

Questions and Issues on the Devolution of Justice and Policing Functions

Introduction

Reform of the criminal justice system and police service in Northern Ireland is a central component of the Belfast Agreement. In this respect, the Agreement established both a Police Commission and a Criminal Justice Review Group, each tasked with producing a report of recommendations for reform, within agreed and specified terms of reference. The ensuing recommendations of both groups (the Patten Report and Review of the Criminal Justice System in NI) have given rise, in the case of policing, to the Police (NI) Act 2000 and two Implementation Plans and for criminal justice, to the Justice (NI) Act 2002 and a single Implementation Plan. It is anticipated that the Government will publish a revised implementation plan on the Criminal Justice Review in early 2003.

A key element and arguably the ultimate goal of both the criminal justice and policing reviews is the intention to give real consideration to devolving justice and policing powers from Britain to Northern Ireland. This is expressed in the Agreement, in the Patten Report, the Criminal Justice Review and in their associated implementation plans. Indeed a number of practical measures have since been taken to make a reality of this intention. For instance, preparatory legislative arrangements have already been put in place by means of the Justice Act, to give statutory effect to those recommendations of the Review which have been formulated and will only come into force in the context of devolution. While this and other such measures, demonstrate clear commitment to devolving justice and policing powers at a future date, there are still many questions remaining as to how this transfer of powers should take place.

There are many different institutional models which could potentially accommodate devolved justice and policing powers. While valuable lessons may certainly be learnt from the criminal justice structures currently existing in our neighbouring jurisdictions, there is no single model which can directly be transferred to Northern Ireland. The continued existence of cultural, political and religious complexities in Northern Ireland distinguishes it from its neighbours and necessitates a model which has been fully assessed in terms of its implications for human rights, equality and broader public policy considerations. The need for a rigorous and comprehensive analysis of how justice and policing functions might best be devolved cannot be over emphasised, given that it must secure widespread public confidence.

What follows in this paper is a list of some of the kinds of questions which we hope will engender debate on many of the legal, political, financial and policy implications of devolution, in all of its potential, institutional forms.

Institutional Models

As mentioned in our introduction, there are many potential institutional models to accommodate the devolution of justice and policing powers to NI. Which of these models could be recommended on human rights grounds and on what basis can such an evaluation be made?

Some of the possible models follow below.

▪ A single department of justice

This could house all powers with the exception of the prosecution service, which would be the responsibility of the office for the attorney general. The Irish and Scottish systems follow this approach and it is also the preferred choice of the Review, having researched a number of justice systems in various jurisdictions.

A single department could, among a number of possibilities, be headed by:

- a single minister in line with the current arrangements for existing government departments under the devolved administration;
- a minister and deputy minister equivalent to the OFMDFM model; or
- a rotating minister and deputy.

What are the implications of any of these arrangements? If we have a rotating ministry, what impact may this have on efficiency and continuity? If we adopt the OFMDFM model would any consideration be given to the idea of separating responsibility for justice and policing and giving one area each to the FM and DFM? In a single ministry, would it be considered necessary to develop special safeguards, such as for example, introducing a requirement that certain decisions are approved by the whole Executive? What relationship would the potential office of the attorney general have with the justice ministry?

▪ A department which is divided into two main divisions

This is the case in Canada and the Netherlands where they have a Ministry of Interior which deals with policing and internal security and a Ministry of Justice. If this model was to be adopted in NI, what relationship would exist between the minister for policing and minister for justice?

▪ A department which is divided into many divisions

This has recently been done in New Zealand where a Ministry of Justice, Department of Corrections, Department for Courts, Crown Law Office and New Zealand Police have been created? If this model was accepted, would the D'Hondt formula be a suitable means of allocating responsibility for the separate divisions?

Will the relevant departmental and standing committees of the NI Assembly function in the same way for justice as for other areas of devolved government? What safeguards may they provide? Is there any need to consider restructuring the departmental committees?

How would youth justice issues potentially be managed under a single justice department? Is this an opportunity to consider the merits of creating a separate Children's Office, with its own Minister and Deputy or to transferring youth justice issues to the Department of Health?

To what extent will Recommendation 245 of the Review, proposing an assessment of the scope for harmonisation of the criminal law and procedure in the four jurisdictions of England and Wales, Scotland and the Republic of Ireland, impact upon devolution of justice decisions?

Relationships

In the case of a single department of justice what would be the relationship between the ministry and the Lord Chief Justice who, by virtue of section 12 of the Justice (NI) Act 2002, will take over from the Lord Chancellor as head of the judiciary in NI? What will be the relationship between the Lord Chancellor in his new reduced capacity (responsible only for senior judicial appointments) the Ministry and the Lord Chief Justice?

The Justice (NI) Act creates two new offices: Attorney General for NI and Advocate General, both of which are exercisable only on devolution. The powers granted to the new AG for NI by the act are not comparable to those formerly vested in the AG for England and Wales (who previously had responsibility for NI). Specifically, all powers which relate to "national security" and international relations are now conferred on the new Advocate General who will be a UK Officer. If the prosecution service is made the responsibility of a potential office of the attorney general, how then will that office be run, in terms of the division of responsibilities between the newly created AG for NI and the Advocate General?

How will the devolution of justice and policing powers affect the nature and substance of existing relationships between the Police Board, the Chief Constable, the Police Ombudsman and the Secretary of State? (Eg; Will decisions which relate to the funding of the Office of the Police Ombudsman become the responsibility of a minister for justice or remain a matter for the Secretary of State?)

The Judicial Appointments Commission, created by the Justice Act will take over responsibility from the Lord Chancellor in terms of making recommendations for appointments up to the level of high court judge and will also provide the FM and DFM with advice on candidates for senior judicial appointments. In both instances it will present its recommendations to OFMDFM, so what relationship will exist between that office and a future department of justice in this respect?

Human resources

If the current criminal justice system is replaced by a new institutional model, what implications will this have for the staff of the existing agencies? For example, what will happen to pension provisions?

Would a potential department of justice be staffed by transferring personnel from the NIO policing and criminal justice divisions? Could this create any particular difficulties?

In the event of the need for redundancies, on what basis will they be carried out bearing in mind S.75 requirements?

How will recruitment for new staff operate? How long will it take to fully establish (a) new department/s in terms of recruiting staff? Eg; The current reforms to the prosecution service appear to be spread out over a number of years.

Financial questions

How and by whom will decisions on the allocation of resources be made? What system of funding would best ensure independence? What is the current financial situation in relation to funding and how has this impacted upon the work of the Assembly in devolved areas of responsibility?

How might equality considerations determine budgetary re-allocation?

Should there be a more root and branch analysis of the cost effectiveness of the existing approach and priorities attached to the criminal justice system? Could discussions on devolution present an opportunity for a fundamental re-think in this area?

Will there be any resulting negative impacts on other public policies as a result of devolution of justice in NI, either directly in NI itself or in the UK as a whole?

Has consideration been given to the need for a degree of fiscal autonomy in NI to accompany devolution of further powers? Under Scottish devolution, the Scottish Parliament has the power to raise or lower the basic rate of income tax by up to three pence in the pound. If NI cannot exercise such a power, will the Government's control over the budgetary process restrain the newly devolved powers of the local authorities?

Powers held by Westminster/Secretary of State

Consideration should be given to each of the powers currently vested in the Secretary of State and the impact that retention of such powers will have on the ability to deliver justice and policing reforms. For example under the current arrangements the Secretary of State can effectively veto the establishment of inquiries by the Policing Board on a number of grounds including that of national security. In the event of devolution of policing powers, would this controversial veto power be exercised by a single minister of justice and if so, how would s/he be able to exercise the national security power given that it remains firmly an excepted matter?

Under the NI Act the UK Government has full discretion in deciding whether a matter of criminal law or a policing issue may be considered a matter of "national security" and therefore beyond the scope of the Assembly's future devolved powers. As national security is an excepted matter, Westminster alone can legislate in this area and the Secretary of State may revoke any act of the Assembly which breaches its jurisdictional competence. Given the contention associated with decisions made in the name of national security and the broad

interpretation that this term has been afforded, how might the current situation affect public confidence in the criminal justice reforms?

Role for Bill of Rights

To what extent can the proposed Bill of Rights for Northern Ireland safeguard and develop human rights standards in the areas of justice and policing; particularly how may it increase accountability?

Even after the devolution of justice and policing powers, all disputes on jurisdictional competence will fall to be resolved by the Privy Council. In light of this fact, has any further consideration been given to the establishment of a NI constitutional court which could exercise general jurisdiction over the proposed Bill of Rights?

Rate of Devolution

Will criminal justice and policing powers be devolved together? The Review recommended that all powers should be devolved simultaneously. If this is not accepted, what approach will be adopted to determine the order of implementation?

Law Commission

How may the Law Commission, created under S.50 of the Justice Act, be put to best effect in the advent of devolution and thereafter? Once a commencement order has been made in respect of the Commission, it can begin its task of reviewing substantive aspects of the criminal and civil law in NI – particularly those areas which have been the cause of greatest concern.

In the event that a single department of justice is formed, would it be appropriate for the Law Commission to be incorporated into this new department and take over the functions of the UK Office of Law Reform, as recommended by the Review (recommendation 255)?

Oversight Arrangements

In December 2002, the Government announced its plans to create the office of an oversight commissioner to monitor criminal justice reforms. When will this office come into effect? Will it have a statutory basis? Will the commissioner and staff be independent? Will they be local or international appointees? How large will the intended office be? For how long will the office be given a mandate? Has any consideration been given to arrangements after the Commissioner's role expires?

Currently responsibility for implementing many of the reforms set out in the Justice Review lies with the Criminal Justice Board. This board is however composed of senior representatives from the six main statutory criminal justice agencies in NI. Are there any plans to establish an independent board for criminal justice issues, equivalent to the Police Board?

Suspension Arrangements

If the Assembly is suspended again, after devolution of justice and policing, what arrangements will be made?