

# **The Northern Ireland Law Commission - Reflections on the early years**

**Presentation by The Right Honourable Sir Declan Morgan,  
Lord Chief Justice**

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[1] I want to start off by saying how pleased I am to have the opportunity to speak at the commission's second conference. I became involved in law reform in Northern Ireland when I was appointed chairman of the Law Reform Advisory Committee in 2005. During the early part of 2006 I joined the project board which was charged with establishing a law commission. On the establishment of the commission I took up my appointment as its first chairman and stayed in that position until my appointment to my present post in 2009.

[2] I would like to take this opportunity to repeat my thanks to those with whom I worked during that period for their commitment in driving forward the work of the commission and their perseverance in the face of what seemed impossible obstacles particularly towards the start of the commission's work. I am grateful to all of those who wished me well on my departure and if there was a sigh of relief at least it wasn't audible in my hearing!

[3] I envy my successor the opportunity to shape and develop a role for independent law reform in this jurisdiction. That is a challenging task to take on but I have no doubt that it is one to which he is equal. In this short talk I hope to venture some general thoughts which might be helpful. I hope they will be viewed as constructive. They are my reflections on how the commission might fulfil its objectives and therefore how it might best make its contribution.

[4] As it happens I chaired the law commission's first conference in October 2008. I thought it would be helpful to read over my introductory notes in preparation for today. A lot changes in the course of two years but it is worth remembering just where the commission was at that stage. The chief executive had been in place for one year. The commissioners had been in place for a matter of months. The commission had just published a consultation paper on the first work programme. The conference focused on land law and the aspiration was to publish a consultation paper on that topic in 2009.

[5] Since then consultation papers on vulnerable witnesses, business tenancies and bail have been published as well as 2 consultation papers from the landlaw team. In addition the commission will publish before the end of the

year a final report on land law and ground rents which will include draft legislation. The commission has also begun the process of consulting on its second work programme.

[6] That leads me to examine what was it that the commission sought to achieve at that early stage and to question whether or not those objectives have been secured. In order to answer that question it is important to realise the background against which the commission was established. The recommendation for the establishment of the law commission arose from the Review of the Criminal Justice System in Northern Ireland and in particular a research report produced by Brice Dickson and Michael Hamilton in March 2000. It is, however, of some significance that the establishment of the commission was the last of the criminal justice review recommendations implemented by government. It took three references from the oversight Commissioner before the government committed to the establishment of the commission. It has always been clear, therefore, to those involved in the early days of the commission that it would have to justify its existence.

[7] In order to demonstrate the value the commission could bring to law reform in Northern Ireland it was considered strategically important to ensure that there was a mix of programmes which could establish the commission's competence and reputation in its first programme. In line with that objective it was felt important to demonstrate that the commission could develop policy and strategy in relatively complicated areas of law and bring forward codified legislative solutions in line with the thinking of those who carried out the review. It is therefore of the utmost importance that the consultation papers and final reports with legislation when produced are of the high standard which is required if implementation is to be achieved. A critical part in that process is the opportunity to communicate with and listen to those who are involved in the issues. That is why events like today are so important.

[8] Although it was always clear that the commission had to justify its existence there is no doubt that in the present public spending climate the onus to demonstrate value for public money is a significant factor. I find it difficult to see how the commission would be judged as providing value for money if its projects do not achieve implementation. In particular given that hundreds of thousands of pounds will have been spent on the land law and bail projects by the time of their completion a failure to implement those projects would surely raise serious issues about the justification for the commission. Quite apart from the potential waste of public money if the projects were not to be implemented one has to recognise the waste of valuable time and effort by commissioners, specialist lawyers and others if these reports are simply to adorn shelves in libraries and offices.

[9] The starting point in this discussion was the attempt to identify how the commission would justify its existence. The clear conclusion that I have reached is that in the absence of implementation that justification will be difficult to find. The onus to find the justification is not, however, solely that of the commission. The work programme upon which these vast sums of public money have been spent was approved by the predecessor of the present Department of Justice. I have been encouraged by conversations I have had with the Minister and the chairman of the commission that robust arrangements are being put in place to secure a satisfactory outcome. In particular for any new project which might require a legislative solution there is much to be said for a quasi contractual arrangement where the commissioning Department undertakes to find legislative time in the coming session if the proposal is accepted by it. Where no such satisfactory undertaking is offered it is difficult to see why the project should advance. Put simply in my view legislative implementation of the commission's early work is critical to its future.

[10] I have spent a little time discussing the extent to which legislative implementation of the commission's early work is critical to its future but I want now to focus on some of the matters which it might be worth considering in relation to that future. There are really 2 elements that I wanted to consider. The first is the structure which might be appropriate for a law commission in this jurisdiction and the second is the substance of how such a commission might deliver law reform in the future.

[11] Having been involved in the establishment of the commission I can attest to the fact that virtually none of those involved had any direct experience of how such a commission worked. Those who devised the format visited and spoke to the commissions in England, Scotland and Ireland and the outcome was a GB light version for Northern Ireland. I want to suggest that for law reformers this was rather a timid solution and little consideration appears to have been given to alternative structures for the delivery of effective independent law reform.

[12] This is an opportune time to reflect on these issues. The present commissioners have been in office for more than 2 years and are in a position to judge the present structures. In 3 years all of them will be gone so they would have no selfish interest in securing any particular structural outcome since it will not affect them. They are, therefore, ideally placed to reflect on this issue and I am aware that those who were responsible for establishing the commission anticipated such a review around this time.

[13] There has been a lot of ink spilled in considering the features of a modern law reform commission. Those which all will readily accept are permanence, independence and first class scholarship thereby making the product authoritative. There is also, however, a clear preponderance of support for the

view that a standing law reform commission needs at least some full time commissioners and a critical mass of excellent research staff if high quality product is to be achieved. Of course the cost of such commissions, particularly in a small jurisdiction like ours, might well be prohibitive and it is of some significance that the various commissions in Australia and the Canadian commissions ceased to exist in the 1980s and early 1990s because of funding pressures. Ronan Keane's lecture on the occasion of the 30<sup>th</sup> anniversary of the Law Reform Commission in Dublin was interesting for its consideration of the legal position of the Irish commission when all of the commissioners had retired and the government declined to appoint any new commissioners to it for over 2 years.

[14] The response for a number of these commissions has been to develop a new model where the commission is the responsibility of a joint enterprise between the government, the university sector and the professions. This model has worked well in Alberta where the commission is actually housed within the university and in Tasmania where size was clearly a factor. No doubt the sceptics among us will contend that there is likely to be no appetite for a constructive consensual approach with such a wide variety of interests but I wonder whether an innovative approach of this kind is not likely to produce a more effective outcome than aping our bigger cousins across the sea. The real point, however, is that if ever there should be a root and branch review of the structures of an organisation it should surely occur within a law commission where the freedom to think laterally should be fundamental to the ethos of the organisation.

[15] A further reason for considering such an approach is the argument that the needs of a modern law reform commission now require a generalist and interdisciplinary dimension. Specialist lawyers will always be required for particular projects but the standing complement should be flexible. The systemic complexity of modern society calls for interdisciplinary work on research. To some extent the bail project is an example of that. That breadth and range of skills might be more easily found in this jurisdiction through the model I have discussed.

[16] Of course just as I have suggested that one should be careful about importing the GB model into a small jurisdiction like Northern Ireland one should perhaps be even more careful about the importation of models from other jurisdictions with different traditions. The issue, however, is whether the commission has secured the involvement on an institutional basis of the universities and the professions rather than the involvement of individuals from those groups. If it has not can we really afford to not to tap this well of talent?

[17] At this stage you are probably beginning to appreciate why the chief executive and the commissioners were not altogether distressed to wave me

goodbye. It is bad enough trying to get on with your project work without being asked to consider turning your systems upside down. I will therefore be relatively brief on the last point which I wish to suggest for consideration.

[18] I have already spent some time earlier in this short paper looking at the importance of legislative implementation. I have no doubt that the strategy of demonstrating that as a commission we could achieve high quality outputs was correct. If those could not be achieved we had no entitlement to continue. On the assumption that the commission passes the quality hurdle I now want to examine whether the same strategy is appropriate for the future.

[19] It is important to recognise that the legislative structures in place in Northern Ireland reflect what are referred to as the post conflict arrangements which have enabled political debate to evolve. The structures for scrutiny of proposed legislation are time consuming. The timescale for implementation is extended. In the case of the land law project it will not be considered by the Assembly committee until after the next election in May 2011 even if approved. Implementation will be well into 2012 at best. For bail implementation will be at least 2013. There are very few projects where one can be confident of keeping public and ministerial support for a period of 5 years or more against a background of changing Ministers and parties. I want to suggest, therefore, that there is much to be said for outcomes which do not require legislative solutions.

[20] Justice systems can be influenced by case management systems, protocols and Rules all of which are much more easily implemented. An example is the protocol drafted by the Law Reform Advisory Committee on provision for family and dependant claims. In Australia the law reform bodies have looked at professional association rules with a view to securing public benefit. Protocols might enable the commission to respond quickly to pressing social problems in the present economic climate. The protocol on repossessions in the High Court is an example. The Law Commission in England and Wales produced guidance for bail decision takers and their advisers after the implementation of the Human Rights Act.

[21] These options allow a law reform agency to be quick on its feet in responding to social issues. If the commission is minded to consider this option should there not be a conversation around the second programme consultation with the NGOs and voluntary bodies looking at the areas where this might bite? Is this not a proper example of the commission giving direction to the emergence of the second programme?

[22] I confess to having enjoyed this brief return to the work and role of the law commission. It has the opportunity to play an important role in our society. There are exciting options out there and the issues I have raised here are in my view worthy of wider discussion which will only raise the profile of

the commission. I wish all in the commission well in the interesting times ahead.