amendments introduced by the Protection of Freedoms Act 2012 tighten up the use of the powers by introducing the authorisation regime mentioned above under the heading of 'Legal Issues' for the use of stop and search powers under the Justice and Security (Northern Ireland) Act 2007 and the Terrorism Act 2000.

STOP AND SEARCH STATISTICS¹

Number of Persons stopped under the following Powers	2010/11				
	1 Apr to 30 Jun 2010	1 Jul to 30 Sep 2010	1 Oct to 31 Dec 2010	1 Jan to 31 Mar 2011	Total 2010/11
PACE & JSA Section 21	-	-	8	14	22
PACE & JSA Section 24	-	-	7	6	13
PACE & JSA Section 21 & JSA Section 24	-	-	-	-	-
TACT Section 44 and questioned under JSA Section 21	1,849	43	-	-	1,892
JSA Section 21	86	334	513	494	1,427
JSA Section 24 and questioned under JSA Section 21	26	519	892	530	1,967
JSA Section 24	147	2,385	4,152	3,000	9,684
TACT Section 43 & JSA Section 21	-	10	5	4	19
TACT Section 43 & JSA Section 24 & JSA Section 21	1	15	6	6	28
TACT Section 43 & JSA Section 24	1	6	10	12	29
Totals	8,107	9,003	11,144	9,577	37,831

Number of Persons stopped under the following Powers	2011/12				
	1 Apr to 30 Jun 2011	1 Jul to 30 Sep 2011	1 Oct to 31 Dec 2011	1 Jan to 31 Mar 2012	Total 2011/12
PACE & JSA Section 21	16	21	8	7	52
PACE & JSA Section 24	3	7	4	13	27
PACE & JSA Section 21 & JSA Section 24	-	1	-	-	1
TACT Section 44 and questioned under JSA Section 21	-	-	-	-	-
JSA Section 21	426	317	414	478	1,635
JSA Section 24 and questioned under JSA Section 21	509	488	445	350	1,792
JSA Section 24	3,670	2,261	2,751	2,161	10,843
TACT Section 43 & JSA Section 21	7	2	3	10	22
TACT Section 43 & JSA Section 24 & JSA Section 21	4	-	3	2	9
TACT Section 43 & JSA Section 24	11	5	3	8	27
Totals	9,525	7,600	9,450	8,497	35,074

¹ Excerpt from Northern Ireland Statistics and Research Agency Quarter 4 report on Stop and Search Statistics for the periods 2010/11 and 2011/12.

The Armed Forces were provided with powers of question, arrest, search and entry under the 2007 Act, considered to be the minimum necessary for its role in supporting the PSNI, particularly in respect of explosive ordnance disposal (EOD). Paragraphs 203 to 220 in the Independent Reviewer's report set out the Armed Forces use of the powers.

Powers to take possession of land (section 29) and close roads by order (section 32) have been extended to the Department of Justice (DoJ) through agency arrangements between the Secretary of State and the DoJ. These arrangements allow the DoJ to exercise these powers where this does not affect any excepted or reserved matter. At 10th July 2012, the DoJ had made 3 land requisitions under section 29 of the Act, and 3 road closures under Section 32 of the Act, in respect of devolved matters. The Secretary of State has made 3 road closures under section 32 of the Act.

Powers: supplementary

Section 33 provides that powers conferred on a person, by virtue of sections 21 – 30, are additional to and do not affect common law powers, other statutory powers, or Her Majesty's prerogative powers. It also provides that reasonable force may be used for the purpose of exercising a power, it allows for the retention of items that have been seized, clarifies the definition of premises and makes requirements for the provision of identification by members of the Armed Forces. There have been no difficulties in the exercise of the powers in accordance with this section.

Sections 34 - 36 provides for the Secretary of State to make a Code of Practice in connection with the exercise of powers in the Act. The Government is currently consulting on a draft Code of Practice which provides guidance to the PSNI and Armed Forces on the appropriate use of the powers within the 2007 Act.

Section 37 requires the Chief Constable to make arrangements for the completion of records of the exercise of powers by constables under sections

21 – 26 of the 2007 Act. The PSNI makes records in accordance with section 37.

Section 38 and Schedule 4 provides for the payment of compensation where the exercise of powers under sections 21 – 32 has resulted in property being removed, occupied, damaged or destroyed. Claims for compensation are handled by the Compensation Agency. The Secretary of State meets costs relating to compensation claims incurred by the Compensation Agency.

Section 39 requires the Director of Public Prosecutions to consent to the prosecution of an offence under sections 21 – 32 of the 2007 Act (except for an offence under paragraph 12 of Schedule 4). Subsection (3) requires the DPP to seek the permission of the Advocate General for Northern Ireland before he can give his consent in relation to the prosecution of any offence which appears to have been committed for a purpose connected with the affairs of a country other than the United Kingdom. The DPP has not been required to seek the consent of the Advocate General for Northern Ireland under this section.

Section 40 makes arrangements for the appointment of a reviewer of the operation of powers under sections 21 – 32 of the Act and of the procedures adopted by the Armed Forces for handling complaints. The Independent Reviewer has submitted four reports to the Secretary of State thus far.

In his fourth report, the Independent Reviewer examined 8 complaints against the military all of which were about aircraft and helicopter flying. Not all of these complaints involved military aircraft but some raised issues about liaison with other authorities. The Independent Reviewer found that all the complaints were dealt with effectively; the case handling was well documented and easy to follow and that despite the small number of complaints, the current effective arrangements for the investigation of them should be maintained. Proportionately there are a small number of complaints in comparison to the total volume of helicopter traffic.

Miscellaneous

Section 41 allows the Secretary of State to repeal, by order, sections 21 – 40. No such repeals have been made.

Section 43 requires the Secretary of State to maintain a public register of community based restorative justice schemes that meet requirements and demands published by him. This function transferred to the Department of Justice with the devolution of policing and justice in April 2010. The Secretary of State retains the power to remove a scheme on the basis of national security information.

Section 44 and Schedule 5 inserted new sections and a new Schedule into the Northern Ireland Act 1998, making further provision for a Northern Ireland department with policing and justice functions, with associated enabling powers. Devolution of policing and justice powers took place on 10 April 2010. It did not follow the model which was set out in the amendments to the Northern Ireland Act 1998 contained in Section 44, as further amendments were made by the Northern Ireland Act 2009.

Section 45 amends the Justice (Northern Ireland) Act 2002 to require the Chief Inspector of Criminal Justice to inspect the Northern Ireland Court Service, the Northern Ireland Legal Services Commission and the Life Sentence Review Commissioners (now the Parole Commissioners). It excludes judges or any person making judicial functions or exercising judicial discretion from inspection. It also provided for the Lord Chancellor to be involved in various ways with the Chief Inspector's work, although all of those provisions were repealed by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. There have been no difficulties in the implementation or operation of this section.

Section 46 and 47 deal with matters relating to legal aid in magistrates courts and altering the title of resident magistrates. These matters have now devolved and fall under the responsibility of the Department of Justice.

Section 48 sets out transitional arrangements for the regulation of the private security industry in Northern Ireland between the repeal of Schedule 13 of the Terrorism Act 2000 and the introduction of the Security Industry Authority (SIA). These transitional arrangements have since lapsed and the SIA has regulated the private security industry in Northern Ireland since 1st December 2009.



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