



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Northern Ireland Law Commission

11 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mr Leslie Cree
Mr Paul Girvan
Mr Ian McCrea
Mr Adrian McQuillan
Mr Peter Weir

Witnesses:

Dr Andrew Scott	London School of Economics and Political Science
Mr Ken Millar	Northern Ireland Law Commission

The Chairperson: I welcome Mr Ken Millar, who is the interim chief executive of the Law Commission, and Dr Andrew Scott, who is an associate professor in the department of law at the London School of Economics and Political Science. Do you want to make an opening statement?

Mr Ken Millar (Northern Ireland Law Commission): Yes, that would be great. Thanks very much for the opportunity to come here this morning. I have been interim chief executive of the Northern Ireland Law Commission since the end of May. With me is Dr Andrew Scott from the London School of Economics and Political Science. Andrew is seconded to the commission on a part-time basis, specifically to work on the defamation project.

As a supplement to the briefing paper in your packs, I will set out very quickly what the Law Commission is and why we have one. The briefing paper explains in more detail how the programme of work is determined, how the Law Commission relates to the Northern Ireland Departments and especially how it potentially impacts on DFP.

The commission's origins can be traced back to the Good Friday Agreement, which included terms of references for the development of mechanisms to address law reform. A review group reported in March 2000 on almost universal support for the creation of an independent law commission to take forward the task of proposing law reform in Northern Ireland and a broad consensus that there needed to be political neutrality in law reform. That was brought into being by the Justice (Northern Ireland) Act 2002, but the Law Commission was not established until 2007.

Last year, the commission, after six years in existence, was reviewed by the Department of Justice (DOJ). The Minister is still considering the review's recommendations. So, everyone, including me, is in an interim phase at the moment. In addition to me as interim CEO, the current staffing of the commission comprises one commissioner, three lawyers, two legal researchers and a small admin

team. A number of posts in the structure are vacant, including the chair, three commissioner posts and some legal researcher posts. Action on filling those posts will await the outcome of the DOJ review.

The existing arrangements for law reform and the structures are set out in the briefing paper, which includes the concept of programmes of law reform. We are nearing the end of the second programme, and the third programme will probably launch next year, pending decisions on the review.

The briefing paper describes how projects are selected and referred to the commission. It also describes the working methods, from the research, public consultation and consideration of responses to the point at which the Law Commission will make a report with recommendations to the Department responsible for the issues being addressed. At that point, the responsibility for implementing the recommendations passes to the lead Department, which could be DFP, DHSSPS or any of the Departments that the work impacts on. The paper also mentions the resources available to the commission in the last published annual report. Of a total of just under £900,000, around £660,000 goes on salaries and wages, around £150,000 on accommodation and related costs and £55,000 on other running costs. The paper also covers the projects that have been completed or are ongoing over the past six or seven years and particularly mentions those that impinge on DFP.

I can expand on any of those issues, Chairman, or take general questions. I understand that you might want to get more into defamation. As a broad statement on the work of the Law Commission, it is an independent NDPB; it gathers programmes of law reform; it does the research and public consultations; and it draws up recommendations and passes them to the Department responsible.

The Chairperson: Thank you very much.

The annex references all the projects that have been completed and also those that are on the list of work to do. Land law will come before the Committee sometime in the future. That is of interest because, obviously, it will be a considerable amount of work. Is there anything that you want to flag up from your inquiries that the Committee would consider to be a challenge in considering that legislation?

Mr Millar: I am hesitant to do that, first, because I am not a lawyer, and, secondly, because I was not there for most of the time that the land law work was being done, although I know that it was a substantial piece of work. The consultation paper and the report make good bedtime reading — that is one way of putting it. The report was passed to the Departmental Solicitor's Office in DFP to deal with the recommendations. There was a bit of a hiccup in the sense that the Law Commission had put in some legislative drafting work with it, which did not quite suit or fit what DFP needed to do. As I understand it, some of the drafting had to be redone or started from scratch. However, I am afraid that it would be for Laura McPolin and others whom I know you have spoken to to get into the detail of that land law.

All the recommendations of a Law Commission report may or may not be implemented by the Department. That might be a downside of independence, in that there is a clear handover of responsibility. I am sorry that I cannot help you out on —

The Chairperson: Sponsorship of the commission lies with the Department of Justice. The commission has an annual budget of £900,000: is all that funding provided solely by the Department of Justice?

Mr Millar: Yes, it is. Occasionally, if a Department refers a project to the Law Commission, as happened in the last year, and the Law Commission does not have the resource to do it, that Department would either offer a contribution or even offer an individual to be seconded to the commission for the purposes of finishing the work. Direct funding, however, comes from the DOJ.

The Chairperson: In excepted matters such as electoral law, would some Whitehall Departments make a contribution?

Mr Millar: Yes. The Cabinet Office kicked that off and sought permission from the three Law Commissions of Scotland, England and Wales, and Northern Ireland, and in effect made a cash contribution to cover the input from here.

The Chairperson: How effectively have the Law Commission's reports been taken forward by Departments? Is there a clear indication that they are taking on board many of your recommendations, or are there exceptions to that?

Mr Millar: Over the six or seven years, none of the reports has been kicked into touch. The speed of implementation is clearly an issue in that getting a new law moved on seems to take a long time. All the projects that the commission has worked on are still with the Departments for consideration and implementation. I cannot open new legislation today, point to it and say that it started in the Law Commission, but a lot is coming through in the pipeline.

The Chairperson: On defamation law, the briefing paper states:

"The new interim Chief Executive is currently reviewing this timetable against the background of the resources and skills available to the Commission over the duration of the project."

The paper also states that the aim is to publish the final report by the end of June 2015. Is that an indication that there may be some slippage?

Mr Millar: I wrote that when I was in the job for just a few weeks, and I wrote it with the opposite intention. The current plan is that it will be ready by next June. In consultation with Andrew and others on the team, I want to have it close to that time. It mostly depends on the level of consultation responses that comes in between September and December. If the position on what the final report should be is fairly clear in January, I am hopeful that it could be accelerated rather than delayed. I am saying that without consulting Andrew, who will be involved in it. That is my intention. If you want, I will come back later in the year, and we can talk about it.

The Chairperson: You say that discussions are under way with key stakeholders. How far are you going? Is it to Scotland, England, Wales, the South?

Mr Millar: I will pass over to Andrew because he has been involved in that?

Dr Andrew Scott (London School of Economics and Political Science): The key stakeholders with whom we have been consulting are predominantly from Northern Ireland. They are people who have a particular insight because of their work experience or because their day-to-day routine involves themes in the report's ambit. I have also presented some of the themes that we expect to see in the consultation report to experts in Australia and Scotland, and I have had some interesting feedback from those jurisdictions.

Mr Weir: Thank you for the presentation. I want clarity on a couple of points. Obviously, the bulk of your projects seems to be based on civil law reform. Are you taking over from the Office of Law Reform (OLR), or is that separate?

Mr Millar: You are absolutely right. Up until 2007, civil law was handled by the Office of Law Reform, and any reform of criminal law was handled by the NIO, obviously.

Mr Weir: From that point of view, since the devolution of justice powers, you will also have been looking at criminal law reform, but presumably the scope of that may be more limited or less frequent.

Mr Millar: The Department of Justice referred a number of criminal law issues to us, including bail law and the unfitness of an accused person to plead. There are a few others in the pipeline. The defence of insanity to an accused person was started but, for various reasons, was suspended.

Mr Weir: Members of the public could write in and say that they feel that there is a serious problem with divorce law, or whatever it happens to be. I presume that the bulk of your referrals/projects is initiated by Departments that are seeking advice. What is the balance there?

Mr Millar: You are right; it tends to work out that way. There were between 20 and 25 responses to the first and second programmes of law reform. They were from individuals, law firms, pressure groups, Departments and so on. The selection criteria on the first programme, which ended up with five projects, included one from the Commercial Property Lawyers' Association, two or three from DFP

and one from the Department of Justice. Maybe they are better at putting a case together; I am not sure. The criteria that the panel go through treat those 20 or 25 projects —

Mr Weir: Is that dealt with in tranches? If I wrote to you today, for example, with an idea, would it be looked at separately, or would you look at it as part of an overall group and make a selection?

Mr Millar: Both things happen. The programme is set up primarily to cover two to three years. That is the point at which anybody can put a suggestion in, and the programme is drawn up. From then on, during that two or three years, Departments can make referrals, as in the defamation referral or public health. If you wrote in today, we would tell you that, all being well, there will be a third programme at the beginning of next year, and we will take a note and be in touch. The public enquiries would catch the tranche, and departmental referrals would also come in. The public would catch the bus when it came and be watching out for the next one.

Mr Weir: You indicated that, in some cases, you had to say to a Department that you needed such and such to help you to do something. Resource permitting, do you always try to ensure that you meet any referrals from Departments, or are you under an obligation to meet any referrals?

Mr Millar: We are not under an obligation. I was interim CEO for a while in 2012, and there was a referral from a Department that we just could not do. The Department was not in a position to put any resource into it. I do not know what has happened to it since. As I mentioned, even at its best, the commission is a small organisation. The capacity to expand or contract suddenly is not there at the moment. At any one time, at its height, there are probably four lawyers and four legal researchers working with it, and sometimes it is fewer than that. There is not a large open floor of lawyers waiting for referrals to come through the door. For that reason, it is about the management of the resource and what can be done within a timescale. There is a danger, obviously, in taking on a referral without the resource to do it. The project could take too long, and people could get a bad perception of the Law Commission. That would not do anybody any good at all. The judgement at the beginning about what can and cannot be done is vital. The capacity to go outside and get hold of people like Andrew to help on particular projects is an important part of the commission's role.

Mr Weir: I want to tease out your methodology and how you interact with Departments. You indicated that you seek to engage with Departments, Ministers etc. However, once you have produced a report, you say that the formal role of the commission ceases. I appreciate that, if you are consulting Departments, you can simply ask them to give their views on a topic and say that you will look at them and see what emerges. I appreciate that that is where the balance has to be struck between having something informed and, as somebody said, there being a tension with the independence side. Reports are generally directed towards Departments. Somebody in a Department may look at a final report and say, "A, b and c are very sensible, d and e are quite challenging, and f and g, as recommendations, are just complete nonsense. If those proposals had been put to us before we had seen the final report, we could have told the commission that, for particular reasons, that is just not doable". What is the level of interaction? Is there any formal or informal interaction before you get to that stage? I do not know whether I am taking too much cognisance of a particular word, but the briefing paper states that, once a report has been laid, the formal role of the commission "ceases". Is there informal contact after that point on a project, or what way does that work?

Mr Millar: Each project, as well as being overseen by one of the commissioners, is run by a project group or a steering group, which will always include a senior representative of the Department. If the Department says, "Don't put that in because you're wasting your time; it's not going to get there", that would normally be negotiated during the progress of the report so that there are no surprises when the final report comes out.

After the report comes out, I said that the formal role finishes; statutorily, the Law Commission has completed its work. However, there is engagement between departmental officials and commission officials so that they can ask "What exactly did you mean by that?" and "If we were turning this into legislation, if we said that, is that what you meant?" That continues and is clearly best when the people who were doing the work are still around the system to deal with the implementation phase. So, the formal role ceases but contact continues.

The Chairperson: Ken, I made a point about Departments providing resource support to you for a number of the projects. How much support will you get for the defamation project from the Department of Finance and Personnel?

Mr Millar: The defamation project is being run with the resources that come from within the Law Commission: a full-time legal researcher, the oversight of a law commissioner and the part-time input from Andrew. No resource was provided by DFP, nor, to be fair, do I think that any resource was asked for. I think that the commission took it on and said that it would get it done. Speaking as a non-lawyer looking at the way the projects work, I feel that putting four people onto that type of work will not necessarily mean that it will be done in a quarter of the time. In fact, putting four people onto it might double the time because you would get competing views. So, again, there is a balance in getting it done. Obviously, when it comes to the consultation phase, we will work to OFMDFM principles and give it the full 12 weeks. Normally, with most consultations, replies come in in the last two weeks, but that time will not be wasted. The team will use the 10 or 12 weeks between September and December to engage in seminars, raise public awareness and let people know that it is going on to try to encourage as wide a response as possible. The worst thing about any consultation is people saying a month later that they did know that it was going on. So, work will be done to make sure that anyone who wants to speak about this will get the opportunity between now and the end of the year.

The Chairperson: Can you elaborate at all on the work that has been done on engagement with key stakeholders? What issues are being raised, and what do you see as the main challenges?

Dr Scott: I will give a bit more detail on precisely what we have done and on the sorts of people, at least, whom we have been speaking to. There have been three or four separate elements in the project to date. We are conscious of the suggestion that scientists and academics are peculiarly vulnerable for the future in Northern Ireland relative to others in England and Wales. So, we have sought to try to understand, from scientists and academics, their perceptions of their experience of libel laws in the past and their perceptions of the futures that they are likely to face. So, we have surveyed most of the departments of the two main universities in Northern Ireland and have had a fair measure of feedback, which we are crunching at the minute. In addition, we have spoken to a range of stakeholders, including people from the libel reform campaign who have come over from England. We have spoken to the leading judge in the area. We have spoken to three leading QCs who operate in defamation, communicated with another QC and a range of solicitors, most of whom deal with both claimants and defendants. We have taken a survey of their perceptions.

We have also spoken to a number of journalists, largely from newspapers, and to one or two broadcasters to try to gauge their appreciation of what their experience has been to date and what the future is likely to hold for them. We have spoken to Mike Nesbitt, who has a particular interest in the theme. I mentioned that I spoke in Edinburgh, and that audience was made up largely of academics and one or two practitioners from a range of jurisdictions. When I spoke in Australia, the audience was made up of practitioners not only from Australia but from the United States, New Zealand and the UK.

You asked about emerging themes. You will not be surprised to hear that a range of perspectives has been presented to us. There is some dissatisfaction with the status quo on a number of fronts with the operation of the current law. Concerns regarding access to justice for claimants are one of the main themes. Certainly, on the other side of the fence, there has been a concern about the experience of publishers and the prospective futures, given the disparate positions that we are seeing in this jurisdiction and other jurisdictions in the UK.

One option that is on the table concerns the adoption of the Defamation Act 2013 from England and Wales. We are taking views on the desirability of adopting the Act wholesale, or elements of it, into Northern Ireland law. So, we have heard a range of views on the desirability or otherwise of different sections of the Act. It is fair to say that there are disparate views on the desirability of either of those options when they are set against the retention of the status quo. I will leave it there.

Mr Cree: At the risk of asking a rhetorical question, would it not have been logical to have looked at the 2013 Act at the time and said that we can do this by way of a legislative consent motion?

Dr Scott: I am not party to the reasons why Northern Ireland did not adopt the 2013 Act.

Mr Cree: With the benefit of hindsight, how does that look?

Dr Scott: We are very interested in understanding the context in which the Act would operate in Northern Ireland, because it may differ from other jurisdictions. We have been taking advice on that theme from the people with whom we have been discussing matters to date. A very strong theme has

come through about the desirability for consistency between this jurisdiction and England. I do not want to downplay that.

Your question leads us into a debate about the adequacy of the Act. Concerns have been raised about that and the potentially problematic repercussions of the introduction of the Act in England. We have an opportunity in the Northern Ireland context to assess the prospective futures for the Act and decide whether we want to adopt its provisions. Obviously, it is early days with its implementation in England, but some themes are already emerging.

The Chairperson: The commission said that a report will issue in July 2015. Will the commission attach a draft Bill to the report? If legislation were to come forward, there would obviously be an issue with timetabling because of the mandate ending in 2016.

Mr Millar: That tends to vary from project to project in discussion with the relevant Department. I will go back to some of your earlier questions. If a Department is not minded to accept all the recommendations, you can waste time by drafting a Bill and putting money and work into it. It is not easy to get draftsmen in the marketplace, particularly if you hand a Bill over and someone says that they will not to do a, b and c. So, I reserve a position on that until later in the process.

The Chairperson: Are you saying that, during the process, the Department will indicate whether it wants a draft Bill at the end?

Mr Millar: If we could get the resource to do that, that would be ideal. With some projects — land law was one — we almost ended up double drafting because what the Law Commission had done did not quite fit with what the Department wanted. A balance has to be struck to make sure that you do not waste resource in drafting legislation before people have decided what will be put forward. That decision rests with the Department.

If resource became an issue, and the Department was keen for a Bill to be drafted, that would be a good time for the Department to put in additional resource. We will see as we get closer to the time.

Dr Scott: The question, understandably, somewhat pre-empts the outcome of the consultation. It may be that any Bill that comes forward is very straightforward. If you are talking about simply adopting the 2013 Act, there is no work to be done. Similarly, if the outcome of the consultation is to retain the status quo, there is no work to be done. There is a middle way, whereby there would be minor tweaks to sections of the Act. The fourth option would be more significant and would require drafting expertise, which raises the sorts of issues that Ken referred to.

The Chairperson: Ken and Andrew, that was very interesting. Thank you very much.

Mr Millar: Thank you very much indeed.