

Document 42

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
2 December 2014**

See distribution below

1. KAREN PEARSON (KP, 2/12/14)
2. DAVID FORD

CLOSURE OF THE NILC- LETTER TO JOHN HUNTER

Issue: You asked for a letter to John Hunter to inform him of your decision to close the NILC.

Timing: Routine

Presentational Issues: None

FOI Implications: Likely to be disclosable.

**Financial/Legal/Shared
Future Proofing/Legs
Implications:** N/A

**Justice Committee/
Executive Referral:** N/A

Recommendation: That you note the contents of this submission and agree to reply along the lines of the attached draft.

Background

You asked for a letter to John Hunter to inform him of your decision to close the NILC. A draft letter is attached for your consideration.

signed

**WILLIAM STEVENSON
Ext 73590**

Copy list
David Lavery



DRAFT LETTER FOR SIGNATURE BY DAVID FORD

John Hunter Esq



December 2014

THE NORTHERN IRELAND LAW COMMISSION

I am writing to let you know formally of my decision to close the Northern Ireland Law Commission (NILC) from 1 April 2015.

As you know I had accepted the findings of your review of the NILC and officials were working with the Commission to implement the recommendations including the new governance arrangements and senior staffing structure.

However, the budget restrictions imposed on my department in-year and beyond have necessitated a fundamental review of all spending. Some difficult choices have had to be made but my priority has been to protect front-lines services as much as possible. While the function of law reform is undoubtedly desirable it cannot be considered essential or a front-line service and it is in that context that I have decided to close the Commission.

I would like to record my thanks for your well-argued analysis of the issues facing the Law Commission. My hope is that Commission may be re-established at some point along the lines of your review when finances become available.

DAVID FORD MLA
Minister of Justice



**DFP Private Office
2nd Floor
Clare House
303 Airport Road West
Belfast
BT3 9ED**

**Tel: 028 90816711
Email: private.office@dfpni.gov.uk
Your Ref: SUB/1424/2014
Our Ref: GM/840/2014**

FROM: SIMON HAMILTON MLA

DATE: 27 NOVEMBER 2014

TO: DAVID FORD MLA

Thank you for your letter of 20 November which set out your proposals with regard to the handling of the Northern Ireland Law Commission's review of defamation law.

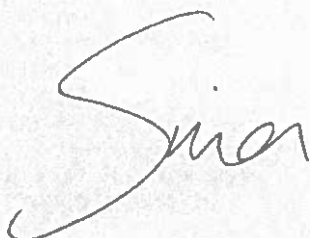
In the letter you say that you are willing to fund the review until the end of March 2015, which is the scheduled date for the closure of the Commission. However, you go on to say that, if the review stretches beyond that date, my Department should bear the cost of the seconded legal expert, Dr Andrew Scott.

I understand the paper has been ready for a few weeks and, if it had issued earlier, the Commission would have had a larger window in which to complete its final report.

I know the Commission will use its best efforts to complete the report by the end of March 2015 and, rather than adding time post closure, I would propose that we add additional time in advance of the closure date by increasing Dr Scott's time commitment to 2 days per week. If Dr Scott was able to do that, I would be willing to pay 50% of the cost, which I understand would be in or around £3,000.

Of course, we would have to seek an undertaking from the Commission that the report would be completed by 31 March 2015, but that would be preferable to an open-ended over-run and Dr Scott will, presumably, be able to delegate the drafting of the background sections of the final report to the Commission's full-time legal researcher.

If you are content our officials can work through the detail of the above proposal and liaise with the Commission, as appropriate.

A handwritten signature in black ink, appearing to read 'Simon', written in a cursive style.

SIMON HAMILTON MLA
Minister of Finance & Personnel

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
27 November 2014**

See distribution below

1. **KAREN PEARSON** [Agreed: KP 27/11]
2. **DAVID FORD**

CLOSURE OF THE NILC – LETTER TO THE TIMES NEWSPAPER

Issue:	Lords Lester, Pannick and Lexden wrote to the Times on defamation law in Northern Ireland suggesting that DOJ had told the NILC to withhold publication of the consultation on defamation. They are critical also of your decision to close the NILC. You had asked us to consider a reply and this is now attached.
Timing:	Routine.
Presentational Issues:	Yes, Press office content.
FOI Implications:	Disclosable.
Financial/Legal/Shared Future Proofing/Legs Implications:	N/A.
Justice Committee/ Executive Referral:	N/A
Recommendation:	That you note the contents of this submission and agree to write to the Times along the lines of the attached draft.

Background

Lords Lester, Pannick and Lexden wrote to the Times on the subject of defamation law in Northern Ireland suggesting that DOJ had told the NILC to withhold publication of the consultation on defamation. They were also critical of the decision to close the NILC and asks that the matter be re-considered. A copy of the letter, which was mentioned at the Justice Committee yesterday, is attached.

2. The letter implies that you/DOJ are in some way trying to curtail the debate on defamation. DOJ did not tell NILC to withhold publication of the consultation

document but it was paused for a couple of weeks at most while we agreed how to handle to current NILC work programme. The consultation paper has been published by the NILC today.

Recommendation

3. It is recommended that you write to the Times to set the record straight and to explain the rationale for closure of the NILC. Michael Henderson has seen and agreed the draft letter attached.

Signed

WILLIAM STEVENSON
73590

Copy list

Nick Perry

David Lavery



Draft letter for approval by David Ford

letters@thetimes.co.uk

Sir, In their joint letter published on 11 November Lord Lester of Herne Hill, Lord Pannick and Lord Lexden suggested that my Department had told the Northern Ireland Law Commission to withhold publication of a consultation document on defamation law in Northern Ireland. The reality is that the launch of the consultation paper was paused for a couple of weeks only to identify the necessary resources. The noble Lords will wish to know that the consultation paper was published by the NILC on 27 November. It is correct that the NILC will close from 1 April 2015. This is entirely due to the severity of the budget restrictions placed upon my department. While law reform is desirable my priority has been to protect front-line services as much as possible. I do not rule out the re-establishment of the NILC but I cannot say when that might be. For clarity, policy on defamation is the responsibility of the Department of Finance and Personnel and not the Department of justice.

David Ford MLA

Minister of Justice

THE TIMES | Tuesday November 11 2014

1 London Bridge Street
London SE1 9GF
Email: letters@thetimes.co.uk



Rethink needed

Sir, The Northern Ireland Law Commission was established in 2007 "to review areas of the law and to make recommendations for reform". Earlier this year it began a review of the law of defamation in the province following the Northern Ireland executive's refusal (which it has never explained) to adopt the Defamation Act 2013 which, with all-party support in parliament, has achieved the right balance between freedom of speech, freedom of the press and the privacy of the individual in England and Wales.

Having drafted a consultation paper on this major topic of law reform, the commission has now been told by the Ministry of Justice in Northern Ireland to withhold publication and to prepare itself for abolition next April after just eight years in existence. Northern Ireland will as a result lose the permanent, independent authority on law reform that it continues to require just at the point when its work on an issue of overwhelming importance is at a crucial juncture.

These decisions are mistaken and should be reconsidered as a matter of urgency.

LORD LESTER OF HERNE HILL QC
LORD PANNICK QC
LORD LEXDEN
House of Lords

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From: [REDACTED]
Sent: 02 December 2014 15:45
To: Stevenson, William <William.Stevenson@dojni.x.gsi.gov.uk>
Cc: Perry, Nick <Nick.Perry@dojni.x.gsi.gov.uk>; Lavery, David A <David.Lavery2@dojni.x.gsi.gov.uk>;

[REDACTED]

Subject: Submission: SUB/1492/2014 CLOSURE OF NILC - LETTER TO THE TIMES NEWSPAPER

DEPARTMENT OF JUSTICE

Unclassified

From: [REDACTED]
Private Office
To: Stevenson William
Date: 02/12/2014

Action Copy: Perry Nick
Lavery David

[REDACTED]

DOJ Special Adviser

[REDACTED]

SUB/1492/2014:CLOSURE OF NILC - LETTER TO THE TIMES NEWSPAPER

Please note the Minister has seen your submission of 27/11/2014 and has noted it accordingly but has added that it is probably too late to respond now.

Many thanks.

[REDACTED]

Castle Buildings Tel: [REDACTED]

Document 46

From: [REDACTED]

Sent: 04 December 2014 10:36

To: Stevenson, William <William.Stevenson@dojni.x.gsi.gov.uk>

Cc: Perry, Nick <Nick.Perry@dojni.x.gsi.gov.uk>; Lavery, David A <David.Lavery2@dojni.x.gsi.gov.uk>;

[REDACTED]

Subject: Submission: SUB/1506/2014 CLOSURE OF THE NILC - LETTER TO JOHN HUNTER

DEPARTMENT OF JUSTICE

Unclassified

From: [REDACTED]

Private Office

To: Stevenson William

Date: 04/12/2014

Action Copy: Perry Nick

Lavery David

[REDACTED]

DOJ Special Adviser

[REDACTED]

SUB/1506/2014:CLOSURE OF THE NILC - LETTER TO JOHN HUNTER

The Minister has seen and agreed your submission of 02/12/2014.

Please see attached copy of final response now cleared and issued from the Minister's office - I would be grateful if you could check against your original draft for any changes that may have been made by the Minister or his Special Adviser and retain for future draft responses.

Many thanks.

[REDACTED]

Castle Buildings Tel: [REDACTED]

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG
Tel: 028 90528121
private.office@dojni.x.gsi.gov.uk

Our ref: SUB/1506/2014

John Hunter Esq



3 December 2014

Dear John

I am writing to let you know formally of my decision to close the Northern Ireland Law Commission (NILC) from 1 April 2015.

As you know I had accepted the findings of your review of the NILC and officials were working with the Commission to implement the recommendations including the new governance arrangements and senior staffing structure.

However, the budget restrictions imposed on my department in-year and beyond have necessitated a fundamental review of all spending. Some difficult choices have had to be made but my priority has been to protect front-line services as much as possible.

While the function of law reform is undoubtedly desirable, it cannot be considered essential or a front-line service and it is in that context that I have decided to close the Commission.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

I would like to record my thanks for your well-argued analysis of the issues facing the Law Commission. My hope is that the Commission may be re-established at some point, along the lines of your review, when finances become available.

Yours

David

DAVID FORD MLA
Minister of Justice

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
10 December 2014**

See distribution below

- 1. KAREN PEARSON [Agreed KP 10/12/14]**
- 2. DAVID FORD**

INV/247/2014 –LAW SOCIETY REQUEST TO DISCUSS CLOSURE OF THE NILC

Issue: Arleen Elliott, President of the Law Society has written to request a meeting with you discuss the closure of the NILC.

Timing: Routine.

Presentation Issues: You reply could be made public.
Press Office content.

FOI Implications: Likely to be disc losable.

**Financial/Legal/Shared
Future Proofing/Legs
Implications:** N/A.

**Justice Committee/
Executive Referral:** N/A

Recommendation: That you note the contents of this submission and agree to meet with Ms Elliott. A draft reply is attached for your consideration.

Background

Arleen Elliott, President of the Law Society of Northern Ireland has written to request a meeting with you to discuss closure of the NILC. In doing so Ms Elliott notes the significant work undertaken by the NILC such as the reform of land law (though she notes with disappointment that the Assembly has yet to bring forward legislation). She opines that the closure is a retrograde step that will put Northern Ireland out of kilter with other jurisdictions. She points out that the origins of the Commission are the Criminal justice Review with the objective of maintaining and enhancing confidence in the legal system that was endorsed by government. The purpose of

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the meeting would be to discuss what other options might be available and how the gap in the legal architecture of this jurisdiction is to be filled.

Recommendation

2. There has been some lobbying on behalf of the NILC and it would be prudent to hear some of the arguments first hand. Also, to decline a meeting with the Law Society on this issue would likely result in further adverse comment on closure of the NILC and it is therefore recommended that you agree to a meeting. A draft letter is attached for your consideration.

SIGNED

WILLIAM STEVENSON
Ext 73590

Copy list

Nick Perry
David Lavery



DRAFT LETTER FOR SIGNATURE BY DAVID FORD

Ms Arleen Elliott
President
The Law Society of Northern Ireland
Law Society House
96 Victoria Street
Belfast
BT1 3GN

December 2014

THE NORTHERN IRELAND LAW COMMISSION

Thank you for your recent letter to request a meeting to discuss closure of the Northern Ireland Law Commission. I would be happy to meet with the Society as requested. Perhaps you could contact [REDACTED], my Diary Secretary, to make the necessary arrangements. [REDACTED] may be contacted on [REDACTED] or by e mail at [REDACTED]

DAVID FORD MLA

Minister of Justice

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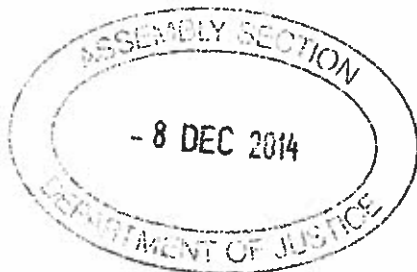
FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Jim Wells MLA



Department of
**Health, Social Services
and Public Safety**

www.dhsspsni.gov.uk

Castle Buildings
Stormont Estate
BELFAST BT4 3SQ
Tel: 028 90 520642
Fax: 028 90 520557
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Mr David Ford MLA
Minister of Justice
Department of Justice
Block B, Castle Buildings
Stormont Estate
Ballymiscaw
BELFAST
BT4 3SG

Your Ref: SUB/1424/2014

Our Ref: COR/1419/2014

Date: 5 December 2014

Dear David

CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Thank you for your letters of 24 September and 20 November about the closure of the Northern Ireland law Commission and the future of the review of the Public Health Act (Northern Ireland) 1967 which the Commission is carrying out.

While I understand the financial pressures that your Department must resolve, it is a matter of concern that the Northern Ireland Assembly and the Executive will no longer have a statutory body charged with reviewing their legislation.

In your letter of 20 November you acknowledge that the review of the 1967 Act is important for my Department. I should add that it is significant for the Department of Justice. DoJ has lead policy responsibility for CBRN planning, and responsibility for CBRN decontamination is currently recognised as a gap and a risk. In the long term DoJ stands to gain financially from this review if a new Public Health Act clarifies roles in relation to decontamination and in doing so relieves PSNI of some of the burden of meeting decontamination costs.

Thank you for clarifying DoJ's contractual commitment to employ the NILC lawyer until 3 March 2016. This, along with my Department's continued funding for the lawyer seconded to the Commission from the National Crime Agency, will allow the review to make further substantial progress during 2015/16.

You asked if my Department would fund half of the NILC lawyer's costs in 2015/16. In view of your Department's contractual obligations in respect of this NILC employee; the fact that my Department is meeting 58% of the employment costs for the review; and the potential benefits for DoJ from the review, I am of the view that DOJ should meet the full costs of its contractual commitment, which I understand will be in the region of £50k in 2015/16.



Subject to my Department being able to put in place the necessary alternative contractual and management arrangements in time for a transfer at the end of March 2015, I am content for DHSSPS to take over the management of the review from 1 April 2015. My Department is currently exploring alternative arrangements, and will work with DoJ and others to resolve current uncertainties as early as possible with the aim of securing the continuation of the review in 2015/16.



Jim Wells MLA
Minister for Health Social Services and Public Safety

FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
9 December 2014

Copy distribution below

- 1. KAREN PEARSON** [Agreed KP 10/12/14. The remaining issue is the method of transferring the lawyer's contract to DHSSPS and we remain in discussion on that].
- 2. DAVID FORD**

SUB/1424/2014: CLOSURE OF THE NILC; REPLY FROM JIM WELLS MLA

Issue: You wrote to Jim Wells MLA to propose arrangements for the transfer of the Review of the Public Health Act to the DHSSPS from 1 April 2015. You suggested that DHSSPS would accept the on-going management of the contract and agree to take over the contract of the NILC lawyer and to pay 50% of the lawyer's costs to the end of the contract in March 2016. Mr Wells has replied agreeing that DHSSPS would take over management of the project and the NILC lawyer's contract but declined to pay 50% of the lawyer's costs as suggested.

Timing: Routine.

Presentational issues: None likely. Press office content.

FOI implications: Likely to be disclosed.

Financial implications: As we are currently contracted to pay the lawyer until the end of the contract there are no additional financial implications beyond those already committed.

Reviewed by Finance.

Shared future proofing: N/A

Legal implications: N/A

Legislative implications: None.

Justice Committee Referral: N/A

Executive referral: N/A

Recommendation: That you reply to Mr Wells to agree that management of the Review of the Public Health Act should transfer to DHSSPS as would the contract of the NILC lawyer. DOJ would fund the NILC lawyer to the end of her contract in March 2016; but not beyond should the project extend into 2016/17.

Background

You wrote to Mr Wells with proposals to transfer the Review of the Public Health (NI) Act 1967 to DHSSPS following closure of the NILC on 31 March 2015. You proposed that DHSSPS should take over management of the project and the contract of the NILC lawyer working on this review. The NILC lawyer is on a fixed term contract ending in March 2016 with no provision for a break clause and you proposed that DHSSPS should pay 50% of the lawyer's costs. The DHSSPS already meet the costs of employing second lawyer seconded to the NILC to work on this review and will continue to fund this post.

2. Mr Wells has replied to agree that DHSSPS would take over management of the project providing the necessary arrangement may be put in place. I know from speaking with DHSSPS officials that discussions are well-advanced to locate the review within a health-related ALB. DHSSPS will also take over the contract of the NILC lawyer but have declined to pay 50% of the costs. The proposal was made in the faint hope that DHSSPS may contribute to the costs of the NILC lawyer: as they have declined we need to accept the contractual obligations and fund the post to the end of the contract in March 2016; but not beyond should the project extend into 2016/17.

3. Mr Wells also commented that while he understands the financial pressures that DOJ must resolve he is concerned that following closure of the NILC the Assembly and Executive will no longer have a statutory body charged with reviewing legislation.

Recommendation

4. It is recommended that you reply to Mr Wells to agree that officials should continue to work towards the transfer of the Review of the Public Health Act to DHSSPS from 1 April 2015; that the NILC lawyer's contract would be transferred to

DHSSPS and that DOJ would meet its contractual obligations and pay the salary of the NILC lawyer up to the end of the contract in March 2016 only and not beyond should the project run into 2016/17. A draft letter is attached for your consideration.

signed

WILLIAM STEVENSON
Criminal Justice Strategy and Secretariat Branch

Copy list

Nick Perry

David Lavery



Mr Jim Wells MLA
Minister for Health, Social Services and Public Safety
Department of Health, Social Services and Public Safety
Castle Buildings
Stormont Estate
BELFAST
BT4 3SQ

December 2014

CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Thank you for your letter of 5 December in response to my proposals for the transfer of the Review of the Public Health (Northern Ireland) Act 1967 to DHSSPS following closure of the Northern Ireland Law Commission on 31 March 2015.

Firstly, may I re-iterate that I regret the need to close the NILC but it is necessary to reduce the impact on front-line services following the difficult budget reductions required of my Department in-year and beyond.

I am grateful for your confirmation that your Department will take over the management of the Review from 1 April 2015 subject to being able to put the necessary arrangements in place. You have also agreed to take over the contract of the NILC lawyer and I am content to meet the contractual obligations of this post in terms of salary and employers costs up to the end of the contract in March 2016. I cannot fund the post beyond this point should the review extend into 2016/17.

I have asked my officials to keep in touch with yours to ensure the smooth transition of this work and indeed the contract of employment. I should also add that I do appreciate the strategic importance of this project to your Department and I hope the transfer of expertise will assist you.

DAVID FORD MLA

Minister of Justice

Ms Christine Darrah
Committee Clerk
Committee for Justice
Northern Ireland Assembly
Parliament Buildings
Stormont Estate
Belfast
BT4 3XX

December 2014

**THE PRE-LISBON POLICING AND CRIMINAL JUSTICE MEASURES –
2014 OPT-OUT**

My Minister provided a written update to the Committee on the detail of the UK's negotiations with European following and process to ensure legislative compliance with the 35 Pre-Lisbon Treaty measures that the UK was seeking to re-join after 1 December 2014. I indicated then that I would provide a copy of the Order but that this may not be available until close the December deadline.

The purpose of this letter is to advise Committee members that the EU Commission and all Member States agreed to the UK's proposals and that the necessary secondary legislation was passed in both Houses of Westminster prior to the deadline of midnight on 1 December 2014. A copy of the relevant Order is attached. This means that the UK was able to re-join the 35 measures, including the European Arrest Warrant, from 2 December 2014 without any operational gap.

Tim Logan
DALO

TOPIC: REVIEW OF DEFAMATION LAW/CLOSURE OF THE NILC

What makes this issue 'topical'?

Mike Nesbitt MLA could ask a question on the NILC's work on defamation. He had planned to introduce a private member's bill to reform defamation law in Northern Ireland along the lines of the reforms introduced in Great Britain. Simon Hamilton referred the matter to the NILC to consider and Mr Nesbitt agreed to postpone introduction of his PMB to await the outcome of the NILC report. The completion of the NILC has been raised in the context of the planned closure of the NILC.

Key Lines:

- The NILC published a consultation paper on defamation on 27 November. The consultation will close on 20 February 2015.
- We are working with DFP and the NILC to consider how best to complete this review in light of the closure of the NILC on 31 March 2015.
- I have not in any way obstructed the NILC carrying out this review.
- Policy on defamation is for DFP to consider.
- I regret that the NILC will close but this is a direct consequence of the difficult budget settlement facing DOJ this year and beyond.

Elephant traps:

- You will want to dispel any suggestion that you have tried impede the defamation review. This is a DFP policy.
- You will want to avoid getting into a discussion about the lack of independence or the mechanics of delivering report should it not be completed (increasingly likely) by 31 March 2015. The line is that these matters are being discussed between NILC, DOJ and DFP.
- There could be a discussion on the closure of the NILC; you will want to hold the line on closure. Alban Maginness in particular has been vocal about its closure at the Justice Committee.

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
11 December 2014**

Copy distribution below

- 1. KAREN PEARSON (Agreed, KP 11/12/14)**
- 2. DAVID FORD**

EXP\14\231 - SUB 1382 2014: CLOSURE OF THE NILC; REPLY FROM SIMON HAMILTON

Issue: As part of the closure plan for the NILC, you wrote to Simon Hamilton with proposals to take forward the review of defamation law. Your proposal was that the project would be funded up to the end of March and that if the project was not complete by then that DFP should fund the legal expert seconded to the NILC to complete the report. Simon Hamilton has replied to suggest that the legal expert should be funded to provide extra input to the project up to the end of March and that in such circumstances DFP would fund 50% of the additional cost.

Timing: Routine.

Presentational issues: None likely.

FOI implications: May be withheld.

Financial implications: Possibly up to £3,000 in total if the legal expert can be secured to work an additional 1 day per week. The cost would be shared on a 50:50 basis with DFP.

Shared future proofing: N/A

Legal implications: N/A

Legislative implications: None.

Justice Committee Referral: N/A.

Executive Referral: N/A

Recommendation: That you note the contents of this submission and agree.

Background

As part of the closure plan for the NILC, you wrote to Simon Hamilton with proposals to take forward the review of defamation law following closure of the NILC on 31 March 2015. Your proposal was that the project would be funded up to the end of March and that, if the work was not complete by then, DFP should fund the legal expert currently seconded to the NILC to complete the report.

2. Mr Hamilton has replied to suggest that rather than adding time post-closure he would prefer to have increased resource is put into the project between now and the end of March. He has suggested that input by the seconded legal Expert (Dr Andrew Scott from the LSE) should be increased from one day per week to two and that, in such circumstances, DFP would pay 50% of the additional cost (around £3,000).

3. Mr Hamilton notes that he understands that the consultation paper was ready for a few weeks prior to publication and that if it has been published sooner would have allowed a larger window during which to complete the report. The implication is that DOJ held back publication of the consultation paper; this is untrue. The reality is that following the announcement of the closure of the NILC officials advised that the paper (which was not complete at this point) should not be published until the NILC's resources for the remainder of 2104/15 had been agreed. Work did not stop on the consultation paper during the period between announcing closure of the NILC and decisions on funding the work programme in-year. The consultation paper was completed around 14 November after which it was sent for printing and subsequently published on 27 November.

4. You will not want to be seen to hinder progress on the defamation review and we have encouraged the NILC to work with Dr Scott to find a solution to expedite the project. This would include funding additional time for Dr Scott to week on the between now and the end of March. We are continuing to work with the NILC and DFP on this matter.

5. At a meeting yesterday attended by NILC, DOJ and DFP Dr Iyer insisted that the final report could not be completed by the end of March even with additional

resources suggested by DFP. We will meet again to meet again in February once the consultation responses have been received to assess what can be done including with additional resources. DFP officials have concerns about the completion of the report, including the independence of the report and who should fund the work, post-closure of the NILC. DOJ have given no commitment on this but Simon Hamilton's comments to the Assembly in response to an AQ on the subject are relevant. He said:-

"My Department will not be assuming any responsibility for the final stages of the review project. Rather, it is envisaged that the commission's lead lawyer, who has been carrying out the work on our behalf, will complete the final report and refer it back to the Department for consideration".

Recommendation

6. It is recommended that you reply to Mr Hamilton to note that you agree that efforts should be made to expedite the defamation project between now and the end of March and that you would accept, subject to Dr Scott's agreement, to fund on a 50:50 basis with DFP the additional cost of Dr Scott working an extra day a week on the project. You will also want to explain that there was no delay in publishing the consultation document. A draft letter is attached for your consideration.

Signed

WILLIAM STEVENSON
Criminal Justice Strategy and Secretariat Branch

Copy list
Nick Perry
David Lavery



Simon Hamilton MLA
Minister of Finance and Personnel
DFP Private Office
Clare House
303 Airport Road West
Belfast
BTs 9ED

December 2014

REVIEW OF DEFAMATION LAW IN NORTHERN IRELAND

Thank you for your letter of 27 November giving your response to my proposals for handling the review of defamation law in light of the closure of the Northern Ireland Law Commission (NILC) on 31 March 2014.

I am advised that the NILC Commissioner's view is that the final report on defamation cannot be completed by the end of March. I understand that our officials met recently with the NILC and that they will meet again once the consultation period has ended to review progress and decide upon the best way forward. In the circumstances I would support your proposal to expedite the review in-year in by seeking to secure additional input from Dr Scott from one day per week to two days per week with the additional costs shared equally between our DOJ and DFP. I am advised that additional input from Dr Scott would not be available until the consultation responses have been received.

I would wish to clarify that publication of the consultation paper was not delayed by my Department. Work on this project did not stop when I announced that the NILC would close. The consultation paper was completed in mid-November when it was sent for printing and publication on 27 November. I am pleased that the consultation paper is now published and I have asked my officials to continue to work with yours and with the NILC to ensure the best outcome possible.

DAVID FORD
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG
Tel: 028 90528121
private.office@dojni.x.gsi.gov.uk

Our ref: SUB/1537/2014

Mr Jim Wells MLA
Minister for Health, Social Services and Public Safety
Department of Health, Social Services and Public Safety
Castle Buildings
Stormont Estate
BELFAST
BT4 3SQ

Den J.

13 December 2014

CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Thank you for your letter of 5 December in response to my proposals for the transfer of the Review of the Public Health (Northern Ireland) Act 1967 to DHSSPS following closure of the Northern Ireland Law Commission on 31 March 2015.

Firstly, may I re-iterate that I regret the need to close the NILC but it is necessary to reduce the impact on front-line services following the difficult budget reductions required of my Department in-year and beyond.

I am grateful for your confirmation that your Department will take over the management of the Review from 1 April 2015 subject to being able to put the necessary arrangements in place. You have also agreed to take over the contract of the NILC lawyer and I am content to meet the contractual obligations of this post in

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terms of salary and employers' costs up to the end of the contract in March 2016. I cannot fund the post beyond this point should the review extend into 2016/17.

I have asked my officials to keep in touch with yours to ensure the smooth transition of this work and indeed the contract of employment. I should also add that I do appreciate the strategic importance of this project to your Department and I hope the transfer of expertise will assist you.

Yours

DAVID FORD MLA
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref: SUB/1382/2014

Simon Hamilton MLA
Minister of Finance and Personnel
DFP Private Office
Clare House
303 Airport Road West
Belfast
BTs 9ED

17 December 2014

Dear Sir

REVIEW OF DEFAMATION LAW IN NORTHERN IRELAND

Thank you for your letter of 27 November giving your response to my proposals for handling the review of defamation law in light of the closure of the Northern Ireland Law Commission (NILC) on 31 March 2014.

I am advised that the NILC Commissioner's view is that the final report on defamation cannot be completed by the end of March. I understand that our officials met recently with the NILC and that they will meet again once the consultation period has ended to review progress and decide upon the best way forward. In the circumstances I would support your proposal to expedite the review in-year by seeking to secure an additional day per week of input from Dr Scott, with the additional costs shared equally between DOJ and DFP. I am advised that additional input from Dr Scott would not be available until the consultation responses have been received.

I would wish to clarify that, contrary to media reports, publication of the consultation paper was not delayed by my Department. Work on this project did not stop when I announced that the NILC would close. The consultation paper was completed in mid-

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November and it was published on 27 November. I am pleased that the consultation paper is now published and I have asked my officials to continue to work with yours and with the NILC to ensure the best outcome possible.

DAVID FORD MLA
Minister of Justice

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
19 December 2014**

Copy distribution below

- 1. KAREN PEARSON (Agreed, KP 19/12/14)**
- 2. DAVID FORD**

**COR/983/2014: DR VENKAT IYER – CLOSURE OF THE NORTHERN IRELAND
LAW COMMISSION**

Issue: Dr Iyer has sought Counsel Opinion on the legality of your decision to close the NILC. He has provided a copy of the Opinion (which suggests that your decision is legally vulnerable) and has asked what steps you intend to take pursuant to the Opinion.

Timing: Routine.

Presentational issues: Dr Iyer could make the Opinion public by some means.

FOI implications: May be withheld.

Financial implications: N/A

Shared future proofing: N/A

Legal implications: Clearly you will want to consider the Opinion together with other advice received.

Legislative implications: There may be a requirement to legislate but this is yet to be agreed.

**Justice Committee
Executive Referral:** Not now, but you would refer the matter to the Committee and Executive should you decide to legislate to repeal the provisions that established the NILC

Recommendation: It is recommended that you do not get into correspondence with Dr Iyer on the legalities of closing the NILC but that you note the contents of this submission and agree to reply along the lines of the attached draft letter.

Background

You have decided to close the NILC from 1 April 2015 and we have been working with the NILC to put the necessary arrangements in place. Nick Perry and David Lavery have met separately with Dr Iyer to keep him in the loop and he is copied into relevant correspondence with other Departments. Despite this he appears to be unhappy with the approach we have taken and the information provided to him. Dr Iyer has taken the novel approach of commissioning counsel opinion on the legality of your decision to close the Commission. He has forwarded the Opinion to you asking what steps you plan to take pursuant to it. We understand that the opinion was provided pro bono.

2. The Opinion questions the legality of your decision to close the NILC on four counts. The main thrust of counsel opinion may be summarised as:

Statutory obligation

Counsel suggests that there is a very strong case that the decision is unlawful to close the Commission without abolishing it by legislation because there is a clear obligation in statute that the Commission is required to exist. This includes obligations which likely cannot be ignored even if the Commission is closed.

Consultation

Counsel suggests that there should have been consultation with interested parties before the decision was taken.

Irrationality

Possible to argue that your decision was irrational as the amounts of money involved are relatively small and there was work to be completed.

Acting without Executive agreement

There is an argument that the decision could be regarded as significant or controversial or that it is cross-cutting thereby requiring Executive approval.

3. We have of course taken our own legal view on closure of the NILC (not from Counsel) and some of the points in Counsel's opinion, particularly in relation to the statutory obligation, have been made. You have also spoken to the Attorney General. We have asked for a legal view of the Counsel Opinion and will shortly provide you with a separate submission on the options open to you in terms of any legalisation that may be required or desirable in order to reduce vulnerability around your decision to close the NILC. At present, we have no plans to alter the direction of travel.

Recommendation

4. This is an unusual intervention from Dr Iyer. Although he notes that counsel advice was sought without questioning the merits of your decision: it seems likely that he opposes it. Legal action against your decision cannot be ruled out and, on that basis, it is recommended that you do not get into correspondence with Dr Iyer on the details of the Opinion. You might acknowledge receipt of the Opinion and indicate you are of course aware of the legal matters around closure. A draft letter is attached for your consideration.

Signed

WILLIAM STEVENSON

Criminal Justice Strategy and Coordination Branch

Copy list

Nick Perry

David Lavery



DRAFT LETTER FOR SIGNATURE BY DAVID FORD

Dr Venkat Iyer
Commissioner
Northern Ireland Law Commission
Linum Chambers
8th Floor
2 Bedford Square
Bedford Street
Belfast
BT2 7ES

December 2014

CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Thank you for your letter of 18 December 2014 attaching Counsel Opinion sought by you on the legality of my decision to close the Commission.

You may be assured that I am alive to the legal issues involved. I will of course write to you in due course once final decisions on the matters raised have been taken.

DAVID FORD MLA
Minister of Justice

18 December 2014

Mr David Ford MLA
Minister of Justice
Castle Buildings, Block B
Ballymiscaw
Belfast BT4 3SG

Dear Minister,

Closure of the Northern Ireland Law Commission

On 03 December 2014 I had written to the Permanent Secretary in your Department indicating that I had, as part of my responsibilities as the sole remaining Commissioner of the Northern Ireland Law Commission, sought independent legal advice on issues surrounding the legality of your decision to close the Commission with effect from 01 April 2015. This advice was sought without questioning the merits of that decision.

In my communication to the Permanent Secretary I had attached a copy of Counsel's Opinion, and had asked him to bring it to your attention as a matter of urgency.

Since I have not so far had the benefit of a reply to that communication, and since Counsel's Opinion raises a number of issues which, in my view, merit serious consideration, I am writing to ask for your response to the opinion. I would be grateful if you could let me know what steps, if any, you intend to take pursuant to that Opinion.

For your convenience, I attach a copy of the Opinion.

Yours,


**Venkat Iyer (Dr)
Commissioner**

Enc

BRIEF TO ADVISE

THE NORTHERN IRELAND LAW COMMISSION

Querist

**in relation to the decision of the Minister for Justice
to close the Commission**

COUNSEL'S ADVICES

INTRODUCTION

1. I am asked to advise the Northern Ireland Law Commission ('the Commission') – which presently consists of only one Commissioner, Dr Venkat Iyer – in relation to the legality of the recent decision of the Minister for Justice to close the Commission.

FACTS AND INSTRUCTIONS

2. At this stage, I have been provided with only limited instructions, which are summarized below.
3. The Commission was established in 2007 following the recommendations of the Criminal Justice Review Group¹. It is established under the Justice (Northern Ireland) Act 2002² ('the 2002 Act'). The Commission's main task is to review areas of the law and to make recommendations for reform. It seeks to ensure that the law is as simple, accessible, fair, modern and cost-effective as possible.
4. The Commission is an independent advisory, non-departmental public body (NDPB). The

¹ See, in particular, Chapter 14 of the Review Group's report.

² As amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ('the

² As amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ('the 2010 Order').

Department of Justice is the Commission's sponsoring Department. In terms of its constitution, the Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Department of Justice must consult with the First Minister and deputy First Minister and the Attorney General for Northern Ireland before making the appointments. The Chairman and Commissioners are appointed on a part-time basis.

5. The 2002 Act requires the Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must submit to the Department of Justice programmes for the examination of different branches of the law with a view to reform. The Department of Justice must consult the Attorney General for Northern Ireland before approving any programme submitted by the Commission.
6. I have been provided with a copy of the Commission's Second Programme of Law Reform³, which runs from May 2012 to March 2015. This programme contains projects relating to the following:
 - (a) Bail law;
 - (b) The law and practice of multi-unit developments;
 - (c) The regulation of health care and pharmaceutical professionals in Northern Ireland;
 - (d) Aspects of landlord and tenant law;
 - (e) The unfitness of an accused person to plead;
 - (f) The availability and scope of the defence of insanity to an accused person' and
 - (g) The initiation of criminal prosecutions.
7. I understand that all of the approved projects within the Second Programme have been completed (or, at least, that there are no such projects currently in progress). However, there are two important projects which are still underway. These are (a) the reform of defamation law; and (b) electoral law reform.
8. The project relating to defamation law arose because, on 28 November 2013, the Finance Minister for Northern Ireland, Simon Hamilton MLA, asked the Commission to examine

³ NILC 11 (2012); which was laid before the Northern Ireland Assembly in July 2012 by the Department of Justice under section 52(2) of the 2002 Act (as amended by paragraph 10 of Schedule 13 to the 2010 Order).

whether the Defamation Act 2013, which received Royal Assent on 25 April 2013 and which was brought into force in Great Britain on 1 January 2014, should be extended to Northern Ireland. Reform of defamation law has been the subject of much discussion throughout the United Kingdom in recent years and in Northern Ireland in particular, since the reforms introduced by the 2013 Act have not been introduced here. The reference to the Commission was formally approved by the Minister of Justice on 7 January 2014 and it has since been included in the Commission's Work Programme as a discrete project.

9. The project relating to electoral law reform aims to simplify and modernise electoral administration law, which has become complex and unwieldy and has given rise to inconsistencies and unjustifiable differences in practice between different elections and different parts of the UK. The scope of the project is limited to technical aspects of electoral law governing the administration of elections and does not include issues such as the voting system, who can vote, etc.. Although electoral law is not a devolved matter (and the Northern Ireland Assembly has no legislative competence in respect of elections), the Minister of Justice consulted with the Secretary of State and the Attorney General for Northern Ireland (as required under section 51(3) and section 51(3A) of the 2002 Act) before granting approval to the Commission to include this project in its Work Programme on 15 November 2012.
10. Owing to the subject nature, any review of the law on elections and referendums must be UK-wide. The project is therefore being led by the Law Commission (England and Wales), supported by the Northern Ireland Law Commission and the Scottish Law Commission. This project is split into three phases, with review points between phases. The first phase is the scoping exercise, which concluded in December 2012. The next phase involves formulating substantive law reform proposals and the final phase will produce a Final Report and draft Bill to implement the recommendations. The aim is to complete the final phases before the end of February 2017.
11. In terms of its working methods, the Commission's projects generally begin with a scoping paper. The purpose of this is to consider how extensive the project should be, find out the key issues as seen by others, and identify interested parties. This early process can involve considerable work with stakeholders. This is followed by publication of a consultation paper. In the consultation paper the law as it currently stands is set out, the perceived

weaknesses or defects in the law and its operation are discussed and possible options for reform are set out. During the consultation period the Commission actively seeks out interested parties and engages with them in meetings, either on their own or with other stakeholders.

12. The responses to the public consultation are then analysed and the Commission takes careful account of these responses as part of its final considerations. A report with recommendations and, where appropriate, draft legislation, is presented to the Department of Justice and is published. It is then for the Department of Justice and the Northern Ireland Administration to decide whether it accepts the recommendations and to introduce any necessary Bill in the Northern Ireland Assembly.
13. In performing its duties the Commission must also consult with the Law Commission (England and Wales), the Scottish Law Commission and the Law Reform Commission of the Republic of Ireland.
14. On 24 September 2014 the Minister of Justice wrote to his Executive Colleagues, in a memo which was copied to the Commission, in the following terms:

"I am writing to inform colleagues that I have decided to close the Northern Ireland Law Commission (NILC) from 1 April 2015. I have asked my officials to ensure an orderly run-down of the Commission and smooth transition to include the early completion or transfer of the remainder of the programme of work. I will write separately to those Ministerial colleagues who have projects currently with the Commission. Eleven staff are contracted to the NILC all of whom are either seconded from other organisations or employed directly by the NILC on fixed-term contracts. The NILC will consult with staff as part of the transition arrangements.

My decision must be seen in the context of the budget reductions that have been imposed on my Department. This has required me to make some difficult choices in terms of what I can now afford to fund. Law Reform is clearly a desirable function, but it cannot be considered essential or a front line service.

My decision to close the NILC is regrettable and should funds become available in future I would of course consider re-establishing the Commission."

15. The Minister's decision was the subject of discussion between the Commission and its sister Commissions in the rest of the UK and Ireland at their annual meeting in Dublin on 24 October 2014. This has resulted in a joint letter from the Chair of each of those Commissions to the Minister, shared with the Northern Ireland Commission, expressing *inter alia* their "concern and regret at the proposed closure of a body which is an effective force for law reform in Northern Ireland and with which we have developed valuable working relationships".
16. I am asked to advise on the legality of the Minister's decision "to close" the Commission.

RELEVANT STATUTORY PROVISIONS

17. The key provision of the 2002 Act establishing the Commission is section 50. Section 50(1) provides simply that: "*There is to be a body corporate known as the Northern Ireland Law Commission.*"
18. Section 50(2)-(4) provides for the membership of the Commission, which is to consist of a chairman and four other Commissioners, appointed by the Secretary of State (now the Department of Justice). The chairman is to be a person who holds the office of judge of the High Court; and, of the other Commissioners, one is to be a person appearing to be suitably qualified to be a Commissioner by experience as a barrister, one appearing to be suitably qualified by experience as a solicitor, one appearing to be suitably qualified by experience as a teacher of law in a university, and the other a lay person. By section 50(6), in appointing persons to be Commissioners, the Minister "*must so far as possible secure that the Commissioners (taken together) are representative of the community in Northern Ireland*".
19. Section 50(7) gives effect to Schedule 9, which makes further provision about the Commission. This includes dealing with matters such as the Commissioners' tenure (paragraph 1) and salary (paragraph 3); the Commission's staff (paragraph 4); its financial arrangements (paragraphs 5-6); and the Commission's status as independent of the Crown (paragraph 8).
20. The duties of the Commission are set out in section 51 of the 2002 Act. Section 51(1) imposes a duty on the Commission to keep the law of Northern under review in particular

ways (providing a non-exhaustive list). Section 51(1) is the in the following terms:

"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."

21. More specific duties, for the purpose of its general duty of keeping the law of Northern Ireland under review, are imposed upon the Commission by section 51(2), which provides as follows:

"For that purpose the Commission must —

- (a) consider any proposals for the reform of the law of Northern Ireland made or referred to it,*
- (b) prepare and submit to the Department of Justice (from time to time) programmes for the examination of different branches of that law 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,*
- (c) undertake, pursuant to any such recommendations approved by the Department of Justice, the examination of particular branches of that law and the formulation (by means of draft legislation or otherwise) of proposals for reform of those branches,*
- (d) prepare (from time to time) at the request of the Department of Justice comprehensive programmes of consolidation and repeal of legislation, and undertake the preparation of draft legislation pursuant to any such programme approved by the Department of Justice,*

(e) *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, and*

(f) *obtain such information as to the legal systems of other countries as appears to the Commission likely to facilitate the performance of its other duties."*

22. Section 51(4) requires the Commission, in performing its duties, to consult the Law Commission, the Scottish Law Commission and the Law Reform Commission of the Republic of Ireland. By section 51(5), the Commission must make an annual report on how it has performed its duties.

23. Section 52 of the 2002 Act makes provision in relation to programmes of reform, reports and annual reports of the Commission.

DISCUSSION

24. It seems to me that there are four areas of challenge on the basis of which the Minister's decision is legally vulnerable. The first, and most straightforward, is that his decision is incompatible with his obligations under the 2002 Act. The second is lack of consultation; the third, irrationality; and the fourth, the question of whether the Minister had authority to act without Executive agreement. I consider each of these issues in further detail below.

The statutory obligations

25. The primary, and most obvious, difficulty with the Minister's decision to "close" the Commission is the simple statutory requirement in section 50(1) of the 2002 Act that "there is to be a body corporate known as the Northern Ireland Law Commission". In other words, as a matter of statutory obligation, the Commission is required to exist.

26. Although the Minister has not set out to 'abolish' the Commission, it is clear that he intends to shut it down so that, for all intents and purposes, it no longer exists. One can detect this, for instance, from the reference in his memo of 24 September 2014 to considering "*re-establishing the Commission*" in future, if the financial position permits.
27. I consider, therefore, that there is a very strong case that the Minister's decision is unlawful because he is acting in breach of a clear obligation imposed in the statute (which must fall upon his Department) to maintain the Commission in existence.
28. I do not consider that the 2002 Act can properly be read as requiring only the theoretical or hypothetical legal existence of the Commission. This is partly because of the plain wording of section 50(1); but also because the Act imposes on the Commission ongoing duties (to be exercised by the Commission, of its own motion, from time to time and on an ongoing basis). These duties include the core duty in section 51(1) to keep the law in Northern Ireland under review. If the Commission is closed, it cannot comply with this statutory obligation imposed upon it.
29. For instance, if an anomaly in the law of Northern Ireland became apparent, or a particular statutory provision came to be highlighted which was obviously no longer of any practical utility, the Commission would be under an obligation to take these matters up, or at least consider doing so. However, in the absence of a functioning Commission, these obligations will go un-discharged. The same may be said in relation to a number of the more focused obligations in section 51(2) of the 2002 Act.
30. I would therefore read section 50(2) of the Act ("*The Commission is to consist of... a chairman, and... four other Commissioners, appointed by the Department of Justice*") as imposing an implied obligation on the Department to make appointments to the Commission.
31. It is perhaps also relevant to mention here paragraph 7 of Schedule 9 to the 2002 Act, which provides that: "*The exercise by the Commission of its functions is not affected by... (a) any vacancy among the Commissioners...*". The Act, accordingly, makes provision that the Commission should remain effective and continue to discharge its functions even if there is a vacancy (or vacancies) among the Commissioners. The clear intention is that the

Commission should continuously discharge its functions.

32. The one counterpoint to this analysis may be said to be the terms of paragraph 5 of Schedule 9 to the 2002 Act, which provides that "*The Department of Justice may make grants to the Commission*". It might be argued that the Department therefore has a discretion whether to fund the Commission or not. In my view, this provision is likely to be one of those limited instances where, notwithstanding the use of the permissive 'may', properly construed it imposes an obligation on the Department to fund the Commission.
33. However, even if that is not so, for the reasons given above, I consider that the Department is not permitted by the terms of the 2002 Act to simply 'close' the Commission, including by the ending of Commissioners' appointments (for reasons other than those set out in paragraph 1(4) of Schedule 9 to the 2002 Act) or simply failing to appoint Commissioners to fill vacancies. Furthermore, in accordance with usual public law principles⁴, any statutory power granted to the Minister is conferred so that it may be used to *promote* the policy and objects of the statute, rather than the contrary.
34. In summary, if the Minister wishes to frustrate the clear policy behind, and requirements of, the 2002 Act, this should be done by way of legislative amendment, rather than simply purporting to shut down the Commission which requires to remain established under the 2002 Act. Relatedly, there is also a strong argument that the Minister, in noting in his memo of 24 September 2014 that the law reform for which the Commission has responsibility "*cannot be considered essential*", has misdirected himself as to the correct legal position under the 2002 Act.
35. Given my clear conclusion on this issue, I can deal with the remaining issues rather more briefly.

Lack of consultation

36. Another striking feature of the Minister's decision is that it seems to have happened with no prior consultation whatsoever of interested parties who will, or may be, significantly affected by the decision. I am thinking, in particular, of the Commission itself (and its staff),

⁴ See *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997.

the other Law Commissions within the UK and Ireland which work closely with the Northern Ireland Commission and/or those Departments which have referred matters to the Commission which are currently ongoing.

37. I note that the Minister envisages some consultation after the event, for instance, the Commission itself consulting with its staff as part of the 'transition arrangements'. However, no consultation on the actual decision to close the Commission appears to have occurred, let alone consultation which would comply with the public law requirements for fair and effective consultation ('the *Sedley* requirements')⁵.

38. I consider there is a strong case that this is the type of decision where consultation was necessary, either as a result of the requirements of common law fairness or as a result of the doctrine of legitimate expectation. As to common law fairness, there are a number of parties who will be directly and adversely affected by the Minister's decision. This applies particularly to the remaining Commissioner and the Commission staff. However, the other UK Law Commissions will also be affected. (I understand that, in particular, the Minister's decision may cause serious problems for completion of the joint electoral law project). The public generally will also be affected; and the Minister's decision is dismantling a key part of the machinery recommended by the Criminal Justice Review. In light of these factors, I consider it likely that public law required consultation on the Minister's decision before it was taken.

39. As to legitimate expectation, it is clear that the Department has granted approval for two ongoing projects which, on foot of that approval, the Commission, its sister Commissions and/or those referring the issue or with an interest in its outcome have a legitimate expectation will be progressed to completion. It may well be permissible for the Department to withdraw approval for a project or to cut it short; but it seems to me likely that, having granted approval for the project, any such decision would require to be consulted upon before it could lawfully be reversed.

⁵ As recently endorsed by the UK Supreme Court in *R (on the application of Moseley) (in substitution of Stirling (Deceased)) v London Borough of Haringey* [2014] UKSC 56.

Irrationality

40. There is also possibly an issue as to the rationality of the Minister's decision to close the Commission at such short notice. Funding decisions are primarily a matter for the Department and a court would be slow to intervene in decisions concerning the allocation of scarce public resources. However, I understand that the Commission's annual budget is, comparatively speaking, a modest sum; and that the extension of the proposed life of the Commission by a relatively short further period would enable the Commission to be wound down in a much more orderly (and cost-effective) fashion and, importantly, to complete necessary work on its remaining two projects. I express no final view on this issue, which may require further investigation; however, this merely serves to emphasize that these are the types of matter which the Minister himself could (and should) have considered had consultation been undertaken in advance of his decision.

Executive agreement

41. Finally, there is also a reasonable argument that the decision of the Minister is either significant or controversial (and clearly outside the agreed Programme for Government) and/or that it is 'cross-cutting', so that the matter required to be brought to the attention of the Executive for its discussion and agreement, rather than being determined by the Minister alone, pursuant to section 20(3) and/or 20(4)(a) of the Northern Ireland Act 1998 (as amended)⁶. If this is so, and the Minister was in breach of the requirements of the Ministerial Code to refer the matter to the Executive, the Minister would be deprived of Ministerial authority to act under section 28A(5) and (10) of the 1998 Act.
42. The reasons why the decision may be considered to be significant or controversial are partly those set out in discussion above and also because, as also noted above, the Minister is dispensing with a key part of the new arrangements recommended by the Criminal Justice Review. It also seems to me likely that the decision is cross-cutting⁷, given the role envisaged for the Office of the First Minister and deputy First Minister in the relevant provisions of the 2002 Act (including a right to be consulted on the Commission's work

⁶ And as read in conjunction with paragraph 19 of Strand One of the Belfast Agreement and the Ministerial Code of Conduct.

⁷ That is to say, cutting across the responsibilities of two or more Departments.

programme and an obligation to lay the Commission's reports before the Assembly⁸) and the fact that the Department of Finance and Personnel presently has a referral to the Commission on defamation law, for which it has responsibility, outstanding.

43. I consider, therefore, that the Minister's decision may well be legally flawed by reason of his failure to refer the matter to the Executive for discussion and agreement⁹. Obviously, this concern would be materially strengthened if another Minister (or Ministers) within the Executive took the view that the matter ought so to have been referred.

CONCLUSION

44. For the reasons given above, I consider that there is a strong case that the Minister's decision to 'close' the Northern Ireland Law Commission was unlawful. The primary basis for this view is the incompatibility of the Minister's decision with what I consider to be the clear requirements of the 2002 Act. Even if that were not correct, I consider that the Minister's decision is legally vulnerable by reason of failure to consult prior to reaching his decision and his failure to refer the matter to the Executive for discussion and agreement.
45. I trust the above advices are of some assistance to the Commission. If I can be of any additional assistance, my instructing solicitor should, of course, not hesitate to contact me further.

David A Scofield QC

Bar Library

Belfast

3 December 2014

⁸ See sections 51(3)(b) and 52(1) and (3).

⁹ His memo of 24 September 2014 is clearly designed merely to inform his colleagues of a decision he *has* taken.

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
1 October 2014**

Copy distribution below

1. KAREN PEARSON (Agreed, KP 1/10/14)

2. DAVID FORD

**SUB/1158/2014; EXP \14\231 – CLOSURE OF THE NORTHERN IRELAND LAW
COMMISSION**

Issue: The Attorney General (AG) has written in response to your letter informing him that you intend to close the NILC. He asks if you intend to repeal the relevant provisions and thinks that it would be better if you did.

Timing: Routine

Presentational Issues: The AG could press his view more firmly and make it public.

[Press Office content with this submission.]

FOI Implications: Parts of this submission may be considered under s.36 of the Act.

Financial Implications: Not in terms of the question raised by the AG.

Shared Future Proofing: N/A

Legislative Implications: Primary legislation would be required should you agree to repeal the legislation in line with the AG's suggestion.

Legal advice: A summary of the legal advice obtained is contained within this submission.

Justice Comm/Executive

Referral: Not required

Recommendation: That you note the content of this submission and agree to write to the AG suggesting that you do not plan to repeal the founding legislation of the NILC at this time.

Background

My earlier submission dated [redacted] provided some advice on the closure of the NILC including letters to Executive Members, the Justice Committee, the Attorney General (AG) and the LCJ. The AG has now replied to say that he is not surprised by your decision and asks if you intend to use the current Justice Bill to repeal the relevant provisions in the Justice (Northern Ireland) Act 2002. He suggests it would "be better he thinks" to repeal sections 50-52 and Schedule 9 of the Act rather than "leave a hollow-shelled body corporate that would still be subject to the duties created by section 51 of the Act". I understand that the AG also mentioned this matter to you recently.

Detail

2. The NILC was established under sections 50-52 and Schedule 9 of the Justice (Northern Ireland) Act 2002. [redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

[redacted] On balance our advice to you tended towards non-repeal primarily because it would be easier to re-establish the NILC in the future (along the lines of the Hunter model) if the legislation remained in place. While the AG thinks it would be better to repeal the legislation he does not suggest that it is essential. Our advice therefore remains that, while not the most elegant solution, the balance is in favour of keeping the legislation on the books. Should you disagree the legislation could of course be repealed; most readily by means of an amendment to the current Justice Bill.

Recommendation

3. It is recommended that you reply to the AG acknowledging that, while there is an argument for repealing the legislation, you would prefer to keep the clauses on the statute book to facilitate any future re-establishment of the NILC. You may of course need to reconsider should the AG press the matter. A draft reply is attached for your consideration.

Signed

WILLIAM STEVENSON
EXT 73590

Copy list

Nick Perry
David Lavery
Lian Patterson
Sue McAllister
Glyn Capper
Maura Campbell
Laurene McAlpine



DRAFT LETTER FOR SIGNATURE BY DAVID FORD

John F Larkin QC
Attorney General for Northern Ireland
PO Box 1272
Belfast BT1 9LU

October 2014

NORTHERN IRELAND LAW COMMISSION (NILC)

Thank you for your recent letter seeking my thoughts on the possible repeal of legislation in light of my decision to close the NILC from 1 April 2015.

I did consider repealing sections 50 to 52 and Schedule 9 of the Justice (Northern Ireland) Act 2002 for the reasons you have identified. On balance, however, I would propose to leave the legislation in place. I do appreciate that this is not the tidiest outcome in terms of the statute book but I was swayed by the argument that, should funds become available in future, the Law Commission would be easier to re-establish with the legislation extant.

DAVID FORD
Minister of Justice



**NORTHERN IRELAND
ASSEMBLY
COMMITTEE FOR JUSTICE**

**Mr Paul Givan MLA
Chairman, Committee for Justice**

Mr David Ford MLA
Minister of Justice
Block B, Castle Buildings
Stormont Estate
Belfast
BT4 3SG

3 November 2014

Dear Minister of Justice

Decision to Close the Northern Ireland Law Commission

At the meeting of the Committee for Justice on 22 October 2014 your decision to close the Northern Ireland Law Commission, as outlined in a letter dated 25 September 2014 in which you indicated that you have asked officials to begin work to ensure an orderly wind-down to include the early completion or transfer of the remainder of the programme of work, was raised.

The Committee agreed to request further clarification of the rationale for your decision given this appears to be a departure from a recommendation in the Criminal Justice Review that there should be a Law Commission.

I would appreciate a response by 17 November 2014.

Yours sincerely

(Approved by the Chairman and signed on his behalf)

**Mr Paul Givan MLA
Chairman of the Committee for Justice**

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
7 November 2014**

Copy distribution below

1. KAREN PEARSON (KP, 11/11/14)
2. DAVID FORD

EXP\14\231: CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Issue: Paul Givan has written on behalf of the Justice to request clarification of the rationale for your decision to close the Northern Ireland Law Commission (NILC) given that this appears to be a departure from a recommendation in the Criminal Justice Review that there should be a Law Commission.

Timing: Routine. A response has been requested by 17 November.

Presentational Issues: Your reply will likely be made public at the Justice Committee.
Press Office content with this submission.

FOI Implications: Likely to be disclosable.

Financial Implications: The primary reason for deciding to close the NILC is financial. We expect savings against the budget this year and further savings next year which will assist the department to live within its budget settlement.
Reviewed by Finance.

Shared Future Proofing: N/A

Legislative Implications: N/A

Legal advice: N/A

Executive Referral: Not required

Recommendation: That you note the content of this submission and agree to write to Mr Givan along the lines of the attached draft.

Background

You wrote to the Justice Committee on 25 September to notify members of your decision to close the Northern Ireland Law Commission (NILC) from 1 April 2015. This was noted without comment by the Committee. Alban Maginness however raised the matter at the meeting on 22 October and asked that the Committee write to ask you provide further clarification on the rationale for your decision given that the establishment of a law commission appears to be a departure from a recommendation in the Criminal Justice Review (CJR).

2. The Law Commission was established following a recommendation in the CJR and this was included in the discussions around the future of the NILC. Interestingly, the CJR also recommends inter alia that the Commission should receive a sufficient budget to do its work. The reality is that you had agreed to reform the NILC in line with John Hunter's review and the decision to close was made due to budget pressures and with some regret.

Recommendation

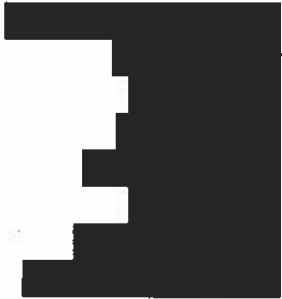
3. It is recommended that you reply to Mr Givan along the lines of the attached draft reply.

signed

WILLIAM STEVENSON

EXT 73590

Copy list
Nick Perry
David Lavery
Lian Patterson



DRAFT LETTER FOR SIGNATURE BY DAVID FORD

Paul Givan MLA
Chairman of the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

November 2014

CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Thank-you for your letter dated 3 November seeking clarification on the rationale for my decision to close the Northern Ireland Law Commission noting that the establishment of the Commission was part of the Criminal Justice Review.

My original intention earlier this year was to restructure the Board and senior staffing at the Commission following an independent review undertaken in late 2012 in line with DFP guidance on the sponsorship arrangements for arms' length bodies. In this context work was underway to appoint a new Chairman, Commissioners and a Director of Law Reform and to prepare a new work programme of law reform.

However, the scale of the budget cuts faced by the DOJ in –year and beyond meant that all such plans had to be reviewed. In light of this I took the decision to close the Commission from 1 April 2015 in order to redirect resources and to protect front-line services as much as possible.

While the Criminal Justice Review recommended the establishment of law reform function it also said that such a body must be adequately resourced. Unfortunately, I am unable to provide the necessary resources in light of the financial pressures facing my department.

I would want to emphasise that I do appreciate and value the function of law reform and the work of the Law Commission to date. As I indicated in my earlier letter my decision was taken with regret and I would hope that the Law Commission may be re-established should funds become available in future. At this time I cannot say when that might be.

DAVID FORD MLA
Minister of Justice

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY & LEGISLATION DIVISION
22 September 2014**

Copy distribution below

1. GARETH JOHNSTON Agreed, GWJ 23/ix/14
2. DAVID LAVERY [DAL 24/9]
3. DAVID FORD

EXP\14\231 - CLOSURE OF THE NORTHERN IRELAND LAW COMMISSION

Issue: You have decided that the NILC should close from 1 April 2015. It would be important to now write to Executive colleagues, the Justice Committee, the Attorney General, the Lord Chief Justice and Dr Venkat Iyer to notify them formally of your decision.

Timing: Routine

Presentational Issues: We may expect some opposition from interested parties in due course concerning the lack of a formal law reform function in Northern Ireland. Some general lines that may be deployed are attached for your agreement.

Closure of the NILC could be included in any press release that may be issued following your attendance at the Justice Committee on 1 October.

Press Office content with this submission.

FOI Implications: Parts of this submission may be considered under s.36 of the Act.

Financial Implications: The closure is taking place in the context of the current budget difficulties. It is estimated that there will be in-year savings of at least £200,000 with potential annual saving of around £600,000 in the following years depending on a number of variables.

Reviewed by Finance.

Shared Future Proofing: N/A

Legislative Implications: None, legal advice is that on balance the founding legislation may remain in place.

Justice Comm/Executive

Referral: Yes, draft letters attached for information.

Recommendation: That you note the content of this submission and agree to

- write to Executive colleagues, the Justice Committee, the Attorney General, the Lord Chief Justice and Dr Venkat Iyer along the lines of the attached drafts at Annex A, and
- the attached lines to take at Annex B on closure of the NILC.

Background

1. You have agreed that the NILC should close from 1 April 2015 with only essential expenditure between now and then to ensure a smooth run-down of the functions and work programme. Your decision will become public knowledge and it would be important to notify Executive colleagues, the Justice Committee, the Attorney General, the Lord Chief Justice and Dr Venkat Iyer soon. The NILC staff will be informed of your decision by the Interim CE once the letters have issued.
2. It is difficult to anticipate the reaction from those you will write to and others but we might expect some opposition and some lines to take have been attached at Annex B for your approval. We will refine the lines and argumentation as the process to wind-up the commission gathers pace.

Recommendation

3. That you note the content of this submission and agree to:
 - write to Executive colleagues, the Justice Committee, the Attorney General, the Lord Chief Justice and Dr Venkat Iyer along the lines of the attached drafts at Annex A, and

- the attached lines to take at Annex B on closure of the NILC.

SIGNED

WILLIAM STEVENSON

Copy list

Nick Perry

Lian Patterson

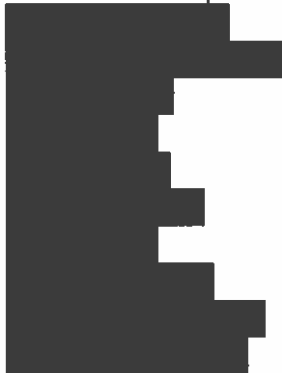
Anthony Harbinson

Sue McAllister

Glyn Capper

Maura Campbell

Laurene McAlpine



ANNEX A

Draft letters to Executive Colleagues, the Justice Committee, the LCJ, the AG and Dr Venkat Iyer (attached below).

**FROM: DAVID FORD MLA
MINISTER OF JUSTICE**

DATE: SEPTEMBER 2014

TO: EXECUTIVE COLLEAGUES

THE NORTHERN IRELAND LAW COMMISSION

I am writing to inform colleagues that I have decided to close the Northern Ireland Law Commission (NILC) from 1 April 2015. I have asked my officials to ensure an orderly run-down of the Commission and smooth transition to include the early completion or transfer of the remainder of the programme of work. I will write separately to those Ministerial colleagues who have projects currently with the Commission. Eleven staff are contracted to the NILC all of whom are either seconded from other organisations or employed directly by the NILC on fixed-term contracts. The NILC will consult with staff as part of the transition arrangements.

My decision must be seen in the context of the budget reductions that have been imposed on my Department. This has required me to make some difficult choices in terms of what I can now afford to fund. Law Reform is clearly a desirable function, but it cannot be considered essential or a front line service.

My decision to close the NILC is regrettable and should funds become available in future I would of course consider re-establishing the Commission.

**DAVID FORD MLA
Minister of Justice**

Christine Darrah
Clerk, Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

September 2014

Dear Christine,

THE NORTHERN IRELAND LAW COMMISSION

I am writing to inform members of the Justice Committee that the Minister has decided to close the Northern Ireland Law Commission (NILC) from 1 April 2015. He has asked officials to begin work to ensure an orderly wind-down to include the early completion or transfer of the remainder of the programme of work and will contact those ministers directly, who have projects with the Commission to agree an outcome for each.

This decision must be seen in the context of the budget reductions that have been imposed on the Department which has required difficult choices in terms of what the DOJ can now afford to fund. Law Reform is clearly a desirable function, but it cannot be considered essential nor or a front line service.

The decision to close the NILC is regrettable and should funds become available in future my minister would of course consider re-establishing the Commission.

Tim Logan
DALO

John F Larkin QC
Attorney General for Northern Ireland
PO Box 1272
Belfast
BT1 9LU

September 2014

THE NORTHERN IRELAND LAW COMMISSION

I am writing to inform you that I have decided to close the Northern Ireland Law Commission (NILC) from 1 April 2015. I have asked my officials to ensure an orderly run-down of the Commission and smooth transition to include the early completion or transfer of the remainder of the programme of work.

My decision must be seen in the context of the budget reductions that have been imposed on my Department. This has required me to make some difficult choices in terms of what I can now afford to fund. Law Reform is clearly a desirable function but it cannot be considered essential or a front line service.

I have every respect for the work of the Commission and the contribution that it has made to Law Reform in Northern Ireland across a number of policy areas. I regret that the NILC is to be wound down at this time. Should funds become available in future I would of course consider re-establishing the Commission.

DAVID FORD
MINISTER OF JUSTICE

The Rt Hon Sir Declan Morgan
Lord Chief Justice
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

September 2014

THE NORTHERN IRELAND LAW COMMISSION

Following our recent meeting I am writing to notify you formally that I have decided to close the Northern Ireland Law Commission from 1 April 2015. I have asked my officials to ensure an orderly run-down of the Commission to include the early completion or transfer of the remainder of the work programme.

My decision must be seen in the context of the budget reductions that have been imposed on my Department. This has required me to make some difficult choices in terms of what I can now afford to fund. Law Reform is clearly a desirable function, but it cannot be considered essential or a front line service.

I have every respect for the work of the Commission and the contribution that it has made to Law Reform in Northern Ireland across a number of policy areas. I would want at this time acknowledge the work of the NILC staff and Commissioners, past and present, (including you as a previous Chairman) and to thank them for the quality of work that has been produced.

I regret that the NILC is to be wound down at this time. Should funds become available in future I would of course consider re-establishing the Commission.

DAVID FORD MLA
Minister of Justice

Dr Venkat Iyer
Northern Ireland Law Commission
Linum Chambers, 8th Floor
2 Bedford Square
Bedford Street
Belfast, BT2 7ES

September 2014

THE NORTHERN IRELAND LAW COMMISSION

I understand that you met recently with David Lavery and Gareth Johnston when they explained my recent decision to close the NILC from 1 April 2015. I am writing now to explain the background to this matter.

My decision must be seen in the context of the budget reductions that have been imposed on my Department. This has required me to make some difficult choices in terms of what I can now afford to fund. Law Reform is clearly a desirable function, but it cannot be considered essential or a front line service. Until recently I had hoped to implement the reforms recommended by John Hunter but this is now not possible.

I want to reassure you and the staff at the NILC that I greatly appreciate the work undertaken by the Commission and the contribution that it has made to Law Reform in Northern Ireland across a number of key policy areas. I appreciate that this is a difficult time for the staff and would want to acknowledge the work of the NILC staff and Commissioners, past and present, and to thank them for the quality of work that has been produced.

I regret that the NILC is to be wound down at this time. Should funds become available in future I would of course consider re-establishing the Commission.

I am conscious that your term of office extends beyond that the anticipated date of closure and I will ensure that officials consult with you on how best to handle the implications of that. Thank you once again for your forbearance during the

uncertainties following the Hunter Review and I appreciate your continued commitment to the Commission which I hope may continue as the work to wind-down the work of the NILC proceeds.

I know this is a difficult time for staff and I should be grateful if you could pass my thanks and appreciation on to all at the Commission.

DAVID FORD MLA
Minister of Justice

ANNEX B

CLOSURE OF THE NILC - LINES TO TAKE

- The Minister of Justice has decided to close the NILC from 1 April 2015.
- Between now and then DOJ staff will work with the NILC to ensure smooth wind-down of the Commission's functions.
- The small number of staff contracted to the NILC are either seconded from other organisations or employed directly on fixed-term contracts. NILC staff will be consulted as part of the transition arrangements.
- The decision has been driven entirely by the budget cuts facing the DOJ.
- The minister appreciates the work of Commission staff and the quality of the reports that have been produced.
- While law reform is a desirable function it cannot be considered essential or a front-line service.
- Should funds become available at some point in the future the minister will consider re-establishing the NILC.
- Officials are working with departments to ensure the smooth hand over of a small number of projects.
- Following closure of the NILC individual departments would be responsible for undertaking law reform within their own areas of policy. Some of this work is currently part-funded by departments under current arrangements.
- Closure of the NILC will realise savings of at least £200,000 this year and at least £600,000 in future years.