EXPLANATORY MEMORANDUM TO

THE NORTHERN IRELAND ACT 1998 (AMENDMENT OF SCHEDULE 3) ORDER 2010

2010 No [Draft]

THE NORTHERN IRELAND ACT 1998 (DEVOLUTION OF POLICING AND JUSTICE FUNCTIONS) ORDER 2010

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1. This Explanatory Memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1 The Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 ("the section 4 Order") provides for legislative powers for certain policing and justice matters to be transferred to the Northern Ireland Assembly ("the Assembly").

2.2 The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ("the section 86 Order") makes provisions which are consequential on, or otherwise give effect to, the section 4 Order.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 In the Northern Ireland devolution settlement, if a matter does not fall within a description specified in either Schedule 2 (excepted matters) or 3 (reserved matters) to the Northern Ireland 1998 ('the Act') it is, for the purposes of that Act, a transferred matter, which means the Assembly can, subject to sections 6 and 7 of the Act, legislate in respect of that matter without the consent of the Secretary of State.

4.2 Section 4 of the Act allows the Secretary of State to provide by Order that reserved matters become transferred matters provided a resolution has been passed by the Assembly, in accordance with subsection (2A) praying that the relevant matters should cease to be reserved. Following the passage of such a resolution on 9th March 2010, the section 4 Order provides that certain policing and justice matters, which are currently reserved, shall become transferred matters.

4.3 The section 86 Order, which is made under section 86(1) and 86A(1) of the Act, contains provisions which are consequential on, or otherwise give effect to, the section 4 Order. Section 86 of the Act was amended by section 4 of the Northern Ireland Act 2009 such that an Order made under section 86(1) can, in particular, also transfer functions which are currently exercisable by a United Kingdom authority to a Northern Ireland authority as well as confer functions on a Northern Ireland authority and confer or remove functions from a United Kingdom authority. The Order also makes provision to that effect.

4.4 These instruments will be brought forward in conjunction with the draft Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010, which will abolish the Northern Ireland Court Service and transfer its functions to the Department of Justice in Northern Ireland.

4.5 These three instruments also relate to the Department of Justice Act (Northern Ireland) 2010, which is an Act of the Northern Ireland Assembly and which received Royal Assent on 12 February 2010. This Act created the Northern Ireland Department of Justice and the majority of executive functions that are to be transferred will be exercisable by that Department.

5. Territorial Extent and Application

5.1 The instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State, The Rt Hon Shaun Woodward MP, made the following statement regarding Human Rights:

"In my view the provisions of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 and the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 are compatible with the Convention rights".

7. Policy Background

7.1 Following the Agreement at Hillsborough Castle on 5 February 2010, a clear timetable has been set out for the devolution of policing and justice powers to the Northern Ireland Assembly. At present, responsibility for policing and justice matters remains with the UK Government. However, the Government believes that it is in the best interests of the people of Northern Ireland that decisions on these matters should be made by local politicians and the Northern Ireland Act 1998 contains provisions to enable policing and justice to be devolved, subject to a request from the Northern Ireland Assembly, endorsed by a cross-community vote.

7.2 The Government set out its willingness in principle to devolve these matters in the Belfast (Good Friday) Agreement, the Joint Declaration of 2003 and the St Andrews Agreement of 2006. Under the terms of the St Andrews Agreement the Government undertook to devolve policing and justice powers whenever the transfer was requested by the Northern Ireland Assembly. Following the Agreement at Hillsborough Castle, a resolution was passed by the Assembly by cross-community vote on 9 March 2010, requesting that certain policing and justice matters be transferred to the Northern Ireland Assembly. In line with the Agreement at Hillsborough Castle, this transfer will take place on 12 April 2010. These Orders, together with the Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010 give effect to that transfer of powers and represent the final stage in the process of devolution.

The Section 4 Order

7.3 Currently policing and justice matters are reserved, meaning that the Assembly is not able to legislate in respect of such matters without the consent of the Secretary of State. This Order provides that matters falling within a description specified in paragraphs 9, 9A, 10, 11, 11A, 12, 14A, 15, 15A and 17 of Schedule 3 to the Act, shall, subject to certain exceptions, cease to be reserved and therefore become devolved.

7.4 The exceptions are set out in Articles 3 to 7 of the Order, which substitute new (narrower) descriptions in paragraphs 9, 10, 11 and 12 of Schedule 3 to the Act such that these matters will remain reserved.

7.5 The Government's policy is, consistent with the wishes of the Assembly, to devolve as much as possible of these matters that are currently reserved. There are, however, a small number of issues where it is necessary to maintain limited reservations – primarily in areas where there is an interface with national security. There are also a few discrete areas – such as parading and the 50:50 police recruitment provisions – where reservations are being kept. As set out in the Agreement at Hillsborough Castle, the expectation is that responsibility for parading will transfer to the Northern Ireland Assembly at a later date. The maintenance of these reservations does not affect the overall operability of the justice system. The matters being transferred are entirely consistent with the resolution passed by the Assembly on March 9.

The Section 86 Order

7.6 As a result of the changes made to the list of reserved matters, it is necessary to make a number of consequential changes to other parts of the statute book and to transfer a wide range of statutory functions currently conferred on UK Ministers to the appropriate devolved authorities.

7.7 The majority of those functions are either Secretary of State ones in respect of Northern Ireland criminal justice matters or Lord Chancellor ones in respect of Northern Ireland judicial and general justice matters and these functions are transferring to Northern Ireland authorities, mainly the new

Department of Justice in Northern Ireland. In addition, certain functions of the Treasury, Minister for Civil Service, Comptroller and Auditor General which relate to Northern Ireland policing or justice matters are transferring to the equivalent Northern Ireland authorities.

7.8 Most provisions are straightforward substitutions of references such as "the Department of Justice" for "the Secretary of State". There are, however, certain provisions that split functions currently exercised by the Secretary of State so that, in future, they will be exercised by the Secretary of State in respect of reserved or excepted matters (such as national security) or by the Department of Justice in respect of devolved policing and justice matters.

7.9 The Order makes a number of additional amendments to existing legislation that are necessary to give effect to the devolution of policing and justice. In particular, article 23 of the Order gives effect to the element of the Agreement at Hillsborough Castle which sets out the relationship between the Justice Minister and the Executive. Article 24 provides for the Royal prerogative of mercy, other than in relation to terrorism, to be exercisable in Northern Ireland by the Northern Ireland Minister of Justice, as opposed to other prerogative powers which can be exercised be any Northern Ireland Minister.

7.10 The Order also transfers to the Department of Justice in Northern Ireland certain property and liabilities relating to that department's functions. The property listed at Schedule 21 is property that is currently used for purposes that will remain reserved or excepted and therefore is not to transfer. It also transfers the properties listed in Schedule 20 to the Order to the Director of Public Prosecution for Northern Ireland. These premises are those which will be occupied by the Public Prosecution Service for Northern Ireland. Finally, it also makes provision so as to transfer staff.

- ***Consolidation***

7.11 There is no intention to consolidate the amended legislation at this time.

8. Consultation outcome

8.1 In March 2008 the Secretary of State published illustrative draft legislation and an accompanying commentary that provided the Government's thinking at the time on what should devolve. The document was intended to help explain the Government's current thinking on how devolution will work in practice and helped inform the Assembly's discussions about the transfer of these powers. The texts have since been revisited in light of further scrutiny.

8.2 A copy of the illustrative draft legislation was placed in the House library and circulated to the political parties.

9. Guidance

9.1 None.

10. Impact

10.1 A full impact assessment has not been produced for these instruments as no impact on the private or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring and Review

12.1 The changes set out in these instruments aim to effectively transfer to the appropriate devolved authorities certain statutory functions relating to policing and justice matters. This will be in a form consistent with the wishes of the Assembly.

13. Contact

13.1 David Withey at the Northern Ireland Office (tel: 020 7210 0255 or e-mail: david.withey@nio.x.gsi.gov.uk) can answer any queries regarding the instruments.