

(2 March 1998)

STRAND ONE: CRIMINAL JUSTICE

A discussion paper by the British Government

Purpose of Paper

1. This paper addresses criminal justice issues for purposes of discussion in Strand 1 of the talks process. A shorter paper on Justice issues was made available for the Strand 1 discussions on 10 November 1997. This paper is produced against the background of the reference in "Propositions for Heads of Agreement" to the need for effective and practical measures to establish and consolidate an acceptable peaceful society.

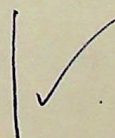
2. The paper seeks views on the aims of the criminal justice process and whether these should be enshrined in legislation. It outlines the current structural and constitutional position with regard to criminal justice, before inviting views on options for organising the system in the event of a devolved administration. It also addresses the linkages between the criminal justice and the community. There are inevitably a wide range of important criminal justice issues not covered here. Participants may wish to raise additional topics and options for discussion.

Aims Of Criminal Justice *restorative justice models*

3. The criminal justice process involves a number of statutory bodies and professions as well as defendants, witnesses and victims. Before looking at how it should be delivered or whether changes are needed it is helpful to consider what it is for. It might be helpful if, as part of the outcome of the talks process, the participants could reach agreement on the fundamental principles which would inform the operation of the criminal justice system. One possibility would be to

enshrine a definition of the purpose of the process in legislation to provide a clear statutory framework. One description of the aim of the public bodies involved in the Criminal Justice system in Northern Ireland is to provide a service to the community which:

- delivers a fair system of justice to the community;
- is responsive to the community's concerns, and encourages community involvement where appropriate;
- has the confidence of all parts of the community;
- works in conjunction with the community to reduce crime, minimise the fear of crime and enhance community safety;
- treats the victims of crime with respect and keeps them informed of progress made on their cases;
- ensures witnesses and jurors can perform their roles free from harassment or intimidation;
- brings those who commit crime to justice;
- ensures the prompt and just treatment of those suspected, accused or convicted of crime;
- where prosecution ensues, ensures a fair trial before an independent impartial tribunal, convicts the guilty and otherwise acquits;
- works to prevent individuals from offending and sentences those found guilty in a just and proportionate manner, while seeking to reduce the risk of further offending; and



- acts in all instances to enhance effectiveness, efficiency and economy. ✓

The Government would welcome suggested amendments, and views on whether it would be useful to develop an agreed definition of the aims of criminal justice and, if so, whether it should be enshrined in legislation.

Structural issues

4. An outline of the current statutory responsibilities for administering the criminal justice process in Northern Ireland, together with a description of the key elements of procedure, is contained in the enclosed booklet.

5. The basic elements of the criminal justice system are:

A. Prosecution

- a prosecution system with independence safeguarded by law. Under current arrangements the Attorney General for England and Wales is also appointed Attorney General for Northern Ireland and is the Government's Chief Law Officer. The Attorney General appoints the Director of Public Prosecutions for Northern Ireland, who exercises independently the function of directing whether or not prosecutions should be brought, but under the superintendence (which ensures Parliamentary accountability) and direction of the Attorney General. The DPP is responsible for prosecutions in all Crown Court cases and more serious magistrates' courts cases. His office also represents the Crown in all criminal cases in the High Court, the Court of Appeal and the House of Lords, as well as appeals from magistrates' courts to county courts. The police have responsibility for prosecuting less serious cases.

B. The Courts

- the **administration of the courts** and associated functions
- a system for making **judicial appointments** including judges and magistrates which ensures that these critical appointments are made impartially, based on merit and that judicial independence is safeguarded.

Since 1979 both these functions have been the responsibility of the Lord Chancellor.

C. The criminal law, criminal investigations and correctional services

- arrangements for bringing forward proposals for **new criminal law and procedure**;
- arrangements for investigating offences; ie providing the framework and resources for **police investigation**;
- arrangements for the **licensing of prisoners** including the discretionary release of life sentence prisoners;
- arrangements for an implementation of sentences and supervision of offenders including **prisons and probation services**; and
- arrangements for **crime prevention**. The most effective ways of preventing crime requires the involvement of agencies inside and outside criminal justice, including social services and education, working with the community, commerce and the voluntary sector.

These are currently the responsibility of the Secretary of State for Northern Ireland and are reserved matters under the 1973 Constitution Act. Investigations of alleged miscarriages of justice have since March 1997 been the responsibility of the independent Criminal Cases Review Commission, based in Birmingham.

Option 1: Criminal justice continuing to be reserved

6. One option in the event of devolved institutions being established is that all those responsibilities would continue to be reserved or excepted matters, at least in the first instance. Thus the various Ministers of the United Kingdom Government, the Secretary of State, Lord Chancellor and Attorney General would continue to perform the roles outlined above. This would ensure that key offices maintained independence from local party political pressures. This might be considered preferable because new innovative arrangements for government in Northern Ireland might have the best chance of success if they did not have to contend, particularly at the outset, with the burden of criminal justice issues, some of which are particularly sensitive. In the event that these responsibilities remained reserved or excepted, at least for a while, machinery could be established to enable devolved institutions to be consulted on them. ✓

7. On the other hand not giving a new devolved administration criminal justice responsibilities deprives the people of Northern Ireland and their elected representatives of the opportunity to develop locally-driven criminal justice initiatives and to play a role in securing the best service from criminal justice agencies by exercising local accountability. It could be argued that early agreement on how locally elected institutions might take on responsibility for criminal justice matters would give a substantial boost to the long-term stability of any new devolved system of government.

The Government would welcome views on whether it is preferable to continue with the present allocation of responsibilities for the administration of justice or to set up entirely new arrangements. In the event that such responsibilities

were not devolved at the outset, what sort of consultative arrangements might be put in place in order to give devolved institutions a meaningful role in this area?

Option 2: A Northern Ireland Department of Justice

8. If criminal justice matters are devolved to a local administration, an option would be to set up a Northern Ireland Department of Justice under the control of locally elected representatives through whatever agreed arrangements are made for the exercise of devolved powers. Its responsibilities could include some or all of the following, depending on the extent of devolution of legislative powers and other considerations:

- criminal law and procedure, excluding matters such as the law on drugs, firearms, explosives and terrorism which would more suitably be handled on a UK-wide basis;
- responsibility for the arrangements for administering the courts, legal aid, coroners, and the legal profession;
- responsibility for the Prison Service, Forensic Science Agency, Compensation Agency, Probation Board, and State Pathology;
- public order;
- security industry licensing;
- rights issues eg racial equality, equal opportunities, disability and perhaps community relations could be considered for inclusion in a Department of Justice - alternatively it may be more appropriate to envisage a separate Department for Equality and Rights issues;

*more
up
agenda*

- providing the legislative and other governmental arrangements for policing. (in some jurisdictions policing is the responsibility of a separate Department of the Interior); and
- judicial appointments (see below);

There may also be merit in considering including responsibility for “home affairs/justice” functions currently carried out by NI Departments such as fire services (DOE) and civil law (DFP). However, if a Department of Justice were established with wide-ranging responsibilities as outlined above, then particular care would have to be taken to ensure that the structure and organisation of the Department provided for efficiency and effectiveness while safeguarding the essential independence of many of its key functions.

Views on the merits of establishing a Department of Justice and on its role and responsibilities would be welcome.

The independence of the judiciary

9. Under the 1973 Constitution Act, the appointment of the judiciary is an excepted matter. All judicial appointments are the responsibility of the Lord Chancellor. In recent years, the process has been made more open, with advertising becoming increasingly the norm and lay involvement in the assessment process in England and Wales. The Government suggests that the principles which should govern judicial appointment might be:

- appointment strictly on merit;
- appointment processes to be open and fair;
- safeguards to prevent any partisan element creeping into the process;

- security of tenure, subject to safeguards, to protect the independence of the judiciary

Options consistent with these principles might include:

- retaining overall responsibility with the Lord Chancellor whilst opening up opportunities for local lay involvement in the appointment process;
- setting up an independent Judicial Appointments Commission, accountable to the devolved Executive, and with local lay involvement, with responsibility for all but the most senior judicial appointments. The appointment of the Lord Chief Justice and Lord Justices of Appeal might continue to be made by The Queen on the advice of the Prime Minister (perhaps on the basis of nominations from the devolved Executive). The Irish Government might have a role in putting forward views and proposals on the membership of the Commission.

The Government would welcome views on the principles which should underpin judicial appointments and what safeguards should be adopted to ensure that these important appointments are free from any opportunity for bias.

The prosecution process

10. Careful consideration needs to be given to securing the independence of the prosecution process. This could be enhanced by giving the Department of the DPP responsibility for all criminal prosecutions, including those currently carried out by the police. This would provide an additional safeguard to the public, since there would be independent review of all investigations before the matter were brought before a court. On the other hand, there would be resource implications and evidence from elsewhere suggests that adding an additional stage to the prosecution process can increase delay and diminish the effectiveness of the justice system.

The Government would welcome views on whether the prosecution process should be made entirely separate from the investigation process by giving the DPP responsibility for the prosecutions currently undertaken by the police.

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11. The appointment of the DPP and his Department are excepted matters under the Constitution Act. The DPP is responsible to the Attorney General, who has other responsibilities with regard to the provision of legal advice to the Government. The Attorney General of England and Wales is also appointed Attorney General of Northern Ireland. Under a devolved administration a number of options are possible:

- continuing existing arrangements, with arrangements being made for the devolved Executive to have access to independent legal advice; or
- appointing a Northern Ireland Attorney General, within or without the executive, with responsibility for the DPP and with responsibility for advising the devolved Executive; or
- appointing an independent DPP outside the devolved Executive, thus separating the prosecution function from political office

The Government would welcome views on how best the independence of the prosecution process should be safeguarded.

Criminal Investigations

12. In common with many jurisdictions, the police (who conduct most, but not all criminal investigations) have considerable autonomy, since they are not under direction by Government.

13. While this provides important safeguards in terms of freedom from political control (and the police are always, of course, answerable to the law), other models

are possible. Arguably, greater external scrutiny could be provided while still preserving independence from political control. One model is to enhance the role of the prosecutor, adopting aspects of the system in Scotland where the Procurator Fiscal has special powers. Another option is to enhance judicial involvement in the investigating process by providing for examining magistrates, as is the practice in some other European countries. Either of these options would have far-reaching implications for the entire system of criminal procedure (and criminal justice resourcing), which would need to be carefully explored in detail.

The Government would welcome views on whether greater external supervision of the criminal investigation process is desirable and whether any other system provides an appropriate model for consideration.

Criminal Justice and the Community

14. The formal criminal justice system does not exist in a vacuum. It is seen as deficient by some because they consider it to be politically unacceptable under present arrangements, by others it is sometimes perceived as slow, distant and unresponsive. It should also be recognised that there are areas of Northern Ireland where the police in particular have for some years been unable to operate normally. All this has in some cases led people from both communities to develop - to greatly varying extents - their own systems, sometimes dominated by the paramilitary organisations, sometimes not. In some localities summary beatings, shootings and expulsions have been considered to provide what is sometimes described as an "alternative justice system". But vicious and violent assaults can never represent justice, nor can a labelling with guilt without due process or respect for the rights of the suspect be considered as administering justice.

15. The challenge is therefore to make the formal system more acceptable and accessible to all, for example by building confidence, speeding up processes and improving the focus on the needs of victims and communities. It is important to

recognise the legitimacy of local communities' concerns about crime and their desire to be involved in addressing it. Some work is already in hand harnessing local energies by, for example, securing greater community input into both crime prevention and work with those at most risk of offending.

The Government would welcome views on how the criminal justice system can be more responsive to local communities and win greater confidence from all sections of the community. Lay people are already very involved in the formal criminal justice system as victims, witnesses and jurors. The Government would particularly welcome proposals on how lay participation can be enhanced.

Improving Accountability: Scrutiny of Criminal Justice

16. The effectiveness of the criminal justice process depends on the quality of the service provided. As in other jurisdictions, the criminal justice process is plagued with delay and at times there are questions about whether the large quantities of resources expended are being used to best effect. Some independent scrutiny of the service provided by the criminal justice process is already carried out: the police are inspected by HM Inspectorate of Constabulary, the Probation Service by the NI Social Service Inspectorate and Prisons by HM Inspectorate of Prisons. There is no inspection of the courts at all. One way of improving the situation may be to establish a Criminal Justice Inspectorate for Northern Ireland, with responsibility for inspecting prisons, probation, youth justice facilities and services, the administration of the courts (without impinging on judicial independence and matters of a judicial nature) and other criminal justice services. A single inspectorial service would have the advantage of allowing thematic inspections crossing traditional professional boundaries and could be particularly appropriate in a small jurisdiction. There may be scope for formal linkages with analogous inspectorates in other jurisdictions and for enabling an Inspectorate to co-opt lay assessors.

The Government would welcome views.

The Criminal Law in Northern Ireland

17. Northern Ireland has its own body of criminal law consisting of some residual legislation enacted by the Irish Parliament prior to the Act of Union, Acts of the United Kingdom Parliament prior to partition, Acts of the Northern Ireland Parliament and legislation enacted by the United Kingdom Parliament since the imposition of direct rule. Provisions for dealing with terrorism are "excepted" matters under the NI Constitution Act 1973 and primary legislation must be passed by Bill at Westminster. The criminal law is a "reserved" matter. The 1974 Northern Ireland Act authorised the use of Orders in Council (originally conceived of as a temporary measure). Most criminal justice legislation in Northern Ireland under direct rule has been enacted by this means, often replicating English provisions some years after their original enactment. Also, particularly in more recent years, certain Home Office Bills have extended to Northern Ireland in whole or in part.

18. There has been no independent mechanism for the review of the criminal law in Northern Ireland and many aspects of the criminal law and procedure are overdue for reform. One way of ensuring impetus for well-considered reforms would be to set up an independent Northern Ireland Law Commission, which would consult widely on proposals for reform and make recommendations to the executive. (It could take on responsibility for civil law as well as criminal law - at present the Law Reform Advisory Committee, a body appointed by the Secretary of State, provides an independent mechanism for the review of the civil law. The Office of Law Reform within the Department of Finance and Personnel has responsibility for keeping the civil law under review and advising on reform.) Establishing a Law Commission need not constrain the freedom of the devolved executive to propose or revise legislation.

The Government would welcome views on whether an independent Law Commission would be an appropriate way of taking forward the task of proposing law reform in Northern Ireland and if so, for views on how the members of such a Commission should be selected.