Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Second Programme of Law Reform

May 2012 to March 2015

NILC 11 (2012)

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THE NORTHERN IRELAND LAW COMMISSION

INTRODUCTION

As Chairman of the Northern Ireland Law Commission ("*the Commission"*), it is my great pleasure to formally request the Minister for Justice, on behalf of the Department of Justice ("*the Department*"), to lay before the Northern Ireland Assembly the Commission's Second Programme of Law Reform (May 2012-March 2015). The obligation imposed on the Department to lay this Programme before the Northern Ireland Assembly is a statutory one, enshrined in Section 52(2) of the Justice (Northern Ireland) Act 2002, as amended ("*the 2002 Act*"). The Department is the sponsoring agency vis-à-vis the Commission.

Statutory Remit and Framework

The Commission is an independent statutory body, established and governed by Sections 50-52 of and Schedule 9 to the 2002 Act. The creation of the Commission is one of the significant reforms of the Northern Ireland legal system affected by the 2002 Act. By Section 50, the Commission is a body corporate, consisting of a Chairman and four Commissioners appointed by the Minister. Pursuant to Section 51 of the 2002 Act, the Commission is obliged to keep under review the law of Northern Ireland with a view to its systematic development and reform. Specifically, the methods prescribed for the performance of this overarching duty are codification, the elimination of anomalies, the repeal of unused legislation and the reduction of the number of separate legislative provisions. Section 51 further provides that the Commission should undertake the simplification and modernisation of the law of Northern Ireland.

Within the ambit of the broad statutory remit set out above, the Commission has certain specific statutory obligations. These are:

(a) To consider any proposals made for the reform of the law of Northern Ireland.

(b) To prepare and submit to the Minister, periodically, law reform programmes.

(c) To make recommendations to the Minister about law reform programmes and to pursue such programmes as are duly approved.

(d) Within the framework of such programmes to formulate, by means of draft legislation or otherwise, law reform proposals.

(e) Pursuant to any request of the Minister to prepare, periodically, comprehensive programmes of consolidation and repeal of legislation.

(f) To provide advice and information (i) to Northern Ireland Departments and (ii) with the consent of the Department of Justice, to Departments of the Government of the United Kingdom and other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law of Northern Ireland.

(g) To obtain such information about the legal systems of such countries as appears to the Commission likely to facilitate the performance of its other duties.

The Commission is also obliged by statute to transmit to the Department:

(a) An Annual Report
(b) Its law reform proposals, upon completion of each project
(c) Each law reform programme approved by the Minister.

All of these must be laid by the Department before the Northern Ireland Assembly and the Commission must arrange for publication of these materials. Pursuant to Section 51(4) of the 2002 Act, in performing its duties, the Commission must consult the Law Commission of England & Wales, the Scottish Law Commission and the Law Reform Commission of the Republic of Ireland.

Approval of Law Reform Programmes

The Commission is not empowered by statute to determine the contents of its law reform programmes. Rather, ministerial approval is required. Approval for the Commission's First Programme of Law Reform was given by the responsible Minister, the Secretary of State for Northern Ireland. Following devolution changes in April 2010, the responsible Minister is now the Minister of Justice. The Minister must, before approving any Commission law reform programme, consult the Attorney General for Northern Ireland. Following an appropriate process, the Minister of Justice has recently approved the Commission's Second Programme of Law Reform.

The Commission's First Programme of Law Reform

The Commission's First Programme of law Reform consisted of five projects:

(i) Land Law Reform
(ii) Business Tenancies Law Reform
(iii) Reform of the Law and Practice concerning Vulnerable Witnesses in Civil Proceedings
(iv) Reform of Bail Law and Practice
(v) Reform of the Laws and Practice relating to and regulating Multi-Unit Developments: this is a term of convenience which denotes apartments and other residential developments with shared open space or other shared facilities.

The first three of these projects are now complete. The fourth, the bail law project, is expected to culminate in a report to the Minister, with accompanying draft legislation, in mid-summer 2012. The fifth, the law relating to multi-unit developments, has a scheduled completion date of spring 2013.

In respect of each of the three completed First Programme Projects, the Commission has submitted a report and accompanying draft legislation to the Minister for Justice. The intention is that each of these reports will culminate in new legislation and the Commission earnestly trusts that this will materialise sooner rather than later. The rationale of each of these projects, accepted by Northern Ireland Government from their initiation, was – and remains – that there is a pressing case for law reform in the areas to which they relate. Furthermore, substantial public monies have been expended in bringing these projects to completion. Their ensuing reports and draft legislation have benefited from the expertise, intellectual prowess and experience of the Law Commissioners concerned and the members of the individual legal teams. I take this opportunity to emphasize that these are high quality products.

Project Selection Criteria

In the exercise of determining the contents of the two Law Reform Programmes in which the Commission has been engaged since its establishment, it has given effect to the following selection criteria:

(a) **Importance to Northern Ireland**. This incorporates an assessment of potential benefits to and impact on the public, complexity, accessibility and the need for simplification and modernisation.

(b) **Suitability**. The application of this criterion includes an assessment of the demands and dimensions of the candidate project; the desirability of having a good mix of law reform projects at any given time; the projected duration of candidate projects; the skills, expertise and experience of Commissioners and Commission legal staff; and the desirability of any other agency undertaking the candidate law reform project.

(c) **Resources**. The Commission considers the human and financial resources, current and projected, at its disposal.

(d) **Timing**. It is necessary for the Commission to estimate the duration of each candidate project, giving effect to the general rule that where a project is unlikely to result in a report to Government, followed by new legislation, within a four-year period it will not be submitted by the Commission to the Minister for inclusion in a programme.

Engagement with Government Departments, Ministers, Elected Representatives and Others

The Commission's independence does not preclude engagement with Government Departments, Ministers, elected representatives and others at all appropriate stages, both before and after formal ministerial approval of its proposed Programmes of Law Reform and specific law reform proposals. Such engagement is plainly harmonious with the legislative intention underlying the relevant provisions of the 2002 Act. Furthermore, it is necessary for the Commission to have appropriate engagement with interested Departments during the progress of individual projects. This requires the appointment of a suitably senior official within relevant Departments for this purpose. This is followed by appropriate communication between the Commission and the appointed official throughout the duration of the project in question which will entail, *inter alia*, attendance at project steering group meetings. This engagement and liaison are to the mutual benefit of the Commission and Government. All of these processes contribute to establishing and maintaining a healthy and professional working relationship between the Commission and the Departments of the Executive which is mutually beneficial, serves the public interest and facilitates the efficient and expeditious discharge of the Commission's statutory obligations, without compromising its independence.

THE FIRST PROGRAMME: THE TWO UNCOMPLETED PROJECTS

1. The Bail Law Project

This is one of the five projects which the Commission's First Programme of Law Reform incorporates. In this jurisdiction, there is no central governing instrument of bail legislation. This contrasts with England and Wales, where the Bail Act was introduced in 1976 and the Republic of Ireland, where a comparable statute was enacted in 1997. In Northern Ireland, there is a patchwork quilt of statutory sources, married with the exercise of the inherent jurisdiction of the High Court. This is considered unsatisfactory, given the substantial importance of bail in the context of the administration of criminal justice and the relatively intense degree of public interest and concern which this subject routinely generates. The Commission believes that there is a persuasive case for the enactment of a unifying instrument of legislation regulating comprehensively the roles and responsibilities of the primary agencies concerned – the police, the Public Prosecution Service and the courts – coupled with some modernisation of the law in this sphere.

There is undoubtedly a substantial public interest in this project. There are various concerns about the existing law and practice in this sphere; and material misunderstandings abound. In mid-project, there was a surge of publicity about the commission of offences by Defendants granted bail. A newspaper publication suggested that more than 20,000 such offences – including 8 murders, 24 rapes and 150 robberies – were committed during a two year period. While no statutory scheme alone can aspire to resolve all of the difficulties that habitually arise in this area, it is hoped that the proposed legislation will promote consistency and transparency in decision making by the police and the courts and will in turn increase public confidence in the criminal justice system.

This project is now at a very advanced stage. An extensive public consultation exercise has been completed and the Commission has engaged fully with all relevant stakeholders and interested parties. The consultation paper was published in September 2010 and the Commission received a wide range of contributions in response. The Commission also held a number of public seminars to promote awareness of the consultation paper and encourage engagement from as wide a range of interested parties as possible. The responses and representations thereby generated have assisted the Commission greatly in its formulation of the recommendations in the final report. **It is envisaged that the Commission's final report to the Minister, with accompanying draft legislation and explanatory notes, will be completed by mid-summer 2012**.

2. Multi-Unit Developments

The Commission's Consultation Paper preceding the First Programme of Law Reform raised the topic of 'Conveyancing law reform for flat developments' as one of the possible candidates for inclusion as a law reform project. In response to the Consultation Paper the Commission received several responses from professional groups and organisations who advocated that this was an important area for review and reform. Consequently, the Multi-Unit Developments Project was included in the First Programme. The case for reform arises out of an evolution which has occurred in the course of the last fifteen years. This has witnessed a marked increase in the number of multi-unit developments ('MUDs') in Northern Ireland. The reasons for this include:

- a move towards higher density living in urban areas;
- a demand for greater choice in housing provision;
- increased property development in view of the more settled political landscape in the past decade;
- a demand for affordable housing by first-time buyers;

- an increase in the buy-to-let market (particularly from 2003 to 2007);
- the development of more sophisticated forms of apartment living including the emergence of MUDs on a much larger scale, e.g. the Obel Tower and Titanic Quarter Belfast.

All of these factors have quickened the pace of MUDs. Reconsideration of the current legal framework is required to ensure that the legitimate needs and interests of apartment owners are fairly addressed.

Since the physical characteristics of an apartment are quite different from those of free-standing properties, this gives rise to a number of issues relating to maintenance and management. Firstly, each apartment is part of a larger building and is dependent for support on other apartments and parts of the structure. Secondly, various parts and areas of an apartment development, both internal and external, are shared in common by the apartment owners:

- entrance halls, stairs and lifts, roofs and other structural parts are examples of internal parts held in common
- access roads and paths, car parking areas, gardens and landscaping areas are examples of external areas held in common.

Unlike other parts of the United Kingdom and the Republic of Ireland, Northern Ireland does not have a dedicated piece of legislation which provides a clear and comprehensive legal framework for MUDs. In this Project, One of the questions which the Commission is examining is whether such regulation is needed to address the complex interlocking issues which arise as a result of the nature of interdependent living and the sharing of common areas, facilities and services. The issue of MUDs was debated in the Northern Ireland Assembly in November 2009. This gave rise to the formation of a government inter-departmental group. A Private Members Bill – the Apartments Developments' Management Reform Bill - was introduced into the Northern Ireland Assembly on 15 November 2010 but was withdrawn at second stage. An increasing form of 'multi-unit development' is encountered where there are common areas and/or facilities on private housing estates. The Commission is examining this discrete issue. The Commission also considering the question of 'mixed use' developments viz. where a development comprises commercial premises, such as shops or offices, as well as apartments. Finally, the Commission is considering whether there could be a regulatory solution involving, for instance, the licensing and regulation of managing agents. The cost of any such licensing and regulatory system for apartment owners must be borne in mind.

3. <u>Project Aims</u>

The aims of the Project are:

- to assess the evidence of problems in practice and evaluate the need for new legislation;
- to analyse the different types of legislative models which are used to regulate MUDs and assess the most appropriate model for Northern Ireland: this necessarily involves a consideration of whether Northern Ireland should continue with the leasehold model of ownership of flats or progress to a new form of statutory freehold;
- to consult key stakeholders including owners of units, owners' management companies, managing agents, developers, the Law Society of Northern Ireland, MLAs and others;
- to develop detailed legislative proposals which are tailored to the particular context of Northern Ireland and which address the problems arising in this jurisdiction; and

- in particular, to assess whether the optimum legislative solution is by way of regulation including a regulatory authority and licensing system for managing agents and/or owners' management companies.

Project work to date

Research and drafting
The Commission has carried out significant background research and the preparation of the Consultation Paper is advanced.

Stakeholder Engagement
The Commission has also carried out extensive stakeholder consultation with professional and construction related interest groups.

Questionnaire
In 2011 The Commission circulated a Questionnaire among all owners' management companies in Northern Ireland. This stimulated in excess of one hundred responses which, *inter alia*, contain a valuable insight into the views and interests of apartment owners.

4. A regulatory solution?

One possible solution is to devise legislation establishing a system of regulation of managing agents and/or owners' management companies. The advantages of regulation would be to address the problem areas of developer and/or managing agent abuse. At present, the Commission wonders whether there is sufficient evidence of widespread abuse to justify the imposition of a regulatory scheme. One clearly ascertainable disadvantage of regulation is that it would be resource intensive and could be a disproportionate response in the case of well managed developments where there is owner management and control. In addition, it may be taken as a given that government would not contemplate funding the costs of any regulatory system, applying as it would to only one section of the home owning population. Accordingly, if a system of regulation is introduced, it is distinctly foreseeable that the apartment or house owner in any MUD will incur (for instance as an addition to service charge) the costs of registration, licensing and supervision of any new regulatory system. Notwithstanding, the Commission notes that some degree of regulation has recently been introduced in Scotland: see the Property Factors (Scotland) Act 2011. During the forthcoming phase of public consultation, the Commission will be particularly interested to receive views and comments on the desirability and viability of introducing a system of regulation in this sphere.

The MUD project is currently at approximately mid-stage. The next landmark development will be the publication of a Consultation Paper. This is projected to occur at the beginning of September 2012. The Commission expects that the Consultation Paper will be of particular interest to many sectors of society. This is proving to be a particularly interesting and challenging project, one which has attracted not insubstantial political and media interest. It is vitally important that every member of society realise their right to shape and influence the laws which regulate how we live by making representations to and interacting with the Commission. There are also considerations of civic responsibility in this respect. The forthcoming publication of the Consultation Paper will give all members of the population a gilt edged opportunity to influence the content of the law in this particular sphere and in all of the others in which the Commission is engaged. I would strongly encourage all concerned to make their views on this subject known to the Commission: this can be affected by a variety of media, including in particular e-mail, letters and attendance at relevant events. This is an opportunity not to be missed. **It is envisaged that this project will culminate in a report to the Department of Justice in spring 2013.**

THE COMMISSION'S SECOND PROGRAMME OF LAW REFORM

Public Consultation

The Commission's proposals to the Minster for Justice regarding the contents of its Second Programme of Law Reform were the product of a public consultation exercise initiated in August 2010. This generated twenty proposals for new law reform projects. The respondents included individuals, public bodies, the voluntary sector and law firms. The responses entailed fourteen new law reform proposals and the resubmission of proposals previously considered for inclusion in the First Programme, but rejected. All proposals were duly considered with care by the Commission, applying the project selection criteria set out above. This exercise also gave effect to the relevant Equality Commission Guidelines. The Chairman, Law Commissioners and selected members of legal staff were all actively engaged in this exercise. Furthermore, this process entailed appropriate communication and engagement with relevant agencies.

At the conclusion of this process, the Commission, in accordance with the statutory arrangements, requested the Department to approve a Second Programme of Law Reform comprising the following projects:

- **(a) The uncompleted bail law project**
- **(b) The uncompleted project concerning the law and practice of multi-unit developments [MUDs]**
- **(c) Regulation of health care professionals in the United Kingdom**
- **(d) The law relating to coroners and inquests**
- **(e) The law on intestacy, family provision**
- **(f) Re-registration of births and parental responsibility**
- **(g) Certain aspects of landlord and tenant law.**

The Commission had already received informal approval in respect of project (c), which is now under way (*infra*). Accordingly, the Department of Justice was requested, in substance, to approve the inclusion of four new projects in the Commission's Second Programme of Law Reform. In the event, departmental approval has been forthcoming in respect of one of the proposed projects only viz. aspects of landlord and tenant law see (g) above.

As a result of this approach, a substantial proportion of the Commission's Second Programme of Law Reform consists of projects which have been referred to it by the Department for consideration. The Second Programme of Law Reform has the following components:

- **(i) The uncompleted Bail Law Project**
- **(ii) The uncompleted project relating to the law and practice of multi-unit developments [MUDs]**
- **(iii) The Regulation of Health Care and Pharmaceutical Professionals in Northern Ireland**
- **(iv) Aspects of Landlord and Tenant Law**
- **(v) The Unfitness of an Accused Person to Plead**
- **(vi) The Availability and Scope of the Defence of Insanity to an Accused Person**
- **(vii) The Initiation of Criminal Prosecutions.**

The first and second of these projects are described in paragraphs 1-4 above.

The remaining four projects are described in the paragraphs which follow.

The Regulation of Health Care and Pharmaceutical Professionals in Northern Ireland

The Department of Health (England) requested that the Law Commission of England & Wales review the United Kingdom legislation in relation to the regulation of health care profession. Reforms are aimed at reducing the complexity of the legislative landscape which has developed piecemeal in this area over the last 150 years. For example, there are currently six separate Acts of Parliament and three Orders made under section 60 of the Health Act 1990, covering nine individual regulatory bodies. These have since been extensively amended with a further sixteen section 60 Orders and a range of Acts of Parliament added over the last ten years. Parts of the legislation covered by this review include devolved matters (under the Northern Ireland Act 1998) and falls within the policy responsibility of the Northern Ireland Department of Health, Social Services and Public Safety.

Incongruities and impracticalities in this area have been identified as stemming from the following:

- a complex legislative landscape which has developed piecemeal and resulted in a wide range of idiosyncrasies and inconstancy in the powers, duties and responsibilities of each of the regulatory bodies;
- differences in their powers to gather and share information, calling of witnesses and imposition of sanctions.

Additionally, reforms of the procedures for appointments to the health professions' regulatory bodies are mooted in conjunction with the amendment and up-dating of legislation in this area overall. The health-care professionals that will be affected by such reforms include medical and dental practitioners, pharmacists, opticians, osteopaths, chiropractors and nurses/midwives. In England and Wales, it is proposed that the regulation of the social care workforce will also fall within the scrutiny of this review. However, it is not proposed to include a review of social care regulation in Northern Ireland, where different, local regulatory schemes exist. There has been a positive response during initial consultations by the Law Commission of England & Wales in favour of a review of the law, practice and procedure concerning bodies regulating health-care professionals. The reforms will aim to reduce/remove the inconsistencies and idiosyncrasies which have developed in the powers duties and responsibilities of each of the regulators concerned; reduce legislative complexity; streamline procedures and eliminate duplication. Overall, it is anticipated that regulation will become less cumbersome and complicated and, in consequence, more efficient, to the benefit of all concerned. The Department of Health and the Department of Health, Social Services and Public Safety (NI) have jointly requested the Commission to undertake a review of this area of law in partnership with the Law Commission of England & Wales and the Scottish Law Commission. The Commission is satisfied that this is an important area of law in need of reform. During the most recent phase, there has been active engagement in particular with the Pharmaceutical Society of Northern Ireland. The current state of progress of this project is as follows. A Consultation Paper has been published, inviting responses, views and proposals from the public. Those with any interest in this subject are strongly encouraged to respond to the Consultation Paper. It is available on the Commission's website. Please do not forgo this opportunity to shape and influence the reform of the law in this sphere. **It is envisaged that the final report to Government will be published in early 2014**.

Aspects of Landlord and Tenant Law

In the Commission's recent Report on Land Law, major reforms of the basic principles of land law were recommended but, primarily for reasons of resources, the topic of landlord and tenant law was not then included. This report, instead, concentrated on areas

concerning feudal tenure; estates in land; easements; future interests; settlements and trusts; concurrent interests; mortgages; contracts for the sale of land; conveyances; legislation; adverse possession; ground rents and covenants after redemption. The extensive and comprehensive review by the Commission of the areas outlined was the first part of what had been intended as an overhaul of Northern Ireland's antiquated land laws. Previously, major reforms of the law concerning landlord and tenant had also been proposed by the Land Law Working Group, (which published its Final Report in 1990). These proposals were not implemented and, as a result, the law in this area in Northern Ireland has remained largely unchanged for over a hundred years. In short, there is a compelling case for the modernisation of landlord and tenant laws in Northern Ireland.

The Commission received a response to the Second Programme Consultation Paper suggesting that sections 10 and 18 of the Landlord and Tenant Law Amendment Act (Ireland) 1860 (known as 'Deasy's Act') should be repealed. These sections prescribe the ways in which a landlord's consent (where required under a lease) for assignment and a landlord's consent (where required under a lease or letting in conacre) for sub-letting must be effected. It was argued to that in practice these statutory provisions cause delay and generate unnecessary procedural complexity in commercial transactions. Substantial delays are caused especially where the landlord is resident outside the jurisdiction. The Commission reiterates the desirability of a comprehensive review of the landlord and tenant laws of Northern Ireland. This will be a necessary and logical next step in the wake of the Commission's comprehensive Land Law Reform Report. Notwithstanding, the Commission is satisfied that this discrete landlord and tenant law reform proposal can be properly and satisfactorily examined on its own merits at this stage. A persuasive case for law reform in this discrete area has been demonstrated. **It is envisaged that this project will commence circa March 2013 and will be completed by approximately September 2014, when the Commission's report, possibly accompanied by draft legislation, will be made.**

<u>The Unfitness of an Accused Person to Plead</u>

This project has been referred to the Commission by the Department of Justice. The Commission has duly accepted this reference. The terms of the reference require the Commission to undertake the following:

- To review the current law in the Crown Court and the Magistrates' Courts (but not Youth Courts) in Northern Ireland in relation to unfitness to plead;
- To review the current operation of the *Pritchard* test, a common law test which sets criteria against which unfitness to plead can be assessed;
- To consider whether a test based on the mental capacity test which is contained in the Mental Capacity Act 2005 would be a better approach for assessing unfitness to plead or whether tests which exist in jurisdictions such as Scotland or Jersey would be more appropriate options for Northern Ireland;
- To consider whether restrictions in relation to the types of medical evidence that are currently sought to inform the determination of unfitness to plead should be relaxed;
- To consider the current operation of hearings under Article 49A of the Mental Health (Northern Ireland) Order 1986, which are designed to determine whether an unfit accused person has carried out the act or made the omission with which he or she has been charged.

A particular feature of this project is the interaction between certain members of society affected by mental health or learning disabilities and the criminal justice system. The subject of the fitness of an accused person to plead to the offence/s charged occupies an important position in the criminal justice system. If a determination of unfitness to plead is made by the court, a trial will not ensue. The rationale, at its simplest, is that a person

lacking a rudimentary understanding of the nature and purpose of the criminal proceedings concerned is not considered a fit subject for prosecution and punishment. To prosecute and punish such a person is considered incompatible with the criminal justice system, for two basic reasons. The first is that the aims and objects of the criminal justice system are not furthered by prosecutions of this kind. The second is that the accused person concerned may be unable to participate effectively in a trial, being deprived of the fundamental right to a fair trial in consequence.

The Commission is on the verge of publishing a consultation paper in respect of this project. This a wide ranging publication which examines, *inter alia*, the origins and history of the current law; the underlying rationale; the legal tests which have been devised; Article 49A of the 1986 Order and the relevant case law; Article 6 ECHR; the law and practice in other jurisdictions; the role of expert evidence; joint trials and appeals; and so-called special measures. It is anticipated that the consultation paper will be published in July 2012. Responses and representations from all quarters are strongly encouraged and will be most welcome. Please note the following timetable:

(i) **July 2012**: Publication of the Commission's Consultation Paper.
(ii) **October 2012**: Time limit for responding to the Consultation Paper.
(iii) **March 2013**: Presentation of the Commission's report to the Department of Justice.

The Defence of Insanity in Criminal Trials

This project has also been referred to the Commission by the Department. The Commission has duly accepted this reference. The terms of the reference require the Commission to review the defence of insanity in criminal trials. Without prejudice to the generality of the foregoing, it is anticipated that the Commission will undertake a review incorporating an examination of:

- the legal defence of insanity;
- the associated medical examination arrangements;
- the stigmatising nature of the term 'insanity'; and
- the appropriate court procedures.

The MacNaghten Rules govern the insanity defence in England and Wales. Dating from 1843, they are essentially restricted to whether the defendant knew what he was doing, and if so, that it was wrong. The Law Commission of England & Wales has articulated the following criticisms of the MacNaghten Rules:

- the law lags behind modern psychiatric understanding;
- it is not clear whether the defence is available in all cases;
- the label is outdated for those with mental illness and simply wrong for those with learning disabilities, learning difficulties or epilepsy; and
- potential problems of compliance with the ECHR.

In Northern Ireland, the defence of insanity is of somewhat broader scope than the defence prescribed by the MacNaghten Rules. One of the main questions to be considered is whether this defence should apply to a person suffering from a mental abnormality which prevents him from:

(a) appreciating what he is doing; or
(b) appreciating that what he is doing is either wrong or contrary to law; or
(c) controlling his own conduct.

In practice, the defence of insanity rarely arises, partly (or mainly) because of the availability of the plea of diminished responsibility.

In making this referral, the Department has raised the following specific questions:

(i) In light of the desire to rejoin forces with DHSSPS in a single Mental Capacity Bill, would there be merit in focusing for now on those aspects of insanity that must be changed to ensure compliance with mental capacity principles and the ECHR with a full-scale review to follow later (for example, when the outcome in England and Wales has become clear)?

(ii) What, if any, are the implications for insanity procedures of the widening of the potential categories of defendant?

(iii) Should consideration be given to relaxing the current restrictions on the types of medical practitioner upon whose evidence the decision on insanity should be based?

(iv) What would be the optimum means of engaging with and between legal and medical professionals on insanity procedures?

(v) What role should public consultation play in resolving at least some of these questions?

The Commission, in undertaking this project, will take careful heed of the questions referred and will research, consult and, ultimately, report accordingly. **At this juncture, due to resource demands and constraints, a full timetable for the initiation and completion of this project has not been established.** However, preliminary work, entailing the scoping of the substance and boundaries of this project, has commenced. This is being undertaken by a legal researcher under the supervision of a senior lawyer.

The Initiation of Criminal Prosecutions

This is the third of the new projects which have been referred by the Department to the Commission. This referral has been accepted by the Commission. Interaction between the Criminal Justice Board ("*the CJB*") and the Department has been the stimulus for this referral. The basic mischief in play is that of delay in the criminal justice system. For some time, all agencies actively involved in the criminal justice system, including the legal profession and the judiciary, have actively supported the principle of the adoption of reasonable and proportionate measures designed to eliminate or, as a minimum, reduce avoidable delay.

Against this background, the Department has requested the Commission to conduct a fundamental review of the initiation of criminal prosecutions in Northern Ireland. This will examine in particular the extant mechanisms of initiating a prosecution either by the police charging the Defendant or a summons being issued at a later date. Approximately one-third of criminal prosecutions are initiated by the charging mechanism. In view of its attributes of speed and efficiency, this is currently the favoured mechanism of the Police Service of Northern Ireland ("*the PSNI*"). Certain new PSNI initiatives are being developed at present. The remaining two-thirds of prosecutions are initiated by the mechanism of summons. This process involves the Public Prosecution Service, ("*the PPS*"). This mechanism, which applies to the majority of prosecutions, is of considerable vintage and is perceived to suffer from delay and inefficiency. In particular, there can be substantial practical problems in effecting service of a summons. This mechanism is resource intensive and is not considered by the PSNI to be a core policing duty. Some of these

issues have already received consideration by a working group consisting of PPS, PSNI, NICS, CJB and NIO representatives. In particular, this entailed an exercise in public consultation on the issue of abolishing the role of Lay Magistrates, giving rise to a proposed discrete reform to be included in the forthcoming Justice Bill.

The Commission proposes to undertake a wide ranging review and examination of the various aspects of this subject. This will **include**:

(i) A critical evaluation of current operational practice and performance in the initiation of prosecutions.
(ii) Examination of regional differences in operation and performance.
(iii) Assessment of the approaches in other jurisdictions, which will include the reform introduced in England and Wales by Sections 29 and 30 of the Criminal Justice Act 2003, whereby the mechanism of postal charging or "requisitions" was introduced.
(iv) Identification of all relevant stakeholders and consideration of their views and proposals.
(v) Taking into account the work already undertaken in this sphere, outlined briefly above.

The above list is without prejudice to the breadth of the review which the Commission intends to undertake. This exercise will, ultimately, culminate in a report to the Department, possibly with accompanying draft legislation. **It is envisaged that this project will commence circa March 2013.**

SECOND PROGRAMME OF LAW REFORM: OTHER ISSUES

The Reform of Coroners and Inquest Law

In December 2011, the Chairman informed the Minister for Justice that, subject to considerations including resources and capacity, the Commission would give consideration to resubmitting to the Department for inclusion in the Second Programme the proposed Coroners and Inquest Law Reform project, at a later date. This remains a live possibility. The case for reform of this particular sphere of the law in Northern Ireland is not merely compelling but, progressively, overwhelming. The current laws have been decried on more than one occasion by senior members of the judiciary. This is illustrated in the following extract:

> *"[4] The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this nature which has become by its nature and background extremely adversarial. The problems are compounded by the fact that the Police Service which would normally be expected to assist a coroner in non contentious cases is itself a party which stands accused of wrong doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest. What is also clear is that the proliferation of satellite litigation is*

extremely unsatisfactory and diverts attention from the main issues to be decided and contributes to delay."

[Per Girvan LJ in ***Jordan -v- Senior Coroner for Northern Ireland*** [2009] NICA 64].

It is a sombre reflection that this particular inquest commenced in **1994**. Eighteen years later, its recommencement is still awaited. The above unambiguous criticism of the Northern Ireland Court of Appeal was made **three years ago**.

Some of the widely acknowledged shortcomings and anomalies in Northern Ireland coronial and inquest law were highlighted in September 2011, when the Commission organised a highly successful public seminar which focussed on the law and practice of coroners not only in Northern Ireland but further afield. The speakers included leading contributors from New Zealand and England. The various topics highlighted and debated reinforced the powerful need for reform of this branch of the law in Northern Ireland. Given the projection that some spare capacity may arise in the course of the Second Programme of Law Reform, the possibility of resubmitting this particular project to the Minister for approval is a real one.

Reform of the Electoral Laws of the United Kingdom

There is one further possible Second Programme project worthy of separate mention. The Law Commission of England & Wales is currently actively pursuing an electoral law reform project. As this is a United Kingdom wide project, the Northern Ireland Law Commission was invited to become actively involved. However, this was not possible initially, on account of a funding issue. Happily, a solution appears to be in sight. This would be most welcome, since the possibility of active partnership by the Commission in this project was enthusiastically welcomed by the Chairman and Commissioners from the outset. The case for modernisation and simplification of the law in this sphere is compelling. As noted in the Eleventh Programme of Law Reform (published in July 2011) of the Law Commission of England & Wales:

"*There are important and distinctive issues in relation to elections in both Scotland and Northern Ireland, including devolved elections in Scotland. We therefore expect the project to be a tripartite joint project with the Scottish and Northern Ireland Law Commissions. There is also a significant Welsh dimension which will require close engagement with the Welsh Government.*"

Under the regime of the Northern Ireland Act 1998, elections are one of the "*excepted matters*": see paragraphs 12 and 13 of Schedule 2. It would appear that the financial hurdle in the way of the Commission undertaking this project jointly with the Law Commissions in Great Britain is about to be overcome. Optimistic that this will occur, I expect to be formally requesting the Minister to approve the inclusion of this discrete project in the Commission's Second Programme of Law Reform in the near future. At this stage, the Law Commission of England & Wales has confined itself to initial scoping work and research. The timing for commencement of full partnership with the Northern Ireland Law Commission is, therefore, ideal. This project is clearly of importance to and will have a significant impact on the laws and population of Northern Ireland. Thus the Commission remains hopeful of securing the necessary Ministerial approval to becoming fully involved.

CONCLUSION

The Commission looks forward to further fruitful, positive and mutually beneficial engagement with the population of Northern Ireland and all interested organisations and agencies. I expect that those involved in such engagement will include interested Government Departments, Ministers, locally elected representatives, the legal profession and others. I take this opportunity to emphasize the Commission's anxiety to communicate and engage with all interested members of the population. The process in which the Commission is engaged in reforming the laws of Northern Ireland is accessible and open to everyone. Our laws and the reform thereof do not constitute a subject belonging exclusively to the preserve of government, legislators or members of the legal profession. Everyone has the opportunity to shape and influence the future content of those areas of the law which the Commission is at any given time reviewing with a view to simplification, modernisation and progressive reform. The Commission's doors are open to all.

In accordance with Section 52(2) of the Justice (Northern Ireland) Act 2002, the Department of Justice is formally requested to lay before the Northern Ireland Assembly this approved Second Programme of Law Reform. As Chairman of this organisation, I can promise unreservedly that the Second Programme will be conducted with the same enthusiasm, industry, intellectual rigour and expertise which were the hallmarks of its predecessor. These attributes were instilled and nurtured by the inaugural Chairman of this organisation, Sir Declan Morgan, present Lord Chief Justice of Northern Ireland, who bestowed a valuable legacy. I take this opportunity to compliment the Law Commissioners, members of legal staff and members of administrative staff concerned. I entertain no doubt that all outsiders will readily attest to the freshness, vigour, energy and ability with which all members of this organisation consistently perform their duties. This, I promise, will continue unabated. The Commission's kite mark has been, and remains, that of excellence. We earnestly aspire to achieve this standard in everything we do.

THE HONOURABLE MR JUSTICE BERNARD MCCLOSKEY
CHAIRMAN
NORTHERN IRELAND LAW COMMISSION

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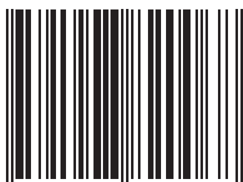
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