



Northern Ireland  
**Law Commission**  
*promoting law reform in Northern Ireland*

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**CONSULTATION PAPER  
FIRST PROGRAMME OF LAW REFORM**

**August 2008**

## CONSULTATION ON FIRST PROGRAMME OF LAW REFORM

### Introduction

On Tuesday 1<sup>st</sup> April 2008 the formal launch of the new Northern Ireland Law Commission took place in its offices at Linum Chambers, Bedford Square, Bedford Street, Belfast (beside the Invest Northern Ireland headquarters building).

At the launch reception the Chairman Mr Justice Morgan said:

*“The Commission is an independent statutory body which is charged with the responsibility of reviewing and systematically developing the law of Northern Ireland. The work of the Commission, therefore, has the potential to impact on the lives of many citizens in Northern Ireland and the establishment of the Commission represents an opportunity to achieve local solutions for technically complex areas where law reform agencies have shown themselves effective in other jurisdictions.”*

The Commission was established under the provisions of the Justice (Northern Ireland) Act 2002. Section 51(1) sets out the duties of the Commission as follows:

“The Commission must keep under review the law of Northern Ireland with a view to its systematic development and reform, including in particular by -

- (a) codification,
- (b) the elimination of anomalies,
- (c) the repeal of legislation which is no longer of practical utility, and
- (d) the reduction of the number of separate legislative provisions,

and generally by simplifying and modernising it.”

The Commission must prepare and submit to the Secretary of State programmes for law reform. (Further details are below)

We wish to proceed as soon as possible with our First Programme. Accordingly, through this consultation we seek views and advice on the proposals for the Programme.

We set out a list of proposals for comments but please do not feel restricted to that, and if you have any other suggestions do let us know.

The next sections give some detail in regard to the Commission and principles that we consider important for our work.

## The Commission

The Commission consists of the Chairman, and four Commissioners (all the posts being part-time). The Commissioners are: Neil Faris (solicitor), Prof Sean Doran (barrister), Robert (Bobby) Hunniford – (lay commissioner).

An academic commissioner, Dr Venkat Iyer, has been appointed and is due to take up his position on 1 September 2008.

The Chief Executive is Judena Goldring who was Director of Law Reform in the Dept of Finance & Personnel and then Director of Environmental Policy and Sustainable Development in the Dept of the Environment.

The legal staff are Sarah Witchell, Diane Drennan, Leigh McDowell and Maria Dougan. The recruitment of other legal staff will take place as projects are commenced.

The launch of the Commission is an event of significance for Northern Ireland as one of the world's smallest common law jurisdictions. It has the potential – if we seize the opportunity – to close, or at least lessen, the gap between the public and the law.

There may be many areas where the law may be failing the public of Northern Ireland. So this consultation document is addressed to all who may be able to help us in the Commission in addressing key areas on which we should concentrate.

We particularly seek the views and advice of those who – in any way - work in the front line in dealing with the public to assist them in their legal problems together with the views of the general public.

## Independence

In all of this it is important to emphasise the independence of the Commission. Mr Justice Morgan said this in his launch speech:

*“ . . . it will be important for the Commission to establish its independence. That independence will be demonstrated by the thoroughness of the Commission's research in relation to individual projects, the rigour with which it examines the materials generated and the quality of the analysis leading to any particular proposal. Any proposal put forward by the Commission will be the product of evidence based analysis. It will be for the Commission to establish those qualities in order to establish its right to be compared with its peers and to ensure that it has the confidence of the public.”*

## The Commission and the public interest

There are advantages from the fact that the Chairman and the Commissioners are part-time. Thus those who are practising lawyers will continue their careers. Their work at the coal face should help them to keep their feet on the ground for realistic and achievable law reform.

One of the innovative aspects of the Commission is that we have a 'lay commissioner'. This emphasises that law reform is not to be a 'cosy little world of lawyer's law'. Lord Scarman rightly demolished that notion in his Lindsay Memorial Lecture at the University of Keele over 40 years ago in 1967. We believe it is no less true today that

as he put it ‘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’.

### The background

Mr Justice Morgan set this out at the launch:

*“Independent law reform has been something of a late developer in this jurisdiction. Law commissions were established by the newly elected Labour government in 1965 in England and Wales and Scotland and in 1975 the Irish government established the Law Reform Commission. It was not until 1989 that a Law Reform Advisory Committee was established in this jurisdiction with a remit confined to civil law. Despite its modest budget with the support of various enthusiastic Directors of the Office of Law Reform and secretaries of the Committee a number of whom are here today it made a considerable contribution to the development of legislative change in this jurisdiction. Indeed during the tenure of Paul Girvan as the chair of the Committee it could rightly be said that it probably represented the best value for money law reform agency in the world. That is quite a reputation to live up to.”*

It is in that spirit that the Commission presents this Consultation Document.

### The preparation of a programme of law reform

Under the Justice (Northern Ireland) Act 2002 the Commission must prepare and submit to the Secretary of State from time to time programmes for the examination of different branches of the law of Northern Ireland with a view to reform, including recommendations as to the agency (whether itself or another body) by which any such examination should be carried out. In addition, the legislation provides for the Commission to prepare from time to time at the request of the Secretary of State comprehensive programmes of consolidation and repeal of legislation.

The Secretary of State for Northern Ireland must consult the Lord Chancellor, the First Minister and Deputy First Minister and the Attorney General for Northern Ireland before approving any programme prepared by the Commission. After approval, the Commission then sends a copy of the approved programme to the First Minister and Deputy First Minister and they, acting jointly, lay it before the Assembly. The Secretary of State lays a copy before each House of Parliament. The Commission then arranges for the document to be published. (These statutory requirements reflect the current role of the Secretary of State for Northern Ireland and will be revised to take account of the devolution of justice to a Northern Ireland Department).

### Programme period

It is intended the Programme will run from November 2008 to March 2011. This period coincides with the Government’s Comprehensive Spending Review and allows the Second Programme to align with the next round of the Review. It is expected therefore that the Second Programme will run for three years from April 2011 to March 2014 and consultation on it will begin in 2010. The timing may depend also on the devolution of justice to a Northern Ireland department.

## The consultation process

The process of drawing up and consulting on this First Programme is more limited than that which the Commission envisages will take place for the Second Programme. This approach reflects a number of factors:

- ∞ first, the recent establishment of the Commission and the need for it to embark as soon as possible on carrying out its core function of reviewing areas of the law and proposing reforms;
- ∞ second, the fact that the Northern Ireland Executive has already requested the Commission to undertake a review of aspects of the land law of Northern Ireland (this large project is already underway within the Commission);
- ∞ and third, it is appropriate to consider projects begun by the previous law reform body in Northern Ireland, the Law Reform Advisory Committee (LRAC) and unfinished before the abolition of that organisation in September 2006. With respect to the work of the LRAC, the vulnerable witnesses in civil cases project was particularly well advanced and there is a good case for completing this work. (See below for an account of the main issues relating to the project).

Within current resource levels, the Commission can realistically take on a maximum of three or four significant topics in its First Programme. The land law project is already underway and the bail and vulnerable witnesses in civil cases projects have strong supporting arguments for inclusion. This leaves scope for inclusion of a limited number of other projects.

The Commission has decided therefore to rely mainly on electronic means for publication and response to this First Programme (although this will not preclude other modes of consultation such as meetings with key stakeholders). We are publishing this short consultation paper with the list of potential topics on our website and alerting all those on our consultation list via electronic means to the commencement of the consultation exercise. The list includes:

- ∞ representative bodies of the legal professions,
- ∞ Northern Ireland Departments including their Agencies and associated public bodies,
- ∞ local authorities,
- ∞ the law schools in the Queens University of Belfast and the University of Ulster,
- ∞ the Northern Ireland Human Rights Commission, the Equality Commission of Northern Ireland and the Children's Commissioner,
- ∞ representative bodies from the business, voluntary and community sectors,
- ∞ elected representatives and political parties.

The Commission also has a statutory duty to liaise with the (English) Law Commission, the Scottish Law Commission and the Irish Law Reform Commission.

The Northern Ireland Law Commission intends to commence a full public consultation that will include more varied and diverse consultation methods in 2010 on the contents of its Second Programme.

A core aim of the Commission in drawing up this First Programme is to put in place as soon as possible a programme of law reform that has the potential – if government accepts our recommendations – to deliver real benefits to the community in Northern Ireland.

## Commission work outside the Programme

Section 51(2) (e) of the Justice (Northern Ireland) Act 2002 requires the Commission to:-

“provide advice and information to government departments and, with the consent of the Secretary of State, to Northern Ireland departments and other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law of Northern Ireland”.

The experience of the Scottish Law Commission is instructive in this regard. In its Third Programme the Scottish Law Commission refers to non-programme work – that is, work outside its own agreed programme, largely comprised of work alongside the Law Commission including joint projects, contribution to Law Commission papers, work in response to and taking account of Law Commission proposals – and notes how it affects resources available for programme work.

The Scottish Law Commission also deals with requests from Scottish Ministers and the Secretary of State for Scotland about specific matters – each one with a specific response date.

The Scottish Law Commission also refers to the practice of supporting, on request, officials who are responsible for implementing their reports. The Irish Law Reform Commission also deals with requests from Ministers and assists on occasion Departmental officials.

Similarly the Northern Ireland Law Commission can reasonably expect a certain level of non-Programme work which will have to be responded to and if necessary prioritised and managed within the modest resources available.

## Project selection criteria

We have established project selection criteria to assist us to make consistent and principled decisions as to the projects that should be included in our programme of reform. These are set out below:

### 1. Importance:

- ∞ the extent to which the law is unsatisfactory (for example, unfair, unduly complex, unclear, inaccessible or outdated);
- ∞ the scale of the problem, whether the area of law affects a wide section of the public or whether it has a particular impact on a narrower section of the public; and
- ∞ the potential benefits and costs likely to accrue to the community from undertaking reform, consolidation or repeal of the law.

### 2. Suitability:

- ∞ whether changes and improvements in the law can appropriately be put forward by a body such as the Commission after research and consultation. This would tend to exclude subjects where the considerations are shaped primarily by political judgements; or
- ∞ whether another body is better placed to undertake the project.

### 3. Resources:

- ∞ the qualification and experience of the Commissioners and their legal staff;
- ∞ the funding likely to be available to the Commission; and
- ∞ the need for a good mix of projects in terms of the scale and timing in order to achieve a balanced workload among Commissioners and to facilitate effective management of the Programme.

### Project Proposals

We now set out for consultation responses our list of potential proposals for projects. The land law project as it is already underway will be included in the Programme and we set out some explanatory background in regard to that project.

It seems to us that the Vulnerable Witnesses in Civil Litigation project is a strong candidate for the Programme by reason of the work the Law Reform Advisory Committee already carried out on that project.

The Bail Project (item 2 below) is also a strong candidate for the Programme because of the importance of the subject within the criminal justice system and the need for accessible legislation in this area. Helpfully, this project fits in with the experience and expertise of two of the Commissioners. The Commission has therefore begun some preliminary scoping work on bail law and practice.

We have also begun a scoping paper on a number of environmental law topics to assess whether any of them are suitable candidates for adoption as a project by the Commission.

We seek your views on these matters and also on any other project that you feel should be included in the Programme.

The current list then is as follows:

### Project already underway at request of Northern Ireland Executive

#### **1. *Reform of aspects of land law***

This is an example of the kind of law reform that can bring practical benefits to a wide range of people in either their domestic or business lives.

Buying and selling ones home is the most important financial transaction that most of us ever undertake – and it marks key stages in our lives. The law in this area should therefore be as straightforward and as easily understood as possible.

It is equally essential for all forms of business in Northern Ireland that property transactions in respect of commercial premises should take place in a way that is cost effective and responsive to the modern needs of business and the economic community.

However, the law governing this area of domestic and economic activity is an uncoordinated amalgam of part 19<sup>th</sup> century and part 20<sup>th</sup> century legislation (with even more antique statutes thrown in). Added to that there is a mass of case law from judges from the Victorian era onwards. The result is that the law has in many ways failed to keep up with the needs of a modern society and economy. There is therefore an urgent need for reforms which will modernise and simplify the land law of Northern Ireland.



## Project 2 (as mentioned above)

### **2. *The law relating to bail***

Unlike the position in England and the Republic of Ireland we do not have in Northern Ireland a specific piece of legislation that codifies the law in relation to bail. The English legislation dates back to 1976 and that in the Republic of Ireland to 1965. Provisions governing aspects of bail are to be found in a number of different statutory sources.

The result is a piecemeal approach to a subject of great importance in the context of the administration of criminal justice. There is an argument for the enactment of a unifying piece of legislation that brings together the various provisions that currently relate to the subject and also that defines for the first time in this jurisdiction the specific criteria governing decisions on bail both by the police and by the courts.

This would be an opportunity not only to consolidate the existing law but also to assess whether there are any weaknesses in the current system of bail.

The project would include a specific consideration of existing remand and bail provisions in respect of young persons presently governed by Article 12 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

## Projects 3 and 4 are previous Law Reform Advisory Committee projects

### **3. *Vulnerable witnesses in civil cases***

The reform of the law relating to vulnerable witnesses in civil law cases also offers the potential for real benefits for people who face the trauma for them of civil litigation in the courts. The general thrust of the reforms would be to extend the modern concepts developed within the criminal law cases for the protection of vulnerable witnesses in civil law court cases. This kind of improved protection would help in particular victims of domestic violence involved in family law cases.

Traditionally vulnerable witnesses in both civil and criminal cases have been expected to give evidence under the same conditions as all other witnesses; that is, in person, before a public forum. The principle of orality has traditionally been seen as a fundamental aspect of the adversarial model of proof and is grounded on the premise that live evidence affords an opportunity for the tribunal of fact to observe the demeanour of the witness and, in turn, to form an accurate opinion on his or her credibility.

Over the course of the past two decades special protections and services have been introduced for such witnesses in criminal proceedings in order to enhance the quality of their evidence. The Criminal Evidence (Northern Ireland) Order 1999 introduced a wide range of “special measures” to enable vulnerable witnesses to give better evidence in criminal cases. Similar legislation was enacted in England and Wales under the provisions of the Youth, Justice and Criminal Evidence Act 1999. In Scotland legislation has been enacted to deal with the protection of vulnerable witnesses in criminal and civil cases under the provisions of Vulnerable Witnesses (Scotland) Act 2004.



In contrast to the comparatively rapid development of protections that have been developed within the criminal justice system, there has been very little interest in the protections available to vulnerable witnesses in civil cases. At first glance it may appear that the problems facing vulnerable witnesses in civil cases are considerably less acute than in criminal cases. Yet civil justice, like criminal justice, depends upon witnesses being willing to give evidence, and being able to testify clearly and as effectively as possible. We need to examine whether the type of protections and special measures provided to certain witnesses in criminal cases should also be afforded to vulnerable witnesses in civil cases in order to enable better evidence to come before the court.

#### **4. *Conveyancing law reform for flat developments***

Flat living is now common across Northern Ireland. It is also common for people to buy rather than rent flats (and flats are also bought as an investment for renting out.) When the conveyancing of flats is properly carried out there is a structure of legal relationships to protect the rights of each flat owner and to define the responsibilities of each flat owner with the other flat owners in the development and with the management company of the development. But this creates a complicated web of legal relationships and is difficult for the flat owners to understand and to operate thereafter.

It may also be anticipated that serious problems are in store for the repair and renewal of flat developments if the management arrangements do not include any or adequate provision to secure funds for the future perhaps very expensive structural repairs and renewals that time will inevitably require.

Further problems accumulate if the conveyancing process – because of these various difficulties – is not thoroughly carried out by competent conveyancing solicitors when the original legal arrangements are being put in place. In particular, these can prejudice the sale on of a flat if lenders (such as banks and building societies) indicate unhappiness with the legal arrangements.

Some of the problems encountered in this area are administrative rather than ones that might be dealt with through substantive law reform. In the Republic of Ireland a number of initiatives have recently been taken to address these sorts of issues. They include the publication of sustainability and planning guidelines aimed directly at multi-unit developments, the publication by the Irish Home Builders Association of a Code of Practice for Multi-Unit Developments and steps taken by the National Consumer Agency with industry partners to deal with service charges and related consumer issues. Most recently in June 2008 the Irish Law Reform Commission issued its Report on Multi-Unit Developments. The Report takes account of the new initiatives and recommends legislative reform to ‘complement existing laws and planned reforms.’

Careful consideration of these developments and the Law Reform Commission’s report is necessary before we can decide whether it would be appropriate for us to take on a project in this area.

## **5. Landlord and tenant law reform**

Given the increase in the private rental market the legal relationship between landlord and tenant requires review to modernise and simplify the law.

This is no less important for business in Northern Ireland with the increasing complexity (and length) of current commercial leases.

This project if adopted would follow on from the land law project.

## **6. Environmental law**

Recent years have seen a major increase of new legislation and regulation relating to the environment. Most of this is driven by the requirements of European Union law.

The rapid growth of legislation and the urgency with much of it was transposed in Northern Ireland has required the introduction of numerous sets of primary and secondary provisions with each measure introducing cross amendments and further refinements of legal obligations. Stakeholders and the environmental regulator (EHS) therefore face a highly fragmented and unwieldy legal landscape making it difficult to accurately ascertain the nature of their legal obligations. Given the need for the Department of the Environment to focus on ensuring transposition, there has been little opportunity for statutory consolidation. Undertaking a consolidation of this legislative framework would represent an important contribution to implementing the commitments made by the Northern Ireland Minister of the Environment and the UK government to ensuring better environmental regulation. A consolidation exercise would simplify the regulatory framework for all concerned, clarify legal positions, and most likely alleviate risks of litigation arising from disputed understanding of the regulatory framework.

The proposed consolidation programme would be consistent with the Minister of the Environment's recent statement in the Assembly setting out a strong commitment to ensuring better regulation. Of course the proposed consolidation programme would not involve a deviation from or change to the substantive policy position reflected in the legislative provisions.

There have also been developments in England and Wales in relation to the use of civil penalties within environmental regulation. The focus on risk based regulation and associated introduction of alternatives to criminal sanction is being embraced as a key dimension to the UK's commitment to better environmental regulation. Legislation designed to confer the Environment Agency with more flexible powers to impose a range of administrative penalties is currently being considered by Parliament in England and Wales. The concept of environmental permitting has also been developed in England and Wales in the context of and as part of the wider better regulation agenda. The new permitting system introduced there combines pollution prevention and control (PPC) permits and waste management licensing (WML) into a single, modern, simpler system.

The Commission in discussion with the Department of the Environment has therefore decided to carry out an initial examination of a number of topics in the area of environmental law and practice. These topics are:

1. Consolidation and rationalisation of current Northern Ireland environmental protection legislation primarily in the areas of waste management, water and air pollution control;
2. Provision of a uniform enforcement regime through consolidation and rationalisation of enforcement powers (powers of entry, appeals, information, charging etc) and appeal rights in Northern Ireland environmental protection legislation primarily in the areas of waste management, water and air pollution control;
3. The use of a civil remedies regime in environmental regulation in Northern Ireland; and
4. The role of environmental permitting within environmental regulation in Northern Ireland.

The exercise will take the form of a scoping paper. The purpose of the scoping paper is to consider the potential for one or more of these topics to be taken on as a law reform project by the Commission. The paper will examine the issues involved and using the Commission's project selection criteria assess the suitability of the topic for adoption as a project by the Commission.

The suggestion below emerged from a consultation with the Northern Ireland judiciary in 2006. (A number of other suggestions were proposed and referred by the Commission to more appropriate bodies for consideration.)

***7. Legislation to provide for cases where a person is in secure accommodation to be dealt with by video link.***

Secure accommodation is dealt with under Article 44 of the Children (Northern Ireland) Order 1995. It is defined as accommodation for the purpose of restricting liberty. There is confusion surrounding the ability of courts to deal with these applications in the absence of the child. There is need for a review of the law in this area to clarify the circumstances when applications for a secure accommodation order may be dealt with by video link having regard to the child's rights under Article 6 of the European Convention of Human Rights and Article 12 of the UN Convention on the Rights of the Child. It may be that this issue will not require legislation but may be dealt with by way of a protocol that provides clarification for the courts and parties involved.

Equality Impact Assessment

The Commission undertook a Preliminary Equality Impact Assessment which indicated that the proposals will have a neutral effect on equality of opportunity and good relations, neither promoting nor adversely affecting them. A full EQIA is therefore not considered necessary.

## Responses

Any queries and responses to our list of projects should be forwarded for attention of:-

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This consultation shall run until 21<sup>st</sup> November 2008. All responses should therefore be submitted by that date. Responses are welcomed by post and e-mail and responses will be acknowledged on receipt.

An electronic version of this document is available on the Northern Ireland Law Commission website [www.nilawcommission.gov.uk](http://www.nilawcommission.gov.uk). Hard copies will be posted on request.

If this format does not meet your needs please contact us.

## Confidentiality of responses

Unless individual respondents specifically indicate that they wish their response to be treated in confidence or the Commission considers it appropriate to do so, then we will treat all responses as public documents in accordance with the Freedom of Information Act. We may attribute comments and include a list of all respondents' names in any final report we publish. If you wish your response to be treated in confidence please let us know.