

PRESUMPTION OF DEATH BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department of Finance and Personnel (“the Department”) in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. “The disappeared” is the name given to those people abducted and killed by terrorist groups during the course of the Troubles up to April 1998 whose bodies have never been found. While the *Independent Commission for the Location of Victims’ Remains* continues its work to find the graves of the disappeared, the remains of 8 of them have yet to be discovered.
4. In recent years some of the families of the disappeared have raised with Ministers their disappointment that the deaths of the disappeared cannot be registered in the absence of their physical remains. In response to calls for some change to the law to be made the Department began, in early 2007, an examination of the current legislative framework for death registration with a view to determining how best to provide a mechanism whereby the deaths of the disappeared in Northern Ireland could be registered and certificates of death provided for their families.
5. In examining this issue it became clear that any new piece of legislation should aim to address not only the needs of the families of the disappeared for a death certificate, but also aim to provide a procedure whereby the cases of other missing persons who are presumed to have died could be addressed. There is a large number of persons reported missing to the PSNI every year, although the majority

are found within a few days. Some missing persons will, however, not be traced so easily. Towards the end of 2007 there were some 68 people registered as missing with PSNI.

6. At the same time as the Department was considering the introduction of new legislation addressing the issue of missing persons, the Council of Europe began an examination of "*Missing persons, presumption of death and commorientes following, in particular, terrorist attacks and natural disasters*". The Working Party examining this issue has been mandated to develop a draft recommendation for approval by the Committee of Ministers. The Working Party published its draft recommendation in February 2009. In addition, the Law Reform Commission of Ireland announced in December 2007 that it would soon be commencing a new project on the "*Civil Law Aspects of the Law of Missing Persons*". In January 2009 a Private Member's Bill (called the Presumption of Death Bill) was introduced in the House of Commons by Tim Boswell MP to address the issue of missing people in England & Wales. The Bill at Westminster is modelled on the Northern Ireland Bill.
7. In taking forward this work the Department has modelled its Bill on the Presumption of Death (Scotland) Act 1977, which provides a comprehensive procedure for declaring that a missing person from Scotland may be declared to have died.

CONSULTATION

8. The Department conducted a public consultation on a draft Bill between 23rd January and 15th April 2008. Over 500 copies of the Consultation Document were issued to a wide range of bodies in Northern Ireland.
9. During the consultation period officials met with some of the family members of the disappeared to discuss the proposals.

OPTIONS CONSIDERED

10. Four options were considered:
 - i) Do nothing – doing nothing would have failed to meet the political imperative of legislating to enable the deaths of the disappeared to be registered and certificates issued to their families.
 - ii) Amend the Births and Deaths Registration (Northern Ireland) Order 1976 to allow registration of a missing person's death after an investigation had concluded that the person is believed to be dead and provided the person had been missing for 7 years. This limited proposal was rejected as it would sit uneasily with the

existing system of death registration in Northern Ireland in the 1976 Order which requires the presence of a dead body and the involvement of a medical practitioner or coroner.

iii) Amend the Coroners Act (Northern Ireland) 1959 to allow a coroner to investigate the cases of missing persons where it is believed that the person was dead. This option was dismissed as, in the absence of a body, it was difficult to see how the coroner would be able to come to any determination as to how, when and where the missing person came by his or her death.

iv) Introduce a new comprehensive piece of legislation, modelled on the Presumption of Death (Scotland) Act 1977, which would confer on the High Court in Northern Ireland the power to issue a declaration that a person who is missing may be presumed to have died (a) if there is evidence that the person is likely to have died, or (b) where the missing person has not been known to be alive for a period of at least 7 years. The Bill implements this fourth option.

OVERVIEW

11. The Bill consists of 21 Clauses and 3 Schedules.

COMMENTARY ON CLAUSES

Clause 1 (Declarations of presumed death) sets out the alternate grounds on which the High Court can make a declaration that a missing person may be presumed dead. The missing person must be thought to have died **or** have not been known to be alive for a period of at least 7 years. Under Clause 1 any person may make an application to the High Court, although the Court must refuse (under subsection (3)) to hear the application if it considers that the applicant (other than an applicant who is the spouse, civil partner or close relative of the missing person) does not have a sufficient interest in the determination of the application.

Subsection (2) sets out the jurisdictional rules which must be met in order for the High Court to be able to hear the application: either the missing person must have been domiciled or habitually resident in Northern Ireland or, where the applicant is the spouse or civil partner of the missing person, the applicant is domiciled or habitually resident in Northern Ireland. A third jurisdictional rule provides that the High Court may hear applications from the families of the disappeared where they are close relatives of a missing person who is a victim of violence within the meaning of section 1(4) of the Northern Ireland (Location of Victims' Remains) Act 1999.

Clause 2 (Making of declaration of presumed death) makes further provision in relation to declarations of presumed death. It provides that when the High Court makes a

declaration of presumed death it must also find either that (a) the missing person has died at a specified time and date or at the end of a specified period in cases where the evidence leads the Court to conclude that the missing person has died, or (b) where the missing person has not been known to be alive for a period of at least 7 years that the missing person died at the end of the day occurring after the date on which the missing person was last known to be alive.

Clause 3 (Effect of declaration of presumed death) provides for the general effect of a declaration of presumed death under Clause 1. In essence, the declaration of presumed death shall be conclusive for all purposes and against all persons – it will have the same effect in law as if the missing person had died and his death recorded by the Registrar General for Northern Ireland in the usual manner.

Clause 4 (Powers of the High Court) deals with the ancillary powers of the High Court which may only be exercised if it makes a declaration of presumed death. There are 3 powers: to determine the domicile of the missing person; to determine questions relating to the interest of any person in the missing person's property and to make such order as it considers reasonable as to any rights to or in property acquired as a result of the making of a declaration of presumed death.

Subsection (2) provides that an order under Clause 4(1)(b) may direct that the value of any rights to or in property acquired as a result of the making of a declaration of presumed death are irrecoverable.

Clause 5 (Variation orders) provides the High Court with the power, on application to it, both to vary and to revoke a declaration of presumed death made under Clause 1. Whilst any person may apply for a variation order, subsection (2) provides that the Court must refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of the application.

Clause 6 (Effect on property rights of variation order) sets out the general rule that a variation order under Clause 5 is to have no effect on property rights acquired as a result of the making of a declaration under Clause 1. While subsection (2) allows the High Court to make a further order in relation to any rights to or in any property acquired as a result of the making of a declaration of presumed death, subsection (5) makes clear that, except in exceptional circumstances, no order under subsection (2) can be made unless the application for a variation order was made within 5 years of the making of the declaration of presumed death. Subsection (3) further limits the scope of any order which may be made under subsection (2) by providing that no such order shall cause income, generated during the period from the making of the declaration to the making of the variation order, to be returned to the missing person or otherwise redistributed to a person entitled to it in consequence of the variation order.

Subsection (4) sets out the considerations which the High Court must take into account in deciding whether to make an order under subsection (2). Subsection (6) provides

protection to a bona fide purchaser for value of any property acquired from a person who was entitled to it on foot of a declaration under Clause 1. Subsection (7) deals with a trustee's liability for breach of trust.

Clause 7 (Insurance against claims) sets out two rules relating to insurance. First, subsection (1) provides that where following a declaration of presumed death a person becomes trustee of the property of the missing person, the trustee shall take out insurance to cover the cost of returning the property to the missing person if he or she turns out to be alive or to transferring property to another person in consequence of a variation order under Clause 6(2). Second, subsection (3) provides that where the missing person's life was insured, an insurer may require the person who receives the insurance money to take out insurance to cover the cost of returning the insurance money should the missing person turn out to be alive.

Clause 8 (Supplementary provisions as to declarations, etc.) provides that Rules of the Supreme Court shall make supplementary provision, *inter alia*, in relation to applications for declarations of presumed death and variation orders. The Rules will prescribe the forms to be used and detail those persons who should receive notice of applications made under the Bill.

Clause 9 (Provisions relating to the Attorney General) provides that the Attorney General for Northern Ireland shall receive notice of all applications for a declaration of presumed death and a variation order under the Bill. Subsection (3) provides that the Attorney General may intervene in any proceedings to argue before the High Court any question which he or she thinks should be fully argued.

Clause 10 (Right to intervene) sets out the circumstances in which any person may intervene in any proceedings for a declaration of presumed death under Clause 1 or a variation order under Clause 5. Subsection (2) provides that a person seeking to intervene (other than the spouse, civil partner or close relative of the missing person) shall have to obtain the leave of the High Court.

Subsection (3) provides that a person intervening may (a) argue before the High Court any question which the Court considers it necessary to have fully argued; (b) seek the making by the Court of an order or determination under Clause 4 (if intervening on an application under Clause 1); and (c) seek the making by the Court of a determination under Clause 5(4) or an order under Clause 6(2) (if intervening on an application under Clause 5).

Clause 11 confers on the High Court power to order a person who is not a party to the proceedings to disclose information to it. Subsection (1) provides that this power shall be used only where the High Court considers disclosure of information necessary for the purpose of disposing of an application under Clauses 1 or 5. The High Court must also consider that the information to be disclosed is relevant to the determination of the

question of whether the missing person is alive or dead. The power to order disclosure may be exercised either on application to the Court or on the Court's own motion.

Subsection (2) sets out the grounds on which a person may refuse to disclose information to the High Court. Subsection (3) requires the High Court to serve notice of its intention to make an order on any person likely to be affected by an order. Subsection (4) provides that the High Court may vary or discharge a disclosure order on application by a person affected by the order.

Clause 12 (Costs) confers on the High Court a broad power to make such order as to who shall pay for the costs of proceedings as it considers just. Costs may be ordered to be paid using the property of the missing person.

Clause 13 (Power to amend certain time periods) allows the Department of Finance and Personnel to amend certain provisions in the Bill. First, the Department may increase or decrease the length of time a person must have not been known to be alive before the High Court may make a declaration under Clause 1. Second, the Department may increase or decrease the 5 year limitation period in relation to property variation orders made by the Court under Clause 6(2).

Clause 14 (Repeal of certain statutory provisions relating to presumption of death) provides that the existing statutory provisions permitting the High Court to dissolve a marriage or civil partnership on the ground of the presumed death of a spouse or civil partner (contained in the Matrimonial Causes (Northern Ireland) Order 1978 and the Civil Partnership Act 2004 respectively) shall cease to exist.

Clause 15 and Schedule 1 (Register of Presumed Deaths) provide for the Registrar General for Northern Ireland to establish and maintain a Register of Presumed Deaths. The powers of the Registrar General in relation to the new Register are set out in Schedule 1.

Clause 16 (Orders and regulations) deals with the subordinate legislation procedure applicable to the making of orders and regulations under the Bill.

Clause 17 (Interpretation) defines certain words or phrases used in the Bill.

Clause 18 (Supplementary provision) allows the Department to make transitional, saving, supplementary, incidental and consequential provision in connection with the Bill.

Clause 19 and Schedules 2 and 3 (Amendments and repeals) deal with a small number of consequential amendments and repeals of legislation. They should be read alongside Clause 14.

Clauses 20 (Commencement) provides that the substantive provisions shall come into force at a date to be determined by the Department. The commencement order will be made as soon as the necessary rules of court and registration regulations have been drafted.

Clause 21 (Short title) provides that the new legislation shall be known as the Presumption of Death Act (Northern Ireland) 2009.

FINANCIAL EFFECTS OF THE BILL

12. The Bill will give rise to additional administrative costs in the Registrar General's office which can be accommodated within existing resources. Some additional cost to the legal aid budget is likely.

HUMAN RIGHTS ISSUES

13. The provisions of the Bill are considered compatible with the Human Rights Act 1998.

EQUALITY IMPACT ASSESSMENT

14. The Department included its Equality Impact Screening as part of the public consultation. The screening exercise concluded that an Equality Impact Assessment was not required.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

15. The Department included its consideration of the potential regulatory impacts as part of the public consultation. It concluded that no Regulatory Impact Assessment was required.

LEGISLATIVE COMPETENCE

16. The Minister of Finance and Personnel had made the following statement under section 9 of the Northern Ireland Act 1998:

"In my view the Presumption of Death Bill (Northern Ireland) would be within the legislative competence of the Northern Ireland Assembly."

SECRETARY OF STATE CONSENT

17. A statement is required under section 10(3)(b) of the Northern Ireland Act 1998, on Secretary of State consent:

"The Secretary of State had consented under section 10(3)(b) of the Northern Ireland Act 1998 to the Assembly considering this Bill."