



# Law Commissions - what is the essence of their law reform role?

by Neil Faris

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## Abstract

This paper reflects on the nature of law reform as carried out by law commissions. This is in the context of the author's experience in the Northern Ireland Law Commission. The paper assesses the importance of independence in any law reform body and the particular impact which law commissioners may bring to the law reform process. The paper looks at the history of law reform in Northern Ireland leading to the establishment of the Commission with a brief overview of the work of the Commission. The conclusion is that there is a role for effective law reform driven by commissioner led independent law commissions.<sup>1</sup>

## 1. The Northern Ireland Law Commission

I must of course, as a former Commissioner of the Northern Ireland Law Commission ('NILC' or 'the Commission'), start with a disclaimer: I do not purport to speak on behalf of the Commission and it is for others to judge the success or otherwise of the work of the Commission during my period of office from 2008 to 2012.

The original legislative base for NILC was in sections 50 to 52 of the Justice (Northern Ireland) Act 2002 ('the 2002 Act'). This established the Commission as a body corporate and the Secretary of State for Northern Ireland had the duty to appoint a chairman (a High Court judge) and four other Commissioners.

Matters took their due course and a Commencement Order in 2007 commenced on 16 April 2007<sup>2</sup> the relevant provisions of the 2002 Act. The Chairman was appointed in 2007 and the Commissioners were appointed in 2008.

The Secretary of State for Northern Ireland had her role under the 2002 Act because at that time the functions of policing and justice had not been devolved to Northern Ireland. By the time of the commencement of the Commission's work in 2008 the devolved institutions in Northern Ireland: Assembly and Executive were fully functioning, but the political parties in the Northern Ireland Assembly did not agree on the terms for the devolution of policing and justice until 2011. Thereupon the powers and duties of the Secretary of State for Northern Ireland were transferred to the new Department of Justice for Northern Ireland ('DoJ' or 'the Department') and the 2002 Act was duly amended.<sup>3</sup>

## 2. How law commissions operate

There is not space to set out in detail the powers and functions of the Commission. It may suffice to say that NILC has in general powers and functions similar to those of the Law Commission for England and Wales, the Scottish Law Commission and the Law Reform Commission which operates in the Republic of Ireland. Indeed, I would understand that the following powers and

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<sup>1</sup> This paper was up to date on 23 September 2014.

<sup>2</sup> The Justice (Northern Ireland) Act 2002 (Commencement No. 12) Order SRNI 2007 No. 237 C. 14

<sup>3</sup> The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 SI 2010/976

functions are generally common to law commissions throughout the Commonwealth and in other jurisdictions (such as the Republic of Ireland) which have adopted the law commission model.

I would understand these are the generally common features:

- Chair and commissioners appointed by government for fixed terms of years: commonly 3 or 5 years with sometimes provision for re-appointment;
- The commissions are to be independent of government;
- There must be proper arrangements for financial accountability;
- Their work is generally carried out under 'Programmes of Law Reform' setting out for a term of years (such as three or five years) a programme of topics of law reform to be tackled in the period;
- Generally, these programmes require the consent of government - through the sponsoring department such as the Department for Justice;
- Public consultation usually takes place before a programme of work is published;
- In carrying out the work the commissions will engage in their own research and in extensive consultation on each topic in the programme;
- This usually involves a consultation paper and possibly other discussion papers and other modes of engaging with those having any interest in the topic;
- Ultimately, the commission will produce a report containing its review of the topic and its recommendations for reform and often a draft bill setting out how the reforms might be effected in legislation;
- It is then for government to decide whether or not to implement the recommendations: each commission strives for a successful 'implementation rate';
- As well as carrying out the programme topics commissions may also accept references from government departments of other topics where law reform is thought appropriate;
- Some commissions also engage in programmes of consolidation of legislation and repeal of redundant legislation;

In the larger commissions such as the Law Commission for England and Wales there are full time commissioners who take 'career breaks' from their academic or professional careers for the duration of their appointments as Commissioners. In the smaller commissions such as NILC this may not be possible; the Chairman and Commissioners in NILC have all been part time appointments.

Whether or not the Commissioners are full time, another important element in all commissions is the research team: generally there is a full time, permanent cadre of researchers and sometimes for particular projects individuals with special expertise may be engaged for the duration of the project.

Generally, a Commissioner will lead a project with a team of researchers working with him or her and good working relations are of course essential to the success of each project.

### **3. NILC's work**

To date the work of the Commission has included:

- A major project of reform of Northern Ireland's Land Law<sup>4</sup>;
- Reform proposals for aspects of Northern Ireland's business tenancy protection law<sup>5</sup>;
- Proposals for protection for vulnerable witnesses in civil litigation<sup>6</sup>;

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<sup>4</sup> NILC 8 (2010)

<sup>5</sup> NILC 9 (2011)

- Proposals for reform of bail law in criminal proceedings in Northern Ireland<sup>7</sup>;
- Report on Unfitness to Plead<sup>8</sup>;
- Review of law on apartments in Northern Ireland<sup>9</sup>.

In addition, the Commission has worked with the Law Commission in London and the Scottish Law Commission on the Regulation of Health Care Professionals<sup>10</sup> and is currently working with the other Commissions on the reform of electoral law for the United Kingdom.

The other major current project of the Commission is a review of defamation law in Northern Ireland: in particular to consider if the reform proposals of the Defamation Act 2013 should be extended to Northern Ireland.

The question may be raised, whatever the merits of these projects, does the law reform have to be carried out by a law commission: for instance previously in Northern Ireland (see further section 5 below) the law reform function was performed without benefit of a law commission as such? I consider this further in my concluding sections, but first set out the current, rather parlous position of NILC and then some of the historical background.

#### **4. The current position of NILC**

In 2012 the Commission underwent a Quinquennial Review which was carried out on behalf of the Department of Justice in Northern Ireland. The Review was, of course, independent of the Commission. The Review was known as the 'Hunter Review' after the senior retired Northern Ireland civil servant who carried it out. Mr Hunter completed his Report and sent to the Department at the end of January 2013, but it has not yet been published. The Department has not yet issued any statement as to its plans for the future of the Commission. In a written answer on 18 April 2014, to a question raised by a member of the Northern Ireland Assembly, the Minister of Justice announced that a business case had been prepared following consideration of a number of options for the Commission's future and that he hoped to be able shortly to agree a way forward and to make the necessary announcement. However, no such announcement has yet been made.

Unfortunately also, the post of Chairman and three of the Commissioner posts have not been filled in the same period of time<sup>11</sup>. In a further Assembly reply on 18 April 2014 the Minister stated that he had determined that the posts should not be filled until the decisions had been taken as to the Commission's future. So currently the Commission faces an uncertain future with only one Commissioner in post.

Thus, although some important law reform work is currently on going, the Commission is an unfortunate state of limbo at the moment. Indeed, the question arises should the DoJ perform its statutory functions of making appointments of Chair and Commissioners under the 2002 Act, rather than constant deferment of such appointments?

However, the DoJ, along with other Departments of the Northern Ireland Executive, is under severe budgetary constraints currently, and the Minister has warned that serious cuts in services will have to be made. It is quite likely, therefore, that no announcement in regard to the Commission will

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<sup>6</sup> NILC 10 (2011)

<sup>7</sup> NILC 14 (2012)

<sup>8</sup> NILC 16 (2013)

<sup>9</sup> NILC 17 (2013)

<sup>10</sup> NILC 18 (2014)

<sup>11</sup> Furthermore, there is currently no Chief Executive in post. An 'Interim Chief Executive' was appointed in May 2014 on a part time basis – see [www.nilawcommission.gov.uk](http://www.nilawcommission.gov.uk) (accessed 19 September 2014)

be made until the Department is in a position to announce its budget decisions, and the future of the Commission may well be influenced by the need for stringent economies.

Nevertheless I still believe there is value in the law commission model of law reform and in the remainder of this article I go on to set out my reasons. I start however, with some explanation of the history of law reform in Northern Ireland.

## 5. The history of law reform in Northern Ireland

Law reform in Northern Ireland (on any institutional basis) goes as far back as 1965 when the Office of Director of Law Reform was instituted within the (then) Ministry of Home Affairs<sup>12</sup>.

The Office of Law Reform within the Department of Finance and Personnel followed in 1974 (after short term arrangements for the 1973 power sharing administration). The Office then continued until the formation of the Commission in 2007. The Commission took over some of the staff of the Office and others went to the Departmental Solicitors Office (which acts for the Departments of the Executive) and elsewhere in the Northern Ireland Civil Service.

An earlier development (the initiative for which came from the Law Society of Northern Ireland) was the formation of the Law Reform Advisory Committee for Northern Ireland ('the Advisory Committee') in March 1989 chaired by a High Court Judge, with volunteer members from both branches of the legal profession and the universities and with a secretary and some research and administrative services from the Office of Law Reform.

Some further historical detail is contained in the Research Report by Professor Brice Dickson and Michael Hamilton in March 2000 *Re-forming Law Reform in Northern Ireland* forming part of the Review of Criminal Justice.<sup>13</sup>

So it may be thought that the institution of NILC in 2007<sup>14</sup> was a 're-forming'<sup>15</sup> of the law reform institutions of Northern Ireland: that NILC subsumed the role and duties of both the Office of Law Reform and the Advisory Committee, and that the main institutional change was that it was under the wing of and reported to firstly the Northern Ireland Office and then, on the devolution of policing and justice, to the DoJ in place of these roles being carried out by Department of Finance and Personnel.

My thesis is that such view fundamentally mis-understands the particular role that should be performed by a law commission as such, as compared with other institutional arrangements for law reform such as prevailed in Northern Ireland from 1965 to 2007.

## 6. Why have an independent Law Commission?

The other jurisdiction on the island of Ireland has enjoyed an independent law commission for now almost 40 years, as the Irish Law Reform Commission ('ILRC') was formed in 1975. In 2005 on its 30<sup>th</sup> Anniversary the former Chief Justice the Honourable Mr Justice Ronan Keane delivered a paper considering and celebrating the work of ILRC over that 30 year period.

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<sup>12</sup> This was in response, I understand, to the creation in 1965 for Great Britain of the Law Commission and the Scottish Law Commission. Ireland followed some ten years later with the creation of the Law Reform Commission of Ireland – based largely on the GB law commission model.

<sup>13</sup> See further Chapter 2 of the Report

<sup>14</sup> NILC was then constituted but did not commence public operation until March 2008 on the appointment of the Commissioners

<sup>15</sup> Note carefully the hyphen in the title of the March 2000 Report

However, he commenced by considering the nature and function of successful law reform bodies:

“First they must be independent of government. A body which is simply another branch of the executive will inevitably be perceived as being concerned with implementing whatever may be government policy at any particular time rather than bring forward proposals for law reform which, viewed objectively, can be seen as in the interests of society as a whole.”<sup>16</sup>

It seems to me that this is the mark which should distinguish NILC from the Office of Law Reform and the Advisory Committee. The point may well be made that both those bodies did distinguished work of benefit to Northern Ireland and that no-one can point to any partisan or other activity subservient to government on the part of either body. I agree. But it must be noted that both the Office and Advisory Committee carried out most of their work during the long regime of direct rule in Northern Ireland: a time during which the attention of local politicians was properly directed to other fundamental matters.

So in my view the Office of Law Reform/Advisory Committee model will no longer run effectively with directly elected Members in the Northern Ireland Assembly and Ministers in the Northern Ireland Executive, all with party manifestos and political policy commitments to implement. I return to this point later.

It may also be observed that Office/Advisory Committee dealt largely with matters of law reform that might be termed ‘lawyers law’ and I turn to this in the next section.

## **7. What is the nature of independent law reform?**

NILC as other law commissions is largely composed of lawyers<sup>17</sup> and the question arises as to whether at all a law reform body should concern itself with matters of policy or should restrain itself to matters that might be described as ‘lawyer’s law’?

Certainly the Advisory Committee in its First Programme of Law Reform stated that in considering its approach (among other considerations):

“. . .the Committee will concern itself primarily with ‘lawyers’ law’. In accordance with that principle its recommendations for reform of the civil law in Northern Ireland will be of a nature that can appropriately be put forward by a body of lawyers on the basis of legal principle and pragmatic common sense after due public consultation. The Committee emphasises that the sphere in which it should operate will be one which is not intended to involve controversial policy decisions or value judgments.”<sup>18</sup>

This emphasis, it may be argued, was prudent on the part of a body with the most limited of resources whose members were all in full time engagement in the law, whether in the judiciary, in the profession or in the university.

However, in the early days of the Law Commission in England and Wales, Mr Justice Scarman (as he then was), the first Chairman of the Commission, set out a bolder vision. He referred to a recent address by Lord Devlin which:-

“. . . drew a distinction between what [Lord Devlin] labelled ‘lawyers’ law reform’ and social or political law reform. When the law is changed in order to achieve a new social or political

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<sup>16</sup> The Keane Paper, p.6

<sup>17</sup> Though NILC has one ‘lay’ commissioner as well

<sup>18</sup> *First Programme of Law Reform* (LRAC No.1) 1990, p.2

objective, this [Lord Devlin] said was not lawyers' law reform; but when social and political objectives are agreed and it is found that the law is defective in carrying them out, this, [Lord Devlin] said, was properly described as law reform. If Lord Devlin was arguing for the existence of a special world of lawyers' law, I would respectfully disagree. There is no cosy little world of lawyers' law in which learned men may frolic without raising socially controversial issues."<sup>19</sup>

I would also subscribe to the view expressed by Lord Scarman that:

“ . . . the challenge of law reform is that it can only be successfully achieved by the combination of the lawyer's learning and the social awareness of the community.”<sup>20</sup>

We shall have to wait for the publication of Mr Hunter's Report for an assessment of how successfully NILC has carried out this in all its work and in the various Reports so far published.

## 8. Failure of full acknowledgement of NILC's operational independence

However, I am concerned that the DoJ currently does not fully recognise the operational independence of the Commission.

At the heart of relationship between the Department and the Commission is the 'Relationship Document' (available on the Commission's website)<sup>21</sup>. This Document :-

“ . . . notes and records [NILC's] overall aims, objectives and targets in support of DOJ's wider strategic aims,<sup>22</sup> including in particular:

- the delivery of a fair and impartial system of justice to the community in Northern Ireland;
- the delivery of justice effectively and efficiently; and
- the development of the law of Northern Ireland to ensure that it remains appropriate, fair and accessible to the community.
- the rules and guidelines relevant to the exercise of the Commission's functions, and duties;
- the conditions under which any public funds are paid to the Commission; and
- how the Commission is to be held to account for its performance.”<sup>23</sup>

It is my personal view that this is a constraint upon the proper exercise of independence by NILC. It also misunderstands the relationship of NILC with DoJ and with other Departments of the Executive and I deal with that in the next section.

Reverting to independence, certainly such independence is by no means absolute. The Document also quite properly provides as noted above for the conditions for funding for NILC and for

<sup>19</sup> *Law Reform The New Pattern* Lindsay Memorial Lectures at the University of Keele November 1967, London , Routledge & Keegan Paul, p.27

<sup>20</sup> *ibid*

<sup>21</sup> Accessed 28 August 2014

<sup>22</sup> My emphasis

<sup>23</sup> Relationship Document para 1.1.2

NILC to be held to account for its performance (and of course the Hunter Review is part of that process).

But the Document does seem to me to wrongly inhibit the operational independence of NILC. For instance, if a (future) Minister of Justice decreed that the ‘fair and impartial system of justice’ delivered ‘effectively and efficiently’ required a policy of ‘zero tolerance’ of criminal behaviour my fear would be that such Ministerial policy could be wielded to constrain NILC from project research that such a policy was ineffective or (for stated reasons) undesirable. A law commission does not have independence, if it cannot perform such challenge function.

It is the case that the Document is expressed not to alter or detract from any legal powers or responsibilities of the Commission<sup>24</sup> but it seems to me that these stipulations of the Document are a chill factor on NILC’s proper operational independence.

## 9. The relationship of NILC with DoJ and other government departments

The position is set out in the Relationship Document:

“Its corporate governance and accountability fall to the DoJ but the Commission’s advisory functions for Northern Ireland law reform are to all the Departments of the Northern Ireland Executive and (where appropriate) to Government Departments at Westminster (where any proposed law reform relates to an excepted or reserved matter). The Reports of the Commission must be laid before the Northern Ireland Assembly (‘the Assembly’) and, where appropriate as above, before each House of Parliament.”<sup>25</sup>

It may be argued that under section 52 (1) of the 2002 Act (as amended) gives the DoJ the dominant role, as NILC must send its Reports to DoJ. But firstly this does not apply to Reports relating to excepted or reserved matters<sup>26</sup>: the Commission must under section 52(3) of the Act send any Reports relating to excepted or reserved matters to the Secretary of State. Secondly, there is an express statutory duty on the DoJ under section 52(2) of the Act that it must lay before the Assembly a copy of each such Report received by it. (There is an equivalent duty on the Secretary of State under section 52(4) of the Act to lay any Reports received by her before Parliament.)

While these are technical provisions, they are important in principle as well as detail. They connote that the Reports do not become the ‘property’ of the Minister of the DoJ (or of the Secretary of State). Neither has any power to require any amendment before laying nor to ‘bury’ any Report without laying.

This seems to me to be right in regard to the principle of independence (as well of course as being the law to be observed). But it also is felicitous in the particular circumstances of the division of powers between the Departments of the Northern Ireland Executive (under the power sharing arrangements of the Northern Ireland Act 1998). Given the division of political control among the various Departments, it would be incongruous if a NILC Report on, for instance, a matter within the purview of the Department of the Environment came under the political control of the Minister for Justice by reason of DoJ asserting dominance of control over all aspects of the work of NILC.

If there are proposals for change in the institutional structures of NILC, I trust that this principle of independence from DoJ operational control, and of NILC providing the reform function to all Departments (and to Westminster in the case of excepted or reserved matters), will be preserved.

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<sup>24</sup> *ibid*

<sup>25</sup> para 1.1.1

<sup>26</sup> Those legislative areas which are still outside the legislative competence of the Northern Ireland Assembly

That said, I am content that DoJ should perform the co-ordinating role in approval of the Programmes of Law Reform as submitted by NILC under the 2002 Act. I also see no reason to alter the general financial supervisory role that DoJ performs in regard to NILC.

## 10. Concluding note

I would wish to end as I started with something positive. So I quote from a note taken of what I said (in my Commissioner role) at the DFP Committee of the Northern Ireland Assembly on 12 October 2011

“The remit of the Commission was for systematic law reform. While this involved considerable technical expertise in the law it did not imply that law reform was the exclusive preserve of technical experts. [Mr Faris] suggested that there are several elements involved in law reform:

- i. Technical expertise
- ii. Thorough research
- iii. Widespread consultation

All this properly carried out should lead to our independent evaluation of how law reform may serve society’s needs. This of course necessitates a balancing exercise in regard to the various legitimate needs and interests of various sections of society and the community which are revealed in the course of the law reform project.

[Mr Faris] suggested that this meant that the members of the Committee (and the Assembly and society generally) had the right to expect from the Commission an independent and informed perspective on how the balance should be struck on any law reform issue. He confirmed that the Commission would not succumb to any sectional or political lobbying in that regard.

[Mr Faris] concluded by pointing out that it was ultimately for the elected members of the Assembly to make the final decision as to whether or not there should be law reform on any particular issue but that in making their decisions the Assembly members should be entitled to rely on the work of the Commission being independent, technically sound, the product of our widespread consultation and containing our independent evaluation of how the balance should be struck on each issue arising in each of our law reform projects.”

This was my best attempt over four years of service as a Commissioner of NILC to strike the right balance between the need in the overall public interest of Northern Ireland for law commissioners with operational independence but respecting the democratic mandate of the members of the Assembly.

I do hope it will prove possible to protect the essentials of this model for the future well being and development of Northern Ireland’s legal jurisdiction.

It would in my view be detrimental to Northern Ireland’s legal jurisdiction if we were the sole jurisdiction within the United Kingdom and Ireland (and within the Commonwealth) to water down the commitment to such independent law reform institution.

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