

REVIEW OF THE NORTHERN IRELAND LAW COMMISSION: FINAL REPORT

Background

Terms of Reference

1. At the end of October 2012 I was commissioned by the Department of Justice to undertake a "Light-Touch" Review of the Northern Ireland Law Commission (NILC) in line with Department of Finance and Personnel guidance. My terms of reference (see appendix 1) invited me to examine a number of issues under two headings: "organisational options" and "improving performance".
2. My terms of reference noted that the NILC is "an independent statutory body", established and governed by Sections 50-52 of and Schedule 9 to the Justice (Northern Ireland) Act 2002. It was formally established in April 2008 as "an advisory non-departmental public body" (NDPB). Its statutory role is "to keep under review the law of Northern Ireland and make recommendations for its systematic development and reform to the Department of Justice (DoJ) Northern Ireland". The Commission's strategic aim is variously described but I have interpreted it as "to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible".
3. My terms of reference invited me to consult with the Commission itself, the Department of Justice and key stakeholders. To that end I have held over 20 meetings (including lengthy telephone conversations) with some 30 plus individuals. In addition I have sought to immerse myself in the affairs of the Commission through reading various documents and reports, supplemented by web based research. I am very grateful for the cooperation and help I received from everyone I consulted, not least members of the administration team in the Commission who were assiduous in providing me with the information I required. The collective support I received for this review reflected a common desire to see the Commission succeed in its important role in contributing to the efficient and effective delivery of a fair and impartial system of justice to the community in Northern Ireland.
4. It was originally envisaged that the review would take around three months to complete, involving 10 to 15 days work. I was asked to provide an interim report by the end of November or early December 2012 and to share my report with the Law Commission in draft for comment and factual accuracy. As my review unfolded it became apparent from my interviews with stakeholders that organisational and performance issues were so intertwined that it made sense to present a final report with no interim report. This change was agreed with the sponsoring Department.
5. I am grateful for the comments I received from the Law Commission on my draft report. I have carefully considered them and incorporated many of them in my final report.

Outline of Report

6. My interviews with stakeholders generally began by examining performance issues before turning to organisational issues, in the belief that organisational changes (if any) should flow from an analysis of performance. I was also conscious that elements in my terms of reference overlapped. Rather than covering the individual items in my terms of reference seriatim, I therefore explored with stakeholders the process by which projects were chosen for inclusion in the Commission's Programmes of Law Reform, through to the delivery of the Commission's reports to the DoJ. My report adopts this approach. It first identifies ways in which the law reform process could be strengthened. Then it explores a number of cross cutting issues, including corporate governance, accountability, staffing and performance. It concludes by examining two overarching issues. The first is organisational options, which take account of not only performance issues but also resource constraints affecting both people and finance. The second is the Commission's strategic aim and its possible improvement. In the process I have sought to cover various miscellaneous items in my terms of reference. At the end of each section I have set out my recommendations in summary form.

Project Selection for the NILC's Programme of Law Reform

Consultation

7. The formulation of the NILC's Second Programme of Law Reform May 2012 – March 2015 was preceded by an extensive and comprehensive programme of consultation with interested parties, followed by a six week scoping study of the 26 projects proposed, undertaken by the CEO, supported by a recently appointed Legal Researcher in the Commission. I endorse the importance attached by the Commission to this early public consultation. Commissioners then considered the various projects against the previously adopted Project Selection Criteria: importance to NI; suitability; resources; and timing. Given the involvement of government departments in the consultations, it was disappointing to the Commission that late changes had to be made to the proposed Programme following the end of consultations, before DoJ approval was received.

Government's Priorities

8. This experience points to the need for a deeper level of engagement between government and the Commission at the planning stage, building on the public consultation. The Commission is an independent body, in common I understand with the 60 or so other Law Commissions across the world. Indeed, independence from government is a defining characteristic of most law reform bodies. However, like

other Law Reform Commissions in these islands the NILC requires Ministerial approval to its Programme of Law Reform. It follows that government should clearly inform the NILC of its priorities at an early stage in the consultative process, while recognising and respecting the Commission's independence and the public interest, not least in regard to potential projects that cut across Departmental boundaries. Those priorities should be drawn from objectives and priorities in departments' strategic plans and in particular the Northern Ireland Executive's Programme for Government (PfG).

9. Priority 1 in the PfG aims at "Growing a Sustainable Economy". Three of the Commission's recent projects contribute to that priority: Land Law; Business Tenancies Law; and Multi-Unit Developments. All should make NI a more attractive place for investment through the modernisation of civil law. Priority 4 aims at "Building a Strong and Shared Community", which is reflected in DoJ's own Mission Statement: "Building a fair, just and safer community." Another three of the Commission's recent projects contribute to this aim: Vulnerable Witnesses in Civil Proceedings; Bail; and Unfitness to Plead. The Department of Finance and Personnel's corporate plan contains a general commitment to civil law reform.
10. While the Commission's projects can therefore be said to be consistent with those of the government, I believe more could be done to align them, through the deeper level of engagement referred to above. In particular, I suspect departments could be more assiduous and systematic in their identification of potential projects that would contribute to their strategic aims. Departments may need to be regularly reminded of the Commission's remit and role so that they are in a position to bid for projects at the appropriate time.
11. In order to secure a deeper level of engagement with government, I believe there would be merit in the Commission formally adopting a two stage consultation process. The first stage would involve all interested parties, following which the Commission would undertake a more detailed scoping study including an examination of each project against the Project Selection Criteria. The second stage would involve the relevant government departments in more detailed discussions before the Commission would submit its final proposals to DoJ for Ministerial approval. It follows that those involved in such discussions should be able to speak authoritatively on behalf of their departments. Projects not included could form a reserve list to be drawn on as time and resources permitted or to be considered afresh in drawing up the next Programme. (It would of course be possible for one or more of those projects to be "referred" to the Commission by a Department for inclusion in the Programme, with the necessary resources.) Those projects admitted to the Programme could be cross referenced in department's plans and the Programme for Government as evidence of a serious intent to follow up reports. Meanwhile the Commission's own Business Plans and Annual Reports could also

include a specific reference to the contribution of its projects to the government's aims and priorities.

Independence

12. While this process might appear to compromise the Commission's independence, it recognises that government (on behalf of the people of NI) is the main stakeholder in the business of the Commission. The Commission would remain the instigator of the process, but would take government's priorities more clearly into account in formulating its draft Programme of Law Reform. For its part, government should recognise that it has to be flexible in its identification of possible projects if the Commission is to fulfil to best effect its statutory remit to "keep under review the law of Northern Ireland with a view to its systematic development and reform" as set out in the Justice (Northern Ireland) Act 2002. It is likely that there will always be more projects than can be accommodated in the Programme.
13. In regard to the independence of the Commission, my attention was drawn to a quotation from the former Chief Justice the Honourable Mr Justice Ronan Keane on the 30th Anniversary of the formation of the Irish Law Commission. Commenting on the nature and function of successful law reform agencies he said: "First they must be independent of government. A body which is simply another branch of the executive will inevitably be perceived as being concerned with implementing whatever may be government policy at any particular time rather than bringing forward proposals for law reform which viewed objectively, can be seen as in the interests of society as a whole."

Recommendations

14. I recommend that:

- **The Commission should undertake a two stage consultation process in the development of its Programme of Law Reform with a deeper engagement with government at stage 2, on the basis of a short list which draws on the public consultation at stage 1;**
- **The Commission should link its projects more clearly to the government's aims and priorities; and**
- **The government should reflect the Commission's Programme of Law Reform in its Departmental Plans and the Programme for Government.**

Project Management

Project Plan

15. Following the approval of the Programme, a Project Initiation Document (PID) is drawn up for each project supported by a Gantt Chart identifying the milestones on a critical path leading to the delivery of a report. Progress is then monitored regularly. While the Commission has adopted appropriate project management techniques it is clear that they are not working robustly in terms of completion dates. The fact that serious delays have occurred in the completion of final reports and draft legislation across all projects, compared to their original PID timetables, is not perhaps surprising given the complexities of law reform projects. Policy issues can emerge requiring more detailed consideration than was originally envisaged, together with changes in emphasis, not to mention sickness on the part of key legal staff. Nonetheless, however good the reasons for delays in particular projects, they risk undermining the credibility of the Commission in the eyes of government. They point to the need for a comprehensive analysis of the project before the development of a project plan, together with greater resilience in the organisation's staffing structure. The PID should be more than an indicative timetable, but a realistic projection of the project's critical path. Past delays also pose a critical challenge to the Commissioners' capacity to give effective leadership to individual projects: a role they discharge only on a part time basis of either one or two days a week and shortly all to become one day a week. (I return to the role of Commissioners later in my report, with particular regard to what can reasonably be expected of them on such a part-time basis.)

Issues Paper

16. The scoping study referred to earlier only indicates in broad terms the issues to be explored in a particular project. I believe that a comprehensive and detailed "Issues Paper" should be required for each project before a PID is developed and formally adopted by the Board. (I understand the preparation of such a paper has not been a uniform practice to date.) An exception might be made in respect of a small and relatively straightforward project. Such a paper should be developed in conjunction with the interested department so that its knowledge and expertise can be brought to bear on the nature and scale of the project.

Staffing Requirement

17. An added advantage of early departmental engagement is the opportunity it would provide to jointly explore the staffing requirements for the necessary team to undertake the project. At present there is a one size fits all approach, involving a Principal Legal Officer supported by one or two legal researchers. Would there be

scope in particular projects to have a seconded official (part time or full time) working with the team, reporting only to the Commission?

18. Discussions could also be initiated at this stage with the Office of Legislative Counsel (OLC) over the preparation of draft legislation. In the short term it seems unlikely that the Office would be able to second a draftsman, due to workload pressures, but it might be possible to identify someone with appropriate drafting expertise from outside the OLC on a contract basis, following appropriate tendering. This expedient has already been adopted by the Commission with some success. An early appointment to the team, part time or full time, would provide a useful reality check on the development of legislative proposals against the existing statute. Without the engagement of an expert draftsman it is doubtful if the Commission's reports should include draft legislation.

Steering Group

19. All projects undertaken by the Commission have appointed "Steering Groups", including a senior departmental representative, to monitor progress on a regular basis. This is a welcome practice, which should provide the opportunity to debate emerging policy issues on the basis of a no surprises regime. While it is the responsibility of the Commission to present its report as an independent body, it should at least be aware of the government's preliminary view on potentially controversial issues.

Public Consultation

20. I welcome the Commission's evident desire to consult with stakeholders on individual projects, not least through the issue of consultation papers. The Commission's general consultation list is impressive and adjusted to reflect the particular project. It covers a wide range of organisations in both the public sector and civil society. In its short life it has established itself as an open and transparent body, due in no small measure to the sterling efforts of successive Chairs and Commissioners to engage with stakeholders, lead consultations, give speeches and generally engage in vigorous debate. Its consultation methods have included seminars, conferences, public meetings, questionnaires and discussions with groups of interested parties. The Commission's practice in this area may be a model for other public sector organisations, not least to the extent that they form part of the Commission's research processes. Moreover the Commissioners have sought to promote the NILC nationally and internationally, including through the Commonwealth Association of Law Reform Agencies and the Commonwealth Law Conferences.

Reference Groups

21. Alongside its efforts to engage a wide range of interested parties, I believe that there would be merit in extending the current practice of establishing small Reference Groups for particular projects. They would be made up of experts in the areas in question, who could be convened on a voluntary and ad hoc basis to provide advice on policy issues. The Groups would have no executive responsibility for monitoring projects. I understand a similar mechanism exists in both the Law Commission for Ireland and the Scottish Law Commission.

New Technology

22. My terms of reference invited me to consider whether the Commission could make more use of new technology. I found the Commission's website up to date and welcome its inclusion of links to all its publications. I have explored the extent to which the Commission could use the social media to encourage interactive dialogue with key stakeholders. I am however conscious both of the effort required to support a continuous dialogue with interested parties and of the risk of superficial engagement. I am not convinced that the effort would be worthwhile. Nonetheless there might be policy issues which would lend themselves to a relatively short and sharp interactive debate using new technology. The Commission might also wish to consider organising webinars to explore key issues with interested parties or even to set up a project blog as a pilot exercise.
23. The ultimate test of the quality of the Commission's reports should be their inclusion in the government's legislative programme – even if some proposals are amended by government. (I note in passing that such amendments would also be the ultimate demonstration of the Commission's independence.) This has yet to happen, although I understand some progress is being made by departments. Part of the reason for delay in certain projects appears to lie in the problems surrounding draft legislation, combined with the scale and complexity of some of the early projects, particularly Land Law, which was a legacy project and took four years and six months to complete. In regard to that project, three consultation papers were issued and the final report ran to over 300 pages with 121 clauses of draft legislation.

Draft Legislation

24. I have been advised that the preparation of draft legislation is a specialised area. It takes many years to train a legislative counsel. Past practice suggests there is a risk in appointing a well intentioned lawyer with expertise in the subject matter but not in the statute book to draft legislation. For this reason I believe that the OLC should be engaged in discussion at an early stage, as mentioned above, with a view to the identification of a suitable expert.

Peer Review

25. The role of Commissioners encourages them to engage in a form of peer review by commenting on the Commission's various projects at key stages. Regular Progress Meetings, held to coincide with alternative Board meetings, provide a formal vehicle for detailed discussion of individual projects based on progress reports. I understand these reports are usually prepared by the lead lawyer, under the close supervision of the relevant Commissioner. I suspect that time constraints limit the extent to which Commissioners can contribute collectively across project boundaries. These constraints will get worse as budgetary pressures further limit the time available.
26. I explored how to extend the present peer review arrangement with several stakeholders. One method of securing a degree of independent quality assurance might be for the NILC to explore developing bilateral arrangements with other Law Commissions for the reciprocal review of completed reports. This could also encourage a sharing of best practice and help improve standards. Academic lawyers might also be engaged to undertake peer reviews in their specialist areas.

Memorandum of Understanding

27. I have been advised that the Commission is working on a Memorandum of Understanding (MoU) with DoJ, intended at least in part to formalise the process of follow up to Commission's reports. Clearly it is important that the Commission is regularly briefed on the status of their proposals. I suggest that as part of the MOU the DoJ Minister should write annually to the Chair summarising the present state of play in regard to completed reports. In particular, if recommendations are to be rejected, a full explanation should be given. I note that such a summary is included in the Annual Reports of the Scottish Law Commission. The Minister's letter should then be published in the Commission's annual report. This mechanism would represent a variant on the protocol enshrined in the Law Commission Act 2009, affecting England and Wales, whereby the Lord Chancellor has a duty to report annually to Parliament on the implementation of Law Commission proposals.

Recommendations

28. I recommend that:

- A detailed Issues Paper should be prepared for each project in conjunction with the relevant department before a robust PID is formally adopted;
- Consideration should be given at an early stage to the composition of the Project Team, including the availability of a Parliamentary Draftsman;
- Consideration is given at an early stage to the formation of an expert Reference Group to provide voluntary and ad hoc advice on policy issues;

- **The Commission should embark on a limited experiment on the use of new technology for consultation purposes;**
- **The Commission should explore the development of reciprocal agreements with other Law Commissions to review and quality assure completed reports; and**
- **The DoJ Minister should write annually to the Chair summarising the state of play in regard to completed reports, for inclusion in the Commission's annual report.**

Corporate Governance

Policies

29. In the course of its relatively short life as an Advisory NDPB the Commission has developed a comprehensive range of policies and procedures to meet the corporate governance requirements set out by the Department of Finance and Personnel. These impose a considerable burden on a small organisation with around 12 members of staff plus the Commissioners. They draw heavily on standard protocols across government and not least those in DoJ. Now that they have been developed, to the credit of the CEO and her small administration team, it is to be hoped that the burden on the Commission itself at Board level will be limited to their maintenance, with DoJ and DFP providing some shared services. These services should reduce the administrative burden on such a small organisation, notably in the areas of finance (through Account NI), personnel (through HR Connect), procurement (through CPD) and IT and Information Management (through NICS IT Assist). I am conscious that despite this back up support, the recruitment of temporary staff will continue to be a major drain on staff time, particularly in regard to the appointment of legal researchers.

Sustainability

30. The Commission is concerned to ensure that it minimises its environmental impact. Its policies commit the organisation to reducing waste and making use of energy saving measures.

Corporate and Business Planning

31. The Commission's three year Programme of Law Reform essentially constitutes the organisation's Corporate Plan, backed up by annual Business Plans. The Commission also produces an Annual Report. There were delays in producing the Business Plan for 2012/13 and the Annual Report for 2011/12, due to a combination of sickness and the appointment of an Acting DEO. (The absence of resilience within the

organisation is a matter of concern that I address later.) Reporting arrangements with DoJ include quarterly meetings. These should be programmed well in advance to avoid slippage. They should be supplemented by an annual meeting between the Minister of Justice and the Chair.

Board Meetings

32. Board meetings are scheduled monthly, with Progress Meetings to monitor progress on projects held every other month, using standard public sector project management methodologies. With the return of the CEO and the prospect of a new Chair it would be important to re-establish the mechanism of both individuals meeting a week prior to the Board to agree the agenda. To help this process and improve organisational discipline, I suggest that the Board should agree a forward programme of business over the year covering significant regular items. This should reduce the risk of delay in the development of key documents such as Business Plans and Annual Reports. In principle, it is desirable for the minutes of Board meetings to be published on the Commission web site, consistent with best practice for NDPBs.

Equality Scheme and FOI

33. As mentioned earlier the Commission seeks to apply best practice in its consultation arrangements. It has committed itself to a regular review of its general consultation list. The Commission seeks to adhere to the requirements of Freedom of Information. It has a draft Equality Scheme, which is expected to be finalised shortly with the Equality Commission. I understand that the delay is due to discussions with the Equality Commission on the interpretation of "policy" for the purposes of the NILC's Equality Scheme, in particular in relation to the monitoring of policies. As an advisory body the Commission does not implement policies and cannot therefore be expected to monitor them. The Commission screens each project, including its contribution to promoting equality of opportunity and good relations, and keeps its assessment under review for the duration of the project. The results of its Equality Impact Assessments are available on the NILC web site. The Commission has also committed itself to ensuring that the public has access to all information and services to all parts of the community (using all available formats), including children, people with learning difficulties and minority and ethnic communities.

Registers

34. The Commission maintains appropriate registers covering organisational risks (including to individual projects), gifts and hospitality and members' interests. The last named is due for review, when the opportunity should be taken to include any additional information on Commissioners' professional interests and responsibilities, however tangential to the work of the Commission. The Commission is alert to the

importance of adherence to the Nolan Principles. It follows standard public sector requirements in regard to procurement of goods and services.

Induction and Other Training

35. For many Commissioners the extent of the corporate governance requirements placed on the NILC came as a surprise. Their induction training was belated and incomplete. New Commissioners should be given a comprehensive induction programme, supported by additional training as required, which should include inter alia the relationship between the Commission and DoJ and the respective roles of the Commissioners, including the Chair, and the CEO.
36. I welcome recent progress in respect of clarifying the latter, through a recently agreed Relationship Document (September 2012). This Document essentially replaces the previous Management Statement and Financial Memorandum agreed in 2008 between the then sponsoring Department (NIO) and the NILC. A new agreement was required with the creation of the DoJ and the devolution of criminal justice functions, together with the removal of the statutory requirement that the Commission furnish full accounts to the NI Audit Office. As mentioned earlier, work has begun on a Memorandum of Understanding between the NILC and DoJ on how they should work together, including the responsibility of departments to consider and as appropriate to carry forward proposals and draft legislation in NILC reports. However, I must emphasise that neither of these documents can be a substitute for good collegiate relationships, based on mutual trust and respect.

Recommendations:

37. I recommend that:

- Quarterly meetings with DoJ should be programmed well in advance;
- The Board should agree a forward work programme over the year to cover significant regular items;
- There should be an annual meeting between the Minister and Chair to review progress;
- The Commissioners' register of interests should be regularly updated to include any additional information on professional interests;
- Work should be completed on the Memorandum of Understanding; and
- New Commissioners should be given a comprehensive induction programme and such further training as may be required.

Accountability

Accountability to Government: Roles of Chair and CEO

38. Effective corporate governance arrangements require clear lines of accountability. These are set out in the Relationship Document referred to earlier. Traditionally in the public sector the Chief Executive as Accounting Officer is held accountable for the performance of his or her organisation, including ensuring the safeguarding of public funds through effective financial management and control. This model does not suit the Commission. Commissioners lead law reform projects and are therefore responsible for delivering on project plans, not the CEO, although she may be assigned responsibility for particular projects. In practice, it is therefore only the Chair who can be held accountable for the overall performance of the Commission in regard to its programme of law reform projects. In these unusual circumstances, it is only the Chair (supported as appropriate by a Commissioner) who can report to the Minister or to an Assembly Committee on this critical aspect of the Commission's performance.
39. This is unsatisfactory: the Chair is a part time appointee, fulfilling an important primary role as a High Court Judge, whose contract provides that he works one day a week for the Commission. It is unrealistic and unfair to expect him to be accountable for all law reform projects and to draw them together in what was described as a "corporate policy approach" in the Commission's First Programme of Law Reform.
40. It is noteworthy that the Relationship Document is silent on the nature of the Chair's responsibility for the overall performance of the Commission. While the Document notes the Chair's responsibility for "formulating the Commission's strategy", it contains no reference to the responsible party for its delivery. However, the terms and conditions of appointment of the last Chair, dated Nov 2009, note his responsibility "to lead the Commission in the execution of (its) work". "Work" refers to the Commission's task "to make the law in NI clearer, more modern, more accessible and less archaic."
41. The Relationship Document describes the CEO's leadership responsibility largely in terms of corporate governance requirements including the safeguarding of public funds, although there is a specific responsibility to "advise the Chairman and Commissioners on the Commission's performance compared with its aims and objectives." Again the Document is silent on the issue of responsibility for the delivery of the NILC's programme of law reform projects. However, the current CEO's letter of appointment, dated June 2007, includes the responsibility to "prepare, agree and ensure the delivery (subject to resources) of a programme of research to support the Work Programme."
42. Subsequently, this "legal research" responsibility, which had never developed, was dropped when the Commission agreed to the CEO's request to work four and then three days a week for family reasons. At that time it was agreed that the CEO's major

responsibilities would include (unspecified) Accounting Officer duties, business planning, staff management, services to the Board and attendance at certain external events. In addition to these responsibilities, the CEO has advised me that recently she has taken on a lead role in respect of the "Regulation of Health Professions" and the "Fitness to Plead in Criminal Cases" projects.

43. Even if the legal research function had not been dropped, I do not believe that this responsibility could be understood in such a way as to assign to the CEO overall accountability for the performance of the Commission across all law reform projects. This view is confirmed by the absence of any specific responsibility for the delivery of the Commission's Second Programme of Law Reform in the CEO's strategic objectives for 2012/13.
44. I address the implications of what I perceive to be a serious accountability lacuna later in my report.

Staffing

Contracts

45. There are currently 12 members of staff in the Commission: a CEO; three project lawyers; four legal researchers; and four administrators in a Business Support Team. The CEO is the only permanent employee of the Commission. All others are either secondees from DFP (all the Business Support Team and one lawyer), or staff on fixed term contracts (mostly three years). The turnover in fixed term contract staff has created some instability and made it difficult to develop an esprit de corps. A particular concern is the fixed term nature of the contracts for all three lawyers. In the absence of a Director of Research, the day to day responsibility for the Commission's programme of law reform essentially rests on their shoulders. When one of them is off sick or leaves to take up another post inevitable delays occur and deadlines are missed to the potential embarrassment of the Commission. Commissioners do not have the time within their part-time contracts to act down, while most researchers are too inexperienced to act up. A further complication is that the length of a fixed term contract is unlikely to match the likely length of the project. Where projects have over run, the contract has necessarily been extended. In short, the organisation's resilience needs to be improved, particularly at lawyer level.

Director of Legal Research

46. It has been suggested to me that the resourcing and development of projects could be enhanced by the appointment of a Director of Legal Research, who would provide a research and advice service to Commissioners as the leaders of projects. Such a

post exists in the Law Commission for Ireland. I fully support the need to beef up the legal research function of the Commission. I consider this issue further under the heading of "Organisation Model."

Lawyers

47. The Acting Chief Executive presented proposals to the Commission in May 2012 on NILC Structures and Grading, based on a combination of lawyer posts (graded at PLO level) and legal researchers graded (graded at EO2 level). He proposed that within the available budget of some £370k for legal posts, the Commission should move to a three PLO lawyers and six legal researchers model or four PLO lawyers and four legal researchers model. The merits of each may well depend on the nature and number of projects. While the present non-permanent staff model for legal posts offers considerable flexibility and the opportunity to recruit experts to work on particular projects, it doesn't develop an in-house expertise in either civil or criminal law. I believe that such expertise will become increasingly necessary as the organisation moves into new areas of law reform. To that end the Commission should consider appointing two permanent lawyers at PLO level to lead project teams in the civil and criminal fields respectively. A third or fourth lawyer could be recruited on a fixed term contract or secondment from the Government Legal Service to lead particular projects for their duration, complementing the expertise of the permanent members of staff. The services of fixed term or seconded lawyers should normally terminate on completion of the relevant projects. A move to this model could increase organisational resilience, at least by offering the prospect of being able to move lawyers around to fill unforeseen gaps. Resilience would be further strengthened by the addition of a fourth lawyer.

Legal Researchers

48. I have been generally advised that the present arrangement of fixed term contracts for legal researchers at the start of their legal careers works well, although I imagine that most of them are on the lookout for permanent posts. They constitute a valuable resource for the Commission. It is a pity that there is little opportunity for them to seek advancement within the current staffing structure, building on their knowledge and expertise. In time, the organisation might wish to consider the merits of developing a staffing model with an intermediate lawyer or senior legal researcher grade between PLO and EO2. The exact composition of each team should be discussed at Project Initiation stage (see earlier comments on project management).

Administration Team

49. Alongside the legal team should be an administration team, as at present. However, depending on the organisation model, it could be led by a Head of Secretariat (or Business Manager). Now that the organisation's systems and procedures have been established, within a sound framework of corporate governance, the grading of such a post is likely to be below that of the current CEO, even though the post should carry standard Accounting Officer responsibilities for financial management and control. The specific grading of the post would require a comprehensive delineation of responsibilities and an expert assessment using the appropriate methodology.
50. It has been suggested to me that the present long term secondment arrangement for members of the administration team should cease and permanent appointments made on the grounds that this would inculcate a greater sense of commitment to the Commission as the employing body. During my visits to the Commission I sensed no lack of commitment on their part: indeed the opposite was the case. In regard to this suggestion I merely note that as permanent employees they would lack any career development opportunities or any realistic prospect of early advancement in such a small organisation – as would be the case with any permanent legal staff.

Recommendations

51. I recommend:

- That the Commission should appoint two permanent lawyers at PLO level to lead project teams in the areas of civil and criminal law respectively, with a third or fourth lawyer recruited on a fixed term contract or seconded from the Government Legal Service to lead particular projects and complementing the expertise of permanent members of staff;
- That the Commission might wish to consider the merits of developing an intermediate lawyer grade or a senior legal researcher grade; and
- Subject to agreement on a new organisation model, the appointment of a Head of Secretariat (or Business Manager) as the Accounting Officer to lead the administration team.

Organisation Model

Current Constitution

52. The Commission consists of a Chairman and four other Commissioners. According to the Justice (Northern Ireland) Act 2002, the Chairman must be a person who holds the office of a High Court Judge. Of the other Commissioners, one should be a

barrister, one a solicitor, one an academic and one a lay person. One of the key responsibilities of the Chairman as set out in his letter of appointment is "to make the law in Northern Ireland clearer, more modern, more accessible, and less archaic". This responsibility is associated with the requirement "to lead the Commission in the execution of this work". For their part, Commissioners' responsibilities include: "to lead your team of lawyers on projects in their own fields"; "to take forward the projects for which you are responsible and oversee the writing of consultation papers and final reports"; and "to participate in peer review". These are onerous responsibilities alongside other duties associated with membership of a corporate body. All Commissioners are currently part time, either one day a week or two. The Chairman's appointment is for one day a week. From the beginning of April 2013 all Commissioners, including the Chairman, will be paid for one day a week only, reflecting budgetary pressures.

53. Comparisons with the Scottish and Irish Law Commissions are interesting. In Scotland the Chairman of the Commission is a Judge of the Supreme Courts of Scotland. He spends 60% of his time on Commission business. The Commission employs three full-time Commissioners and two part-time Commissioners, the latter on a commitment of around 50%. Each full-time Commissioner generally leads two project teams of a lawyer and a legal researcher and is responsible for leading the drafting of consultation papers and reports. Part-time Commissioners would generally look after one project team.
54. In Ireland, the Chairman of the Commission spends 40% of his time on Commission work and 60% as a High Court Judge. The one full-time Commissioner is the Coordinating Commissioner for several projects supported by legal teams for each project. Part time Commissioners oversee a smaller number of projects depending on their varying time commitments.
55. Almost without exception, all stakeholders expressed serious doubts over the capacity of Commissioners in the NILC to discharge their executive legal responsibilities, plus corporate governance duties, in the one day a week dictated by resource constraints for 2013/14. I share those doubts, which are reinforced by my concern over organisational accountability, as mentioned earlier.
56. I believe the management and day to day direction of the Commission's Programme of Law Reform requires full-time leadership. I recommend this be achieved through the appointment of a full-time, legally qualified, Director of Law Reform as the executive head of the organisation. This person would subsume the mainly advisory role of a Director of Legal Research referred to earlier. I must emphasise that this post would differ substantively from that of the current CEO, who has no overall responsibility for the performance of the Commission in respect of the delivery of its programme of law reform.

Director of Law Reform

57. The Director of Law Reform would both oversee and contribute as necessary to the work of the project teams and could lead projects in his or her area of particular expertise, contributing in the process to organisational resilience. He or she would be the principal adviser to the Commissioners (as a Board), on the content of future programmes of law reform (a vital task for the Commission), on the management of projects, on any legal policy issues emerging in particular projects, on draft consultation papers and on draft reports, including any legislation etc. The Commissioners (as a Board), would hold the Director to account for the performance of the Commission, as with other NDPBs. The DoJ would also hold the Director similarly to account for operational performance and not the Chairman - except in so far as the strategic leadership role of the Board was concerned.
58. The post should be graded at a sufficiently senior level to be attractive to suitably qualified and experienced lawyers (with a good knowledge of the statute book and a high level of research related skills) in both the public and private sectors, as well as academia. I understand that the grading of Commissioners is equivalent to Grade 3 or Deputy Secretary. Again, the specific grading of the post would depend on a comprehensive delineation of the responsibilities and an expert assessment using the appropriate methodology. The Director would be supported by a Head of Secretariat (or Business Manager), who would also act as the Accounting Officer. In an organisation of the size and nature of the Law Commission, with some support services provided from elsewhere, the duties of an Accounting Officer should not be unduly onerous.
59. It has been suggested to me that the functions of a Director of Law Reform could be discharged instead by a full-time Commissioner, thereby retaining the existing model of an independent Commissioner led law reform agency. This model exists in the Irish Law Reform Commission where, as referred to earlier, the full-time Chief Commissioner is supported by several part-time Commissioners and a part-time High Court Judge. However, in my view, this model still fails to identify clear lines of overall accountability for the programme of law reform.

Role of Commissioners

60. The Commissioners' other responsibilities in the current terms and conditions of appointment would remain broadly the same, not least in regard to the key strategic issues at the heart of the Commission's work. They would be expected to represent the Commission at public events, as well as continuing to ensure that "the Commission observes the highest standards of governance at all times." Essentially the Commissioners' responsibilities would reflect those strategic responsibilities traditionally associated with the Board of a NDPB. Individual Commissioners could also shadow the work of particular project teams, reflecting their expertise, with a

view to leading discussion of policy issues at Board level and to fronting key consultation engagements. Their performance would be appraised in the normal way for members of NDPBs against the criteria in their terms and conditions of appointment. Importantly, I believe this model would require no change in the current legislation, given that Commissioners would remain, albeit with reduced responsibilities in regard to the leadership of projects.

New Constitution

61. However, if it were decided to remove the requirement that Commissioners be drawn from the three distinct branches of the law plus a non legal person, new legislation would be required. This change has been commended to me on the basis that the current requirement to appoint a barrister, a solicitor, a teacher of law and a non legal person is unduly restrictive. I concur with the view that appointments solely on merit as at present, but without regard to legal constituency, would potentially widen the candidate field and in the process could support the achievement of the Department's diversity targets.
62. Nonetheless, however constituted, the Commission should remain an independent advisory NDPB. The Commissioners themselves should remain the guardians of the Commission's independence.

Cost Implications

63. Under this model, Commissioners would be paid an appropriate Public Appointment rate for, say, two days work per month. Although the purpose of the review was not to reduce costs, but to improve efficiency and effectiveness, I estimate that the resulting savings in the current cost of the Commissioners would be around £70k ie a reduction from £130k to £60k. The additional cost of a Director of Law Reform, depending on the grading of the post, could be £80k, offset by the cost of the current CEO post and savings in office costs as Commissioners would no longer require dedicated accommodation, except perhaps for the Chair.
64. I am also conscious of the relatively high costs of the Commission's current offices (some £180k) in a prestigious development, chosen by the earlier Project Board. They include a large Board Room. I doubt the need for this dedicated space even though I have been advised it is also used for various consultations. Efforts should be made to find more economical accommodation with the use of meeting rooms in alternative venues as required. I understand that such a move would likely require another government department to take on the remainder of the lease.
65. The resulting overall savings, including any savings in office costs, could be applied to increase the vitally important lawyer team and improve organisational resilience. The importance of these savings can be seen in the reduction of the Commission's budget by 19% over the four year period to 2015 as a consequence of the Comprehensive Spending Review. The future viability of the organisation arguably

depends on the existence of a minimum of three or preferably four legal teams. Without this critical mass, the overhead costs could become exorbitant.

Alternative Models

66. I have considered alternative models, some of which were suggested to me by stakeholders. One variant of the current model would seek to overcome the day a week restriction on Commissioners by halving the time of two Commissioners and doubling the time of the other two. I believe this model would leave the latter two Commissioners in the same state as before since they would presumably have to double their workload in terms of project leadership. There would remain an accountability lacuna.
67. An alternative model would replace the Commissioners by a single Commissioner as a corporation sole. The organisation would then become dependent on a single person, acting without the benefit of the collective wisdom and varied experience of a Board of Commissioners. It would remove the leadership of the Commissioners by a High Court Judge, who lends credibility, authority and prestige to the organisation.
68. At the other end of the spectrum, it would be possible to revert to the previous model whereby the Office of Law Reform was an integral part of the Department of Finance and Personnel, although covering civil law reform only, supported by a Law Reform Advisory Committee. A variant would involve the creation of an Executive Agency within DoJ or DFP or both. Neither of these models would give the independence from government much cherished and jealously guarded by law reform agencies across the world. The essence of law reform agencies is that they promote law reform "in the interests of society as a whole" as distinct from "government policy". To fulfil this task effectively, a Law Commission must have the independence to challenge government. The views of the Criminal Justice Review are also worth quoting: "We have heard very powerful argument for a statutory law reform body, independent of government, which could provide an impartial and objective view of areas of law and make recommendations that the government might include in its legislative programme" Para 14.50. For these reasons, I have rejected these "re-integration" models.
69. I have also rejected the "abolition" model. The need for an independent Law Commission remains unchanged from the analysis set out in the Criminal Justice Review. Its value can be seen in the list of important projects forming the Commission's Second Programme of Law Reform, not to mention those omitted.

Recommendations

70. I recommend:

- **a new model for the organisation of the Law Commission based on the appointment of a Director of Law Reform, supported by a Head of**

Secretariat, reporting to a Board of Commissioners who would continue to be the guardians of the Commission's independence;

- Commissioners should no longer have responsibility for the leadership of individual law reform projects;
- Commissioners should shadow the work of project teams with a view to leading discussion at Board level and fronting key consultation engagements;
- Commissioners should be paid an appropriate Public Appointment rate;
- Commissioners should be appointed solely on merit and without regard to their legal constituency; and
- More economical accommodation should be found and the overall savings invested in the lawyer team.

Performance

Comparisons with Other Law Commissions

71. I am not qualified to form an objective opinion on the quality of the reports produced by the NILC in its relatively short life. Nor can a lay person fairly compare its productivity to that of other Law Commissions. By their very nature projects differ within as well as between jurisdictions in regard to their nature, duration and complexity. Moreover, different Commissions have different ways of working involving both full-time and part-time Commissioners and varying sizes of legal teams. While Northern Ireland is at the smaller end of the spectrum as far as these islands are concerned, it has delivered an impressive number of reports as well as consultation papers, notwithstanding serious delays in some projects. I believe its output could be improved through the adoption of my recommendations, including my earlier suggestion of reciprocal agreements between Law Commissions for peer group review.
72. I am conscious that the Law Commission for England and Wales is seeking to develop performance indicators, beyond the implementation of its recommendations by government. These include the number of times the Law Commission is cited in court judgements, by other law reform bodies, in the Houses of Parliament, in academic journals and in the media. The NILC should monitor this initiative with a view to its application in NI.
73. The NILC has sought to develop its links with other Law Commissions. The involvement of all three UK Law Commissions in projects to review the Regulation of Health Care Professionals and to review Electoral Reform will provide a welcome opportunity to explore working practices and learn from each other. It is clear that

the Scottish and Irish Law Commissions particularly value their links with the smaller NILC. The new Commission should seek to develop those links through the more regular exchange of information and knowledge, perhaps involving annual meetings with each, separate from the annual meeting of all five Law Commissions.

Recommendations

74. I recommend:

- **That the NILC should monitor the initiative in the Law Commission for England and Wales to develop performance indicators; and**
- **That the Commission should seek to develop its links with other Law Reform Commissions, notably the Scottish and Irish Law Commissions.**

Strategic Aim

Fitness for Purpose

75. Finally my terms of reference invited me to consider whether the Commission's strategic aim remained fit for purpose. The aim is described in various ways in DoJ and NILC documents, all drawing heavily and not surprisingly, on the wording of the Justice (Northern Ireland) Act 2002. I have interpreted the aim to be: "to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible." This aim is consistent with the statute. As far as I am aware, it has not limited the Commission in its discharge of its responsibilities: indeed it has given the Commission some welcome flexibility in its choice of projects.
76. At the beginning of my report I noted that there was an inevitable tension between the wishes of government in regard to law reform and the wishes of the Commission as an independent body. The challenge facing both parties is to manage those tensions constructively. It would be possible to add to the strategic aim a more explicit steer to the Commission in regard to projects designed more directly to achieve the Executive's priorities as expressed in its Programme for Government. I have resisted this temptation on the grounds that it would lead to the perception that the Commission was less independent than might have been thought. In any event, the government could use the consultative process described earlier to inject its wishes. Ultimately, it could of course use its power of approval to the Commission's proposed Programme of Law Reform. With good will on both sides, the hope must be that the approval power would not be used in a directive way.

Recommendation:

77. I recommend:

- **no change in the Commission's strategic aim.**

Conclusion

78. The recommendations set out above are largely designed to improve the operation and performance of the Commission by strengthening systems and procedures. However, acceptance of those changes would not be sufficient in themselves to secure the step change in the delivery of law reform projects that I believe is necessary. Central to my report is the recommendation that a new organisation model is required based on the appointment of a Director of Law Reform, supported by a Head of Secretariat, reporting to a Board of Commissioners. Commissioners would no longer have responsibility for the leadership of individual reform projects, but would continue to exercise strategic direction and would remain the guardians of the Commission's independence.

79. I am very conscious from my consultations that my recommendations in regard to a new organisational model may be controversial. However, they reflect my personal considered view on the changes necessary to the organisation of the NILC if it is to achieve its strategic aim and fulfil its aspiration to be a centre of excellence in law reform across these islands and beyond. I wish the Commission every success in the future as it builds on the achievements of its first four years.

John Hunter

24th January 2013.

Document 2

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
8 February 2013**

Copy list below

1. GARETH JOHNSTON [Agreed:

GWJ 11/ii]

2 DAVID FORD

**MEETING WITH JOHN HUNTER TO DISCUSS HIS REVIEW OF THE
NORTHERN IRELAND LAW COMMISSION (NILC)**

Issue: Briefing for your meeting on 13 February with John Hunter to discuss his review of the NILC.

Timing: Urgent.

Presentational issues: None. This is a private meeting.

FOI implications: Likely to be exempt under s 35 (formulation of government policy)

Financial implications: Costs may be a factor depending on what your response to the report. Further advice will be provided.

Legislative Implications: Changes to the composition of the Commissioners or the qualifications required of the Chair would require legislation.

Justice/Executive Referral: Not at this point. You will want to inform the Justice Committee in due course of your decisions on the review.

Shared future Implications: None identified

Recommendation: An opportunity for John to brief you on the outcomes for the review and to gauge your views. This will allow for preliminary considerations for a number of implementation issues on which we will then provide further advice.

Background

John Hunter was commissioned to undertake a "light touch" review of the NILC as required under the governance arrangements for arms length bodies. You are meeting with Mr Hunter on 13 February at 16.00 to discuss his final report prior to deciding on your preferred way forward. The terms of reference for the review are at Annex A. The completed report is attached.

Detail

2. The report makes 27 recommendations under the following seven headings:

- Project selection for the NILC Programme of Law Reform
- Project management
- Corporate governance
- Accountability & Staffing
- Organisational model
- Performance
- Strategic aim

The recommendations are listed in Annex B. An initial view on each recommendation has been provided to facilitate your discussion with Mr Hunter. They are of course subject to the decisions that you will take later.

3. Most of the recommendations are fairly straightforward and likely to be acceptable. However, recommendations 19 -24 (Organisational Model) suggest radical change for the NILC and you may wish to concentrate on the proposed organisational reform during your meeting with Mr Hunter. Each of these recommendations is discussed further below.

Current arrangements

4. Briefly, the NILC is an advisory NDPB chaired by a High Court Judge supported by four other commissioners. By statute the commissioners must be a High Court Judge (as Chair), a barrister, a solicitor, a teacher of law and a lay person. At present, the chair and one commissioner post is vacant. The Chair and three of the commissioners work one day per week and the fourth

commissioner works two days per week (this is planned to reduce to one day also for budget reasons). Commissioners currently lead law reform projects and oversee the management of the NILC. The Chief Executive (who currently works three days per week) is the only permanent employee of the Commission. The remaining staff are secondees from DFP or legal officers on fixed term contracts. The CEO acts as accounting officer and manages the administrative support and legal staff on a day to day basis, including corporate governance. The CEO reports to the Chair and Commissioners at Board level. The CEO is legally qualified.

Proposed arrangements

5. Mr Hunter's proposal is that the NILC should remain an advisory NDPB. He suggests that the Chair and commissioners should, in future, shadow rather than lead on individual projects and that they should operate as more of an editorial board to oversee strategically the work of the NILC. Commissioners would be paid a daily attendance rate rather than a salary. He also recommends that commissioners should be appointed on merit only without regard to the constituency from which they come. This would require legislative change. The report is silent on whether the chair should continue to be a High Court Judge.

6. This leads on to potentially the most radical recommendation that responsibility for projects should move from Commissioners to a senior figure with the title of Director of Law Reform, who would lead NILC on a day to day basis. This person would be legally qualified and employed full time. S/he would oversee all of the law reform projects and the work of the NILC in general and would be accountable to the NILC Board of Commissioners. The Director would be supported by a Head of Secretariat (likely to a lower grade than the current CEO) who would manage the administrative team and act as accounting officer. The CEO post would therefore be suppressed and two new posts of Director of Law Reform and Head of Secretariat created. Mr Hunter clearly feels that the part-time nature of the Commissioners and the CEO has given rise to problems of internal communication and confusion over lines of responsibility.

7. The proposed reforms are deemed to be cost neutral although this could only be confirmed following a job evaluation of both the Director of Law Reform and the Head of Secretariat posts to determine the appropriate job weight and salary. (John's working assumption is that the DLR would be Grade 3 – which could attract professorial applicants, and the HOS Grade 7.)

8. Some decisions following the review are quite urgent and we will pick this up following your meeting with Mr Hunter. For example, the position of Chair has been vacant since Mr Justice McCloskey resigned in September 2012 and the LCJ has been reluctant to provide you with the name of his successor until Mr Hunter's review was completed. We suggest you raise this with the LCJ soon. Also, the appointment of two of the existing Commissioners ends on 8 March 2013. We will prepare an implementation plan, including transitional arrangements that may be necessary, following your meeting with Mr Hunter and your thoughts on the way forward.

9. Lines and suggested questions are attached at Annex C. You will be supported at the meeting by David Lavery and Gareth Johnston.

Signed

WILLIAM STEVENSON
Criminal Justice Strategy and Secretariat Branch

Copy list

Nick Perry

David Lavery

Anthony Harbinson



TERMS OF REFERENCE FOR A 'LIGHT-TOUCH' REVIEW OF THE NORTHERN IRELAND LAW COMMISSION

Background

The Northern Ireland Law Commission (the Law Commission) is an independent statutory body. Its statutory role is to keep under review the law of Northern Ireland and make recommendations for its systematic development and reform to the Department of Justice Northern Ireland. It is established under the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. It is constituted as an advisory non-departmental public body and was formally established in April 2008.

The Commission consists of a Chairman and four other Commissioners. The Chairman must be a person who holds the office of a High Court judge. Of the other Commissioners

- (a) one is to be a person qualified to be a Commissioner by experience as a barrister,
- (b) one is to be a person qualified to be a Commissioner by experience as a solicitor,
- (c) one is to be a person qualified to be a Commissioner by experience as a teacher of law in a university, and
- (d) the other is to be a person who does not hold (and has never held) judicial office and is not (and has never been) a barrister, solicitor or teacher of law in a university.

The current members of the Law Commission are:

Chairman: (vacant)
Commissioner (Barrister) Sean Doran
Commissioner (Academic) Dr Venkat Iyer
Commissioner (Lay) Robert Hunniford
Commissioner (Solicitor) (vacant)

The Law Commission may employ staff subject to the approval of the Minister of Justice in terms of numbers, salary and terms of employment.

The Law Commission's strategic aim is to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible. The DOJ sponsors the Law Commission and the position of the DOJ is that the Law Commission must act in support of the Northern Ireland Executive's overall aims for the delivery of a fair and impartial system of justice to the community in Northern Ireland and the delivery of effective and efficient justice.

The Northern Ireland Department of Justice sponsors the Law Commission in support of the Northern Ireland Executive's overall aims for the delivery of a

fair and impartial system of justice to the community in Northern Ireland and the delivery of effective and efficient justice.

It is now an appropriate time to undertake a 'light touch' review of the Law Commission in line with Department of Finance and Personnel Guidance 1. The review is also timely in terms of the current focus on value for money and the role of arms length bodies in providing advice and delivering services. Key issues that should be addressed within the review are outlined below. The review process should include consultation with the Commission itself, the Department of Justice and the Law Commission's key stakeholders.

Issues to be addressed

(i) Organisational options

The bigger picture – to what extent does the Law Commission contribute to the delivery of wider Departmental and Executive objectives? Does the Law Commission's strategic aim best describe the aim of the organisation; if not, how should it be amended?

Links with others – what links does, or should, the Law Commission have with other organisations. To what extent has the Law Commission fulfilled its statutory obligation to confer with equivalent organisations in England and Wales, Scotland and Ireland.

Past performance – how has the Law Commission performed against its aims, objectives, key financial and other targets and quality standards? How does it compare with other bodies performing similar functions? How has it used the freedoms and flexibilities it enjoys? How successful have its relationships been with its sponsor Department (DoJ) and Minister, with other Executive Departments and Ministers and, where appropriate, with Whitehall Departments?

Stakeholders' views – what do the Law Commission customers and other interested parties think about its role and performance?

The future organisation – how should the Law Commission services be delivered in the future? Which organisational option is best suited to delivering responsive, efficient and quality services in the future? The report should consider models in other jurisdictions.

Good practice – what examples are there of good practice in how the Law Commission has delivered its services?

(ii) Improving performance

Performance targets – how far do they reflect the Law Commission's aims and objectives? Are they sufficiently comprehensive and stretching to drive improvement? Is there sufficient continuity from one year to the next? How is performance validated?

Partnership working – should the Law Commission in performance of its functions, responsibilities and duties develop joint working arrangements with

other bodies and, if so, where could the Law Commission develop such joint working arrangements and with which other bodies to enhance the efficiency and effectiveness of service delivery?

New technology – should the Law Commission make better use of new technology and social media to improve the delivery of its services and functions?

Stakeholders' views – have the Law Commission's main stakeholders any suggestions about how the organisation delivers its services and functions?

Openness and accountability – how far is the Law Commission accountable to its customers and other stakeholders for the service it provides? How does it consult on its ways of working and the services it offers and could this be improved? Does it hold open meetings when appropriate? How does the Law Commission perform in relation to its duties under the Freedom of Information Act 2000?

Freedoms and flexibilities – how could the Law Commission benefit from different freedoms? Could it improve the delivery of its services and functions if it was given more flexibility? How has it exercised the responsibility which it already enjoys?

Corporate Governance and reporting – how well are the Law Commission, DoJ and Ministerial roles and reporting arrangements defined and how could this be improved? Do they provide proper support to operational and policy work? Are there sufficient structures in place to enable the Law Commission to meet corporate governance requirements, and manage risk? Are Nolan principles followed in terms of register of member's interests? Is the division of functions, responsibilities and duties between Chairman, CEO and Commissioners well defined and how has this worked in practice?

Sustainable Development – Where relevant, does the Law Commission consider how its services affect sustainable development including as regards to social exclusion?

Obtaining views

As part of the review, the Reviewer will wish to take account of a wide range of views such as:

- The Department of Justice
- The Law Commission including Commissioners, the CEO and staff
- The Office of the Lord Chief Justice
- The Office of the Attorney General for NI
- Departments of the NI Executive with an interest in the NILC
- The Universities of Northern Ireland
- The Law Reform Commission of Ireland
- The Scottish Law Commission

Timescale

It is anticipated that the review should take around 3 months to complete taking account of the Reviewers other time commitments.

Report

The Reviewer will provide an interim report by end of November or early December 2012. The final report should make an assessment of the Law Commission's performance against each of the key issues outlined above and identify recommendations for the future strategic development of the Law Commission. The report should be drafted in a format suitable for publication.

Ownership of the Report and the outputs of the review will reside with the Criminal Justice Policy and Legislation Directorate of the DoJ as the sponsoring Division for the Law Commission. The draft report will be shared with the Law Commission for comment and factual accuracy.

RECOMMENDATIONS AND INITIAL ANALYSIS

RECOMMENDATIONS	INITIAL ANALYSIS
Project Selection for the Programme of Law Reform 1. The Commission should undertake a two stage consultation process in the development of its Programme of Law Reform with a deeper engagement with government at stage 2, on the basis of a short list;	Accept
2. The Commission should link its projects more clearly to the government's aims and priorities; and	Accept
3. The government should reflect the Commission's Programme of Law Reform in its Departmental Plans and the Programme for Government.	Accept
Project Management 4. A detailed Issues Paper should be prepared for each project in conjunction with the relevant department before a PID is formally adopted;	Accept
5. Consideration is given at an early stage to the composition of the Project Team, including the availability of a Parliamentary Draftsman;	Accept
6. Consideration is given at an early stage to the formation of an expert Reference Group to provide voluntary and ad hoc advice on policy issues;	Accept

7. The Commission should embark on a limited experiment on the use of new technology for consultation purposes;	Accept
8. The Commission should explore the development of reciprocal agreements with other Law Commissions to review and quality assure completed reports;	Accept
9. The DoJ Minister should write annually to the Chair summarising the state of play in regard to completed reports, for inclusion in the Commission's annual report.	DOJ cannot speak for all completed projects. Suggest amending to "The relevant <u>lead Minister</u> should write annually to the Chair and copy to the DoJ Minister/Executive colleagues as appropriate".
10. Quarterly meetings with DoJ should be programmed well in advance	Accept
11. The Board should agree a forward work programme over the year to cover significant regular items;	Accept
12. There should be an annual meeting between the Minister and Chair to review progress;	Accept
13. The Commissioners' register of interests should be updated to include additional information on professional interests;	Accept
14. Work should be completed on the Memorandum of Understanding	Accept
15. New Commissioners should be given a comprehensive induction programme and such further training as may be required.	Accept
Accountability & Staffing	
16. That the Commission should	To be considered

appoint two permanent lawyers at PLO level to lead project teams in the areas of civil and criminal law respectively, with a third or fourth lawyer recruited on a fixed term contract or seconded from the Government Legal Service to lead particular projects and complementing the expertise of permanent members of staff	
17. That the Commission should consider the merits of developing an intermediate lawyer grade or a senior legal researcher grade;	To be considered
18. Subject to agreement on a new organisation model, the appointment of a Head of Secretariat (or Business Manager) as the Accounting Officer to lead the administration team.	To be considered
Organisation Model 19. A new model for the organisation of the Law Commission based on the appointment of a Director of Law Reform, supported by a Head of Secretariat, reporting to a Board of Commissioners;	To be considered
20. Commissioners should no longer have responsibility for the leadership of individual law reform projects;	To be considered
21. Commissioners should shadow the work of project teams with a view to leading discussion at Board level and fronting key consultation engagements;	To be considered
22. Commissioners should be paid an appropriate Public Appointment rate;	To be considered
23. Commissioners should be appointed solely on merit and without regard to	To be considered. This would require legislative change.

their legal constituency; and	
24. More economical accommodation should be found and the overall savings invested in the lawyer team.	Accept in principle – although for the NILC to progress. There would be costs to be released from the current lease.
Performance 25. That the NILC should monitor the initiative in the Law Commission for England and Wales to develop performance indicators; and	Accept
26. That the Commission should seek to develop its links with other Law Reform Commissions, notably the Scottish and Irish Law Commissions.	Accept
Strategic Aim 27. No change in the Commission's strategic aim.	Accept

Lines to take and questions

- Thank you for your report. It is a comprehensive yet concise report.
- There are obvious problems at the Commission and your report is a thoughtful and sensitive response.
- Much of the report is straightforward but some recommendations propose a radical reorganisation of the NILC.
- I would like to explore your thoughts of the NILC and the rationale behind some of your recommendations.
- I have not come to a firm view on the way forward but will do so soon including any transitional arrangements.

Questions

- Your review has suggested a radical restructuring of the Commission. I would be interested in hearing your rationale for;
 - The changed role for Commissioners;
 - Dropping the requirement that Commissioners should be selected from particular constituencies, and
 - The need for a Director of Law Reform and how this is significantly different from the existing CEO role.
- Should the Accounting Officer function lie with the Head of Secretariat as suggested or with the Director of law Reform.

REVIEW OF THE NORTHERN IRELAND LAW COMMISSION: FINAL REPORT

Background

Terms of Reference

1. At the end of October 2012 I was commissioned by the Department of Justice to undertake a "Light-Touch" Review of the Northern Ireland Law Commission (NILC) in line with Department of Finance and Personnel guidance. My terms of reference (see appendix 1) invited me to examine a number of issues under two headings: "organisational options" and "improving performance".
2. My terms of reference noted that the NILC is "an independent statutory body", established and governed by Sections 50-52 of and Schedule 9 to the Justice (Northern Ireland) Act 2002. It was formally established in April 2008 as "an advisory non-departmental public body" (NDPB). Its statutory role is "to keep under review the law of Northern Ireland and make recommendations for its systematic development and reform to the Department of Justice (DoJ) Northern Ireland". The Commission's strategic aim is variously described but I have interpreted it as "to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible".
3. My terms of reference invited me to consult with the Commission itself, the Department of Justice and key stakeholders. To that end I have held over 20 meetings (including lengthy telephone conversations) with some 30 plus individuals. In addition I have sought to immerse myself in the affairs of the Commission through reading various documents and reports, supplemented by web based research. I am very grateful for the cooperation and help I received from everyone I consulted, not least members of the administration team in the Commission who were assiduous in providing me with the information I required. The collective support I received for this review reflected a common desire to see the Commission succeed in its important role in contributing to the efficient and effective delivery of a fair and impartial system of justice to the community in Northern Ireland.
4. It was originally envisaged that the review would take around three months to complete, involving 10 to 15 days work. I was asked to provide an interim report by the end of November or early December 2012 and to share my report with the Law Commission in draft for comment and factual accuracy. As my review unfolded it became apparent from my interviews with stakeholders that organisational and performance issues were so intertwined that it made sense to present a final report with no interim report. This change was agreed with the sponsoring Department.
5. I am grateful for the comments I received from the Law Commission on my draft report. I have carefully considered them and incorporated many of them in my final report.

Outline of Report

6. My interviews with stakeholders generally began by examining performance issues before turning to organisational issues, in the belief that organisational changes (if any) should flow from an analysis of performance. I was also conscious that elements in my terms of reference overlapped. Rather than covering the individual items in my terms of reference seriatim, I therefore explored with stakeholders the process by which projects were chosen for inclusion in the Commission's Programmes of Law Reform, through to the delivery of the Commission's reports to the DoJ. My report adopts this approach. It first identifies ways in which the law reform process could be strengthened. Then it explores a number of cross cutting issues, including corporate governance, accountability, staffing and performance. It concludes by examining two overarching issues. The first is organisational options, which take account of not only performance issues but also resource constraints affecting both people and finance. The second is the Commission's strategic aim and its possible improvement. In the process I have sought to cover various miscellaneous items in my terms of reference. At the end of each section I have set out my recommendations in summary form.

Project Selection for the NILC's Programme of Law Reform

Consultation

7. The formulation of the NILC's Second Programme of Law Reform May 2012 – March 2015 was preceded by an extensive and comprehensive programme of consultation with interested parties, followed by a six week scoping study of the 26 projects proposed, undertaken by the CEO, supported by a recently appointed Legal Researcher in the Commission. I endorse the importance attached by the Commission to this early public consultation. Commissioners then considered the various projects against the previously adopted Project Selection Criteria: importance to NI; suitability; resources; and timing. Given the involvement of government departments in the consultations, it was disappointing to the Commission that late changes had to be made to the proposed Programme following the end of consultations, before DoJ approval was received.

Government's Priorities

8. This experience points to the need for a deeper level of engagement between government and the Commission at the planning stage, building on the public consultation. The Commission is an independent body, in common I understand with the 60 or so other Law Commissions across the world. Indeed, independence from government is a defining characteristic of most law reform bodies. However, like

other Law Reform Commissions in these islands the NILC requires Ministerial approval to its Programme of Law Reform. It follows that government should clearly inform the NILC of its priorities at an early stage in the consultative process, while recognising and respecting the Commission's independence and the public interest, not least in regard to potential projects that cut across Departmental boundaries. Those priorities should be drawn from objectives and priorities in departments' strategic plans and in particular the Northern Ireland Executive's Programme for Government (PfG).

9. Priority 1 in the PfG aims at "Growing a Sustainable Economy". Three of the Commission's recent projects contribute to that priority: Land Law; Business Tenancies Law; and Multi-Unit Developments. All should make NI a more attractive place for investment through the modernisation of civil law. Priority 4 aims at "Building a Strong and Shared Community", which is reflected in DoJ's own Mission Statement: "Building a fair, just and safer community." Another three of the Commission's recent projects contribute to this aim: Vulnerable Witnesses in Civil Proceedings; Bail; and Unfitness to Plead. The Department of Finance and Personnel's corporate plan contains a general commitment to civil law reform.
10. While the Commission's projects can therefore be said to be consistent with those of the government, I believe more could be done to align them, through the deeper level of engagement referred to above. In particular, I suspect departments could be more assiduous and systematic in their identification of potential projects that would contribute to their strategic aims. Departments may need to be regularly reminded of the Commission's remit and role so that they are in a position to bid for projects at the appropriate time.
11. In order to secure a deeper level of engagement with government, I believe there would be merit in the Commission formally adopting a two stage consultation process. The first stage would involve all interested parties, following which the Commission would undertake a more detailed scoping study including an examination of each project against the Project Selection Criteria. The second stage would involve the relevant government departments in more detailed discussions before the Commission would submit its final proposals to DoJ for Ministerial approval. It follows that those involved in such discussions should be able to speak authoritatively on behalf of their departments. Projects not included could form a reserve list to be drawn on as time and resources permitted or to be considered afresh in drawing up the next Programme. (It would of course be possible for one or more of those projects to be "referred" to the Commission by a Department for inclusion in the Programme, with the necessary resources.) Those projects admitted to the Programme could be cross referenced in department's plans and the Programme for Government as evidence of a serious intent to follow up reports. Meanwhile the Commission's own Business Plans and Annual Reports could also

include a specific reference to the contribution of its projects to the government's aims and priorities.

Independence

12. While this process might appear to compromise the Commission's independence, it recognises that government (on behalf of the people of NI) is the main stakeholder in the business of the Commission. The Commission would remain the instigator of the process, but would take government's priorities more clearly into account in formulating its draft Programme of Law Reform. For its part, government should recognise that it has to be flexible in its identification of possible projects if the Commission is to fulfil to best effect its statutory remit to "keep under review the law of Northern Ireland with a view to its systematic development and reform" as set out in the Justice (Northern Ireland) Act 2002. It is likely that there will always be more projects than can be accommodated in the Programme.
13. In regard to the independence of the Commission, my attention was drawn to a quotation from the former Chief Justice the Honourable Mr Justice Ronan Keane on the 30th Anniversary of the formation of the Irish Law Commission. Commenting on the nature and function of successful law reform agencies he said: "First they must be independent of government. A body which is simply another branch of the executive will inevitably be perceived as being concerned with implementing whatever may be government policy at any particular time rather than bringing forward proposals for law reform which viewed objectively, can be seen as in the interests of society as a whole."

Recommendations

14. I recommend that:
 - The Commission should undertake a two stage consultation process in the development of its Programme of Law Reform with a deeper engagement with government at stage 2, on the basis of a short list which draws on the public consultation at stage 1;
 - The Commission should link its projects more clearly to the government's aims and priorities; and
 - The government should reflect the Commission's Programme of Law Reform in its Departmental Plans and the Programme for Government.

Project Management

Project Plan

15. Following the approval of the Programme, a Project Initiation Document (PID) is drawn up for each project supported by a Gantt Chart identifying the milestones on a critical path leading to the delivery of a report. Progress is then monitored regularly. While the Commission has adopted appropriate project management techniques it is clear that they are not working robustly in terms of completion dates. The fact that serious delays have occurred in the completion of final reports and draft legislation across all projects, compared to their original PID timetables, is not perhaps surprising given the complexities of law reform projects. Policy issues can emerge requiring more detailed consideration than was originally envisaged, together with changes in emphasis, not to mention sickness on the part of key legal staff. Nonetheless, however good the reasons for delays in particular projects, they risk undermining the credibility of the Commission in the eyes of government. They point to the need for a comprehensive analysis of the project before the development of a project plan, together with greater resilience in the organisation's staffing structure. The PID should be more than an indicative timetable, but a realistic projection of the project's critical path. Past delays also pose a critical challenge to the Commissioners' capacity to give effective leadership to individual projects: a role they discharge only on a part time basis of either one or two days a week and shortly all to become one day a week. (I return to the role of Commissioners later in my report, with particular regard to what can reasonably be expected of them on such a part-time basis.)

Issues Paper

16. The scoping study referred to earlier only indicates in broad terms the issues to be explored in a particular project. I believe that a comprehensive and detailed "Issues Paper" should be required for each project before a PID is developed and formally adopted by the Board. (I understand the preparation of such a paper has not been a uniform practice to date.) An exception might be made in respect of a small and relatively straightforward project. Such a paper should be developed in conjunction with the interested department so that its knowledge and expertise can be brought to bear on the nature and scale of the project.

Staffing Requirement

17. An added advantage of early departmental engagement is the opportunity it would provide to jointly explore the staffing requirements for the necessary team to undertake the project. At present there is a one size fits all approach, involving a Principal Legal Officer supported by one or two legal researchers. Would there be

scope in particular projects to have a seconded official (part time or full time) working with the team, reporting only to the Commission?

18. Discussions could also be initiated at this stage with the Office of Legislative Counsel (OLC) over the preparation of draft legislation. In the short term it seems unlikely that the Office would be able to second a draftsman, due to workload pressures, but it might be possible to identify someone with appropriate drafting expertise from outside the OLC on a contract basis, following appropriate tendering. This expedient has already been adopted by the Commission with some success. An early appointment to the team, part time or full time, would provide a useful reality check on the development of legislative proposals against the existing statute. Without the engagement of an expert draftsman it is doubtful if the Commission's reports should include draft legislation.

Steering Group

19. All projects undertaken by the Commission have appointed "Steering Groups", including a senior departmental representative, to monitor progress on a regular basis. This is a welcome practice, which should provide the opportunity to debate emerging policy issues on the basis of a no surprises regime. While it is the responsibility of the Commission to present its report as an independent body, it should at least be aware of the government's preliminary view on potentially controversial issues.

Public Consultation

20. I welcome the Commission's evident desire to consult with stakeholders on individual projects, not least through the issue of consultation papers. The Commission's general consultation list is impressive and adjusted to reflect the particular project. It covers a wide range of organisations in both the public sector and civil society. In its short life it has established itself as an open and transparent body, due in no small measure to the sterling efforts of successive Chairs and Commissioners to engage with stakeholders, lead consultations, give speeches and generally engage in vigorous debate. Its consultation methods have included seminars, conferences, public meetings, questionnaires and discussions with groups of interested parties. The Commission's practice in this area may be a model for other public sector organisations, not least to the extent that they form part of the Commission's research processes. Moreover the Commissioners have sought to promote the NILC nationally and internationally, including through the Commonwealth Association of Law Reform Agencies and the Commonwealth Law Conferences.

Reference Groups

21. Alongside its efforts to engage a wide range of interested parties, I believe that there would be merit in extending the current practice of establishing small Reference Groups for particular projects. They would be made up of experts in the areas in question, who could be convened on a voluntary and ad hoc basis to provide advice on policy issues. The Groups would have no executive responsibility for monitoring projects. I understand a similar mechanism exists in both the Law Commission for Ireland and the Scottish Law Commission.

New Technology

22. My terms of reference invited me to consider whether the Commission could make more use of new technology. I found the Commission's website up to date and welcome its inclusion of links to all its publications. I have explored the extent to which the Commission could use the social media to encourage interactive dialogue with key stakeholders. I am however conscious both of the effort required to support a continuous dialogue with interested parties and of the risk of superficial engagement. I am not convinced that the effort would be worthwhile. Nonetheless there might be policy issues which would lend themselves to a relatively short and sharp interactive debate using new technology. The Commission might also wish to consider organising webinars to explore key issues with interested parties or even to set up a project blog as a pilot exercise.
23. The ultimate test of the quality of the Commission's reports should be their inclusion in the government's legislative programme – even if some proposals are amended by government. (I note in passing that such amendments would also be the ultimate demonstration of the Commission's independence.) This has yet to happen, although I understand some progress is being made by departments. Part of the reason for delay in certain projects appears to lie in the problems surrounding draft legislation, combined with the scale and complexity of some of the early projects, particularly Land Law, which was a legacy project and took four years and six months to complete. In regard to that project, three consultation papers were issued and the final report ran to over 300 pages with 121 clauses of draft legislation.

Draft Legislation

24. I have been advised that the preparation of draft legislation is a specialised area. It takes many years to train a legislative counsel. Past practice suggests there is a risk in appointing a well intentioned lawyer with expertise in the subject matter but not in the statute book to draft legislation. For this reason I believe that the OLC should be engaged in discussion at an early stage, as mentioned above, with a view to the identification of a suitable expert.

Peer Review

25. The role of Commissioners encourages them to engage in a form of peer review by commenting on the Commission's various projects at key stages. Regular Progress Meetings, held to coincide with alternative Board meetings, provide a formal vehicle for detailed discussion of individual projects based on progress reports. I understand these reports are usually prepared by the lead lawyer, under the close supervision of the relevant Commissioner. I suspect that time constraints limit the extent to which Commissioners can contribute collectively across project boundaries. These constraints will get worse as budgetary pressures further limit the time available.
26. I explored how to extend the present peer review arrangement with several stakeholders. One method of securing a degree of independent quality assurance might be for the NILC to explore developing bilateral arrangements with other Law Commissions for the reciprocal review of completed reports. This could also encourage a sharing of best practice and help improve standards. Academic lawyers might also be engaged to undertake peer reviews in their specialist areas.

Memorandum of Understanding

27. I have been advised that the Commission is working on a Memorandum of Understanding (MoU) with DoJ, intended at least in part to formalise the process of follow up to Commission's reports. Clearly it is important that the Commission is regularly briefed on the status of their proposals. I suggest that as part of the MOU the DoJ Minister should write annually to the Chair summarising the present state of play in regard to completed reports. In particular, if recommendations are to be rejected, a full explanation should be given. I note that such a summary is included in the Annual Reports of the Scottish Law Commission. The Minister's letter should then be published in the Commission's annual report. This mechanism would represent a variant on the protocol enshrined in the Law Commission Act 2009, affecting England and Wales, whereby the Lord Chancellor has a duty to report annually to Parliament on the implementation of Law Commission proposals.

Recommendations

28. I recommend that:
 - A detailed Issues Paper should be prepared for each project in conjunction with the relevant department before a robust PID is formally adopted;
 - Consideration should be given at an early stage to the composition of the Project Team, including the availability of a Parliamentary Draftsman;
 - Consideration is given at an early stage to the formation of an expert Reference Group to provide voluntary and ad hoc advice on policy issues;
 - The Commission should embark on a limited experiment on the use of new technology for consultation purposes;

- The Commission should explore the development of reciprocal agreements with other Law Commissions to review and quality assure completed reports; and
- The DoJ Minister should write annually to the Chair summarising the state of play in regard to completed reports, for inclusion in the Commission's annual report.

Corporate Governance

Policies

29. In the course of its relatively short life as an Advisory NDPB the Commission has developed a comprehensive range of policies and procedures to meet the corporate governance requirements set out by the Department of Finance and Personnel. These impose a considerable burden on a small organisation with around 12 members of staff plus the Commissioners. They draw heavily on standard protocols across government and not least those in DoJ. Now that they have been developed, to the credit of the CEO and her small administration team, it is to be hoped that the burden on the Commission itself at Board level will be limited to their maintenance, with DoJ and DFP providing some shared services. These services should reduce the administrative burden on such a small organisation, notably in the areas of finance (through Account NI), personnel (through HR Connect), procurement (through CPD) and IT and Information Management (through NICS IT Assist). I am conscious that despite this back up support, the recruitment of temporary staff will continue to be a major drain on staff time, particularly in regard to the appointment of legal researchers.

Sustainability

30. The Commission is concerned to ensure that it minimises its environmental impact. Its policies commit the organisation to reducing waste and making use of energy saving measures.

Corporate and Business Planning

31. The Commission's three year Programme of Law Reform essentially constitutes the organisation's Corporate Plan, backed up by annual Business Plans. The Commission also produces an Annual Report. There were delays in producing the Business Plan for 2012/13 and the Annual Report for 2011/12, due to a combination of sickness and the appointment of an Acting DEO. (The absence of resilience within the organisation is a matter of concern that I address later.) Reporting arrangements with DoJ include quarterly meetings. These should be programmed well in advance

to avoid slippage. They should be supplemented by an annual meeting between the Minister of Justice and the Chair.

Board Meetings

32. Board meetings are scheduled monthly, with Progress Meetings to monitor progress on projects held every other month, using standard public sector project management methodologies. With the return of the CEO and the prospect of a new Chair it would be important to re-establish the mechanism of both individuals meeting a week prior to the Board to agree the agenda. To help this process and improve organisational discipline, I suggest that the Board should agree a forward programme of business over the year covering significant regular items. This should reduce the risk of delay in the development of key documents such as Business Plans and Annual Reports. In principle, it is desirable for the minutes of Board meetings to be published on the Commission web site, consistent with best practice for NDPBs.

Equality Scheme and FOI

33. As mentioned earlier the Commission seeks to apply best practice in its consultation arrangements. It has committed itself to a regular review of its general consultation list. The Commission seeks to adhere to the requirements of Freedom of Information. It has a draft Equality Scheme, which is expected to be finalised shortly with the Equality Commission. I understand that the delay is due to discussions with the Equality Commission on the interpretation of "policy" for the purposes of the NILC's Equality Scheme, in particular in relation to the monitoring of policies. As an advisory body the Commission does not implement policies and cannot therefore be expected to monitor them. The Commission screens each project, including its contribution to promoting equality of opportunity and good relations, and keeps its assessment under review for the duration of the project. The results of its Equality Impact Assessments are available on the NILC web site. The Commission has also committed itself to ensuring that the public has access to all information and services to all parts of the community (using all available formats), including children, people with learning difficulties and minority and ethnic communities.

Registers

34. The Commission maintains appropriate registers covering organisational risks (including to individual projects), gifts and hospitality and members' interests. The last named is due for review, when the opportunity should be taken to include any additional information on Commissioners' professional interests and responsibilities, however tangential to the work of the Commission. The Commission is alert to the importance of adherence to the Nolan Principles. It follows standard public sector requirements in regard to procurement of goods and services.

Induction and Other Training

35. For many Commissioners the extent of the corporate governance requirements placed on the NILC came as a surprise. Their induction training was belated and incomplete. New Commissioners should be given a comprehensive induction programme, supported by additional training as required, which should include inter alia the relationship between the Commission and DoJ and the respective roles of the Commissioners, including the Chair, and the CEO.
36. I welcome recent progress in respect of clarifying the latter, through a recently agreed Relationship Document (September 2012). This Document essentially replaces the previous Management Statement and Financial Memorandum agreed in 2008 between the then sponsoring Department (NIO) and the NILC. A new agreement was required with the creation of the DoJ and the devolution of criminal justice functions, together with the removal of the statutory requirement that the Commission furnish full accounts to the NI Audit Office. As mentioned earlier, work has begun on a Memorandum of Understanding between the NILC and DoJ on how they should work together, including the responsibility of departments to consider and as appropriate to carry forward proposals and draft legislation in NILC reports. However, I must emphasise that neither of these documents can be a substitute for good collegiate relationships, based on mutual trust and respect.

Recommendations:

37. I recommend that:

- Quarterly meetings with DoJ should be programmed well in advance;
- The Board should agree a forward work programme over the year to cover significant regular items;
- There should be an annual meeting between the Minister and Chair to review progress;
- The Commissioners' register of interests should be regularly updated to include any additional information on professional interests;
- Work should be completed on the Memorandum of Understanding; and
- New Commissioners should be given a comprehensive induction programme and such further training as may be required.

Accountability

Accountability to Government: Roles of Chair and CEO

38. Effective corporate governance arrangements require clear lines of accountability. These are set out in the Relationship Document referred to earlier. Traditionally in the public sector the Chief Executive as Accounting Officer is held accountable for the performance of his or her organisation, including ensuring the safeguarding of public funds through effective financial management and control. This model does not suit the Commission. Commissioners lead law reform projects and are therefore responsible for delivering on project plans, not the CEO, although she may be assigned responsibility for particular projects. In practice, it is therefore only the Chair who can be held accountable for the overall performance of the Commission in regard to its programme of law reform projects. In these unusual circumstances, it is only the Chair (supported as appropriate by a Commissioner) who can report to the Minister or to an Assembly Committee on this critical aspect of the Commission's performance.
39. This is unsatisfactory: the Chair is a part time appointee, fulfilling an important primary role as a High Court Judge, whose contract provides that he works one day a week for the Commission. It is unrealistic and unfair to expect him to be accountable for all law reform projects and to draw them together in what was described as a "corporate policy approach" in the Commission's First Programme of Law Reform.
40. It is noteworthy that the Relationship Document is silent on the nature of the Chair's responsibility for the overall performance of the Commission. While the Document notes the Chair's responsibility for "formulating the Commission's strategy", it contains no reference to the responsible party for its delivery. However, the terms and conditions of appointment of the last Chair, dated Nov 2009, note his responsibility "to lead the Commission in the execution of (its) work". "Work" refers to the Commission's task "to make the law in NI clearer, more modern, more accessible and less archaic."
41. The Relationship Document describes the CEO's leadership responsibility largely in terms of corporate governance requirements including the safeguarding of public funds, although there is a specific responsibility to "advise the Chairman and Commissioners on the Commission's performance compared with its aims and objectives." Again the Document is silent on the issue of responsibility for the delivery of the NILC's programme of law reform projects. However, the current CEO's letter of appointment, dated June 2007, includes the responsibility to "prepare, agree and ensure the delivery (subject to resources) of a programme of research to support the Work Programme."
42. Subsequently, this "legal research" responsibility, which had never developed, was dropped when the Commission agreed to the CEO's request to work four and then three days a week for family reasons. At that time it was agreed that the CEO's major responsibilities would include (unspecified) Accounting Officer duties, business planning, staff management, services to the Board and attendance at certain external events. In addition to these responsibilities, the CEO has advised me that

recently she has taken on a lead role in respect of the “Regulation of Health Professions” and the “Fitness to Plead in Criminal Cases” projects.

43. Even if the legal research function had not been dropped, I do not believe that this responsibility could be understood in such a way as to assign to the CEO overall accountability for the performance of the Commission across all law reform projects. This view is confirmed by the absence of any specific responsibility for the delivery of the Commission’s Second Programme of Law Reform in the CEO’s strategic objectives for 2012/13.
44. I address the implications of what I perceive to be a serious accountability lacuna later in my report.

Staffing

Contracts

45. There are currently 12 members of staff in the Commission: a CEO; three project lawyers; four legal researchers; and four administrators in a Business Support Team. The CEO is the only permanent employee of the Commission. All others are either secondees from DFP (all the Business Support Team and one lawyer), or staff on fixed term contracts (mostly three years). The turnover in fixed term contract staff has created some instability and made it difficult to develop an esprit de corps. A particular concern is the fixed term nature of the contracts for all three lawyers. In the absence of a Director of Research, the day to day responsibility for the Commission’s programme of law reform essentially rests on their shoulders. When one of them is off sick or leaves to take up another post inevitable delays occur and deadlines are missed to the potential embarrassment of the Commission. Commissioners do not have the time within their part-time contracts to act down, while most researchers are too inexperienced to act up. A further complication is that the length of a fixed term contract is unlikely to match the likely length of the project. Where projects have over run, the contract has necessarily been extended. In short, the organisation’s resilience needs to be improved, particularly at lawyer level.

Director of Legal Research

46. It has been suggested to me that the resourcing and development of projects could be enhanced by the appointment of a Director of Legal Research, who would provide a research and advice service to Commissioners as the leaders of projects. Such a post exists in the Law Commission for Ireland. I fully support the need to beef up the legal research function of the Commission. I consider this issue further under the heading of “Organisation Model.”

Lawyers

47. The Acting Chief Executive presented proposals to the Commission in May 2012 on NILC Structures and Grading, based on a combination of lawyer posts (graded at PLO level) and legal researchers graded (graded at EO2 level). He proposed that within the available budget of some £370k for legal posts, the Commission should move to a three PLO lawyers and six legal researchers model or four PLO lawyers and four legal researchers model. The merits of each may well depend on the nature and number of projects. While the present non-permanent staff model for legal posts offers considerable flexibility and the opportunity to recruit experts to work on particular projects, it doesn't develop an in-house expertise in either civil or criminal law. I believe that such expertise will become increasingly necessary as the organisation moves into new areas of law reform. To that end the Commission should consider appointing two permanent lawyers at PLO level to lead project teams in the civil and criminal fields respectively. A third or fourth lawyer could be recruited on a fixed term contract or secondment from the Government Legal Service to lead particular projects for their duration, complementing the expertise of the permanent members of staff. The services of fixed term or seconded lawyers should normally terminate on completion of the relevant projects. A move to this model could increase organisational resilience, at least by offering the prospect of being able to move lawyers around to fill unforeseen gaps. Resilience would be further strengthened by the addition of a fourth lawyer.

Legal Researchers

48. I have been generally advised that the present arrangement of fixed term contracts for legal researchers at the start of their legal careers works well, although I imagine that most of them are on the lookout for permanent posts. They constitute a valuable resource for the Commission. It is a pity that there is little opportunity for them to seek advancement within the current staffing structure, building on their knowledge and expertise. In time, the organisation might wish to consider the merits of developing a staffing model with an intermediate lawyer or senior legal researcher grade between PLO and EO2. The exact composition of each team should be discussed at Project Initiation stage (see earlier comments on project management).

Administration Team

49. Alongside the legal team should be an administration team, as at present. However, depending on the organisation model, it could be led by a Head of Secretariat (or

Business Manager). Now that the organisation's systems and procedures have been established, within a sound framework of corporate governance, the grading of such a post is likely to be below that of the current CEO, even though the post should carry standard Accounting Officer responsibilities for financial management and control. The specific grading of the post would require a comprehensive delineation of responsibilities and an expert assessment using the appropriate methodology.

50. It has been suggested to me that the present long term secondment arrangement for members of the administration team should cease and permanent appointments made on the grounds that this would inculcate a greater sense of commitment to the Commission as the employing body. During my visits to the Commission I sensed no lack of commitment on their part: indeed the opposite was the case. In regard to this suggestion I merely note that as permanent employees they would lack any career development opportunities or any realistic prospect of early advancement in such a small organisation – as would be the case with any permanent legal staff.

Recommendations

51. I recommend:

- **That the Commission should appoint two permanent lawyers at PLO level to lead project teams in the areas of civil and criminal law respectively, with a third or fourth lawyer recruited on a fixed term contract or seconded from the Government Legal Service to lead particular projects and complementing the expertise of permanent members of staff;**
- **That the Commission might wish to consider the merits of developing an intermediate lawyer grade or a senior legal researcher grade; and**
- **Subject to agreement on a new organisation model, the appointment of a Head of Secretariat (or Business Manager) as the Accounting Officer to lead the administration team.**

Organisation Model

Current Constitution

52. The Commission consists of a Chairman and four other Commissioners. According to the Justice (Northern Ireland) Act 2002, the Chairman must be a person who holds the office of a High Court Judge. Of the other Commissioners, one should be a barrister, one a solicitor, one an academic and one a lay person. One of the key responsibilities of the Chairman as set out in his letter of appointment is "to make the law in Northern Ireland clearer, more modern, more accessible, and less archaic". This responsibility is associated with the requirement "to lead the

Commission in the execution of this work". For their part, Commissioners' responsibilities include: "to lead your team of lawyers on projects in their own fields"; "to take forward the projects for which you are responsible and oversee the writing of consultation papers and final reports"; and "to participate in peer review". These are onerous responsibilities alongside other duties associated with membership of a corporate body. All Commissioners are currently part time, either one day a week or two. The Chairman's appointment is for one day a week. From the beginning of April 2013 all Commissioners, including the Chairman, will be paid for one day a week only, reflecting budgetary pressures.

53. Comparisons with the Scottish and Irish Law Commissions are interesting. In Scotland the Chairman of the Commission is a Judge of the Supreme Courts of Scotland. He spends 60% of his time on Commission business. The Commission employs three full-time Commissioners and two part-time Commissioners, the latter on a commitment of around 50%. Each full-time Commissioner generally leads two project teams of a lawyer and a legal researcher and is responsible for leading the drafting of consultation papers and reports. Part-time Commissioners would generally look after one project team.
54. In Ireland, the Chairman of the Commission spends 40% of his time on Commission work and 60% as a High Court Judge. The one full-time Commissioner is the Coordinating Commissioner for several projects supported by legal teams for each project. Part time Commissioners oversee a smaller number of projects depending on their varying time commitments.
55. Almost without exception, all stakeholders expressed serious doubts over the capacity of Commissioners in the NILC to discharge their executive legal responsibilities, plus corporate governance duties, in the one day a week dictated by resource constraints for 2013/14. I share those doubts, which are reinforced by my concern over organisational accountability, as mentioned earlier.
56. I believe the management and day to day direction of the Commission's Programme of Law Reform requires full-time leadership. I recommend this be achieved through the appointment of a full-time, legally qualified, Director of Law Reform as the executive head of the organisation. This person would subsume the mainly advisory role of a Director of Legal Research referred to earlier. I must emphasise that this post would differ substantively from that of the current CEO, who has no overall responsibility for the performance of the Commission in respect of the delivery of its programme of law reform.

Director of Law Reform

57. The Director of Law Reform would both oversee and contribute as necessary to the work of the project teams and could lead projects in his or her area of particular

expertise, contributing in the process to organisational resilience. He or she would be the principal adviser to the Commissioners (as a Board), on the content of future programmes of law reform (a vital task for the Commission), on the management of projects, on any legal policy issues emerging in particular projects, on draft consultation papers and on draft reports, including any legislation etc. The Commissioners (as a Board), would hold the Director to account for the performance of the Commission, as with other NDPBs. The DoJ would also hold the Director similarly to account for operational performance and not the Chairman - except in so far as the strategic leadership role of the Board was concerned.

58. The post should be graded at a sufficiently senior level to be attractive to suitably qualified and experienced lawyers (with a good knowledge of the statute book and a high level of research related skills) in both the public and private sectors, as well as academia. I understand that the grading of Commissioners is equivalent to Grade 3 or Deputy Secretary. Again, the specific grading of the post would depend on a comprehensive delineation of the responsibilities and an expert assessment using the appropriate methodology. The Director would be supported by a Head of Secretariat (or Business Manager), who would also act as the Accounting Officer. In an organisation of the size and nature of the Law Commission, with some support services provided from elsewhere, the duties of an Accounting Officer should not be unduly onerous.
59. It has been suggested to me that the functions of a Director of Law Reform could be discharged instead by a full-time Commissioner, thereby retaining the existing model of an independent Commissioner led law reform agency. This model exists in the Irish Law Reform Commission where, as referred to earlier, the full-time Chief Commissioner is supported by several part-time Commissioners and a part-time High Court Judge. However, in my view, this model still fails to identify clear lines of overall accountability for the programme of law reform.

Role of Commissioners

60. The Commissioners' other responsibilities in the current terms and conditions of appointment would remain broadly the same, not least in regard to the key strategic issues at the heart of the Commission's work. They would be expected to represent the Commission at public events, as well as continuing to ensure that "the Commission observes the highest standards of governance at all times." Essentially the Commissioners' responsibilities would reflect those strategic responsibilities traditionally associated with the Board of a NDPB. Individual Commissioners could also shadow the work of particular project teams, reflecting their expertise, with a view to leading discussion of policy issues at Board level and to fronting key consultation engagements. Their performance would be appraised in the normal way for members of NDPBs against the criteria in their terms and conditions of appointment. Importantly, I believe this model would require no change in the

current legislation, given that Commissioners would remain, albeit with reduced responsibilities in regard to the leadership of projects.

New Constitution

61. However, if it were decided to remove the requirement that Commissioners be drawn from the three distinct branches of the law plus a non legal person, new legislation would be required. This change has been commended to me on the basis that the current requirement to appoint a barrister, a solicitor, a teacher of law and a non legal person is unduly restrictive. I concur with the view that appointments solely on merit as at present, but without regard to legal constituency, would potentially widen the candidate field and in the process could support the achievement of the Department's diversity targets.
62. Nonetheless, however constituted, the Commission should remain an independent advisory NDPB. The Commissioners themselves should remain the guardians of the Commission's independence.

Cost Implications

63. Under this model, Commissioners would be paid an appropriate Public Appointment rate for, say, two days work per month. Although the purpose of the review was not to reduce costs, but to improve efficiency and effectiveness, I estimate that the resulting savings in the current cost of the Commissioners would be around £70k ie a reduction from £130k to £60k. The additional cost of a Director of Law Reform, depending on the grading of the post, could be £80k, offset by the cost of the current CEO post and savings in office costs as Commissioners would no longer require dedicated accommodation, except perhaps for the Chair.
64. I am also conscious of the relatively high costs of the Commission's current offices (some £180k) in a prestigious development, chosen by the earlier Project Board. They include a large Board Room. I doubt the need for this dedicated space even though I have been advised it is also used for various consultations. Efforts should be made to find more economical accommodation with the use of meeting rooms in alternative venues as required. I understand that such a move would likely require another government department to take on the remainder of the lease.
65. The resulting overall savings, including any savings in office costs, could be applied to increase the vitally important lawyer team and improve organisational resilience. The importance of these savings can be seen in the reduction of the Commission's budget by 19% over the four year period to 2015 as a consequence of the Comprehensive Spending Review. The future viability of the organisation arguably depends on the existence of a minimum of three or preferably four legal teams. Without this critical mass, the overhead costs could become exorbitant.

Alternative Models

66. I have considered alternative models, some of which were suggested to me by stakeholders. One variant of the current model would seek to overcome the day a week restriction on Commissioners by halving the time of two Commissioners and doubling the time of the other two. I believe this model would leave the latter two Commissioners in the same state as before since they would presumably have to double their workload in terms of project leadership. There would remain an accountability lacuna.
67. An alternative model would replace the Commissioners by a single Commissioner as a corporation sole. The organisation would then become dependent on a single person, acting without the benefit of the collective wisdom and varied experience of a Board of Commissioners. It would remove the leadership of the Commissioners by a High Court Judge, who lends credibility, authority and prestige to the organisation.
68. At the other end of the spectrum, it would be possible to revert to the previous model whereby the Office of Law Reform was an integral part of the Department of Finance and Personnel, although covering civil law reform only, supported by a Law Reform Advisory Committee. A variant would involve the creation of an Executive Agency within DoJ or DFP or both. Neither of these models would give the independence from government much cherished and jealously guarded by law reform agencies across the world. The essence of law reform agencies is that they promote law reform "in the interests of society as a whole" as distinct from "government policy". To fulfil this task effectively, a Law Commission must have the independence to challenge government. The views of the Criminal Justice Review are also worth quoting: "We have heard very powerful argument for a statutory law reform body, independent of government, which could provide an impartial and objective view of areas of law and make recommendations that the government might include in its legislative programme" Para 14.50. For these reasons, I have rejected these "re-integration" models.
69. I have also rejected the "abolition" model. The need for an independent Law Commission remains unchanged from the analysis set out in the Criminal Justice Review. Its value can be seen in the list of important projects forming the Commission's Second Programme of Law Reform, not to mention those omitted.

Recommendations

70. I recommend:

- **a new model for the organisation of the Law Commission based on the appointment of a Director of Law Reform, supported by a Head of Secretariat, reporting to a Board of Commissioners who would continue to be the guardians of the Commission's independence;**
- **Commissioners should no longer have responsibility for the leadership of individual law reform projects;**

- Commissioners should shadow the work of project teams with a view to leading discussion at Board level and fronting key consultation engagements;
- Commissioners should be paid an appropriate Public Appointment rate;
- Commissioners should be appointed solely on merit and without regard to their legal constituency; and
- More economical accommodation should be found and the overall savings invested in the lawyer team.

Performance

Comparisons with Other Law Commissions

71. I am not qualified to form an objective opinion on the quality of the reports produced by the NILC in its relatively short life. Nor can a lay person fairly compare its productivity to that of other Law Commissions. By their very nature projects differ within as well as between jurisdictions in regard to their nature, duration and complexity. Moreover, different Commissions have different ways of working involving both full-time and part-time Commissioners and varying sizes of legal teams. While Northern Ireland is at the smaller end of the spectrum as far as these islands are concerned, it has delivered an impressive number of reports as well as consultation papers, notwithstanding serious delays in some projects. I believe its output could be improved through the adoption of my recommendations, including my earlier suggestion of reciprocal agreements between Law Commissions for peer group review.
72. I am conscious that the Law Commission for England and Wales is seeking to develop performance indicators, beyond the implementation of its recommendations by government. These include the number of times the Law Commission is cited in court judgements, by other law reform bodies, in the Houses of Parliament, in academic journals and in the media. The NILC should monitor this initiative with a view to its application in NI.
73. The NILC has sought to develop its links with other Law Commissions. The involvement of all three UK Law Commissions in projects to review the Regulation of Health Care Professionals and to review Electoral Reform will provide a welcome opportunity to explore working practices and learn from each other. It is clear that the Scottish and Irish Law Commissions particularly value their links with the smaller NILC. The new Commission should seek to develop those links through the more regular exchange of information and knowledge, perhaps involving annual meetings with each, separate from the annual meeting of all five Law Commissions.

Recommendations

74. I recommend:

- That the NILC should monitor the initiative in the Law Commission for England and Wales to develop performance indicators; and
- That the Commission should seek to develop its links with other Law Reform Commissions, notably the Scottish and Irish Law Commissions.

Strategic Aim

Fitness for Purpose

75. Finally my terms of reference invited me to consider whether the Commission's strategic aim remained fit for purpose. The aim is described in various ways in DoJ and NILC documents, all drawing heavily and not surprisingly, on the wording of the Justice (Northern Ireland) Act 2002. I have interpreted the aim to be: "to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible." This aim is consistent with the statute. As far as I am aware, it has not limited the Commission in its discharge of its responsibilities: indeed it has given the Commission some welcome flexibility in its choice of projects.
76. At the beginning of my report I noted that there was an inevitable tension between the wishes of government in regard to law reform and the wishes of the Commission as an independent body. The challenge facing both parties is to manage those tensions constructively. It would be possible to add to the strategic aim a more explicit steer to the Commission in regard to projects designed more directly to achieve the Executive's priorities as expressed in its Programme for Government. I have resisted this temptation on the grounds that it would lead to the perception that the Commission was less independent than might have been thought. In any event, the government could use the consultative process described earlier to inject its wishes. Ultimately, it could of course use its power of approval to the Commission's proposed Programme of Law Reform. With good will on both sides, the hope must be that the approval power would not be used in a directive way.

Recommendation:

77. I recommend:

- no change in the Commission's strategic aim.

Conclusion

78. The recommendations set out above are largely designed to improve the operation and performance of the Commission by strengthening systems and procedures. However, acceptance of those changes would not be sufficient in themselves to secure the step change in the delivery of law reform projects that I believe is necessary. Central to my report is the recommendation that a new organisation model is required based on the appointment of a Director of Law Reform, supported by a Head of Secretariat, reporting to a Board of Commissioners. Commissioners would no longer have responsibility for the leadership of individual reform projects, but would continue to exercise strategic direction and would remain the guardians of the Commission's independence.
79. I am very conscious from my consultations that my recommendations in regard to a new organisational model may be controversial. However, they reflect my personal considered view on the changes necessary to the organisation of the NILC if it is to achieve its strategic aim and fulfil its aspiration to be a centre of excellence in law reform across these islands and beyond. I wish the Commission every success in the future as it builds on the achievements of its first four years.

John Hunter

24th January 2013.

APPENDIX 1

TERMS OF REFERENCE FOR A 'LIGHT-TOUCH' REVIEW OF THE NORTHERN IRELAND LAW COMMISSION

Background

The Northern Ireland Law Commission (the Law Commission) is an independent statutory body. Its statutory role is to keep under review the law of Northern Ireland and make recommendations for its systematic development and reform to the Department of Justice Northern Ireland. It is established under the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. It is constituted as an advisory non-departmental public body and was formally established in April 2008.

The Commission consists of a Chairman and four other Commissioners. The Chairman must be a person who holds the office of a High Court judge. Of the other Commissioners

- (a) one is to be a person qualified to be a Commissioner by experience as a barrister,
- (b) one is to be a person qualified to be a Commissioner by experience as a solicitor,
- (c) one is to be a person qualified to be a Commissioner by experience as a teacher of law in a university, and
- (d) the other is to be a person who does not hold (and has never held) judicial office and is not (and has never been) a barrister, solicitor or teacher of law in a university.

The current members of the Law Commission are:

Chairman: (vacant)

Commissioner (Barrister) Sean Doran

Commissioner (Academic) Dr Venkat Iyer

Commissioner (Lay) Robert Hunniford

Commissioner (Solicitor) (vacant)

The Law Commission may employ staff subject to the approval of the Minister of Justice in terms of numbers, salary and terms of employment.

The Law Commission's strategic aim is to provide for Northern Ireland an effective means of simplifying and modernising the law and making it accessible. The DOJ

sponsors the Law Commission and the position of the DOJ is that the Law Commission must act in support of the Northern Ireland Executive's overall aims for the delivery of a fair and impartial system of justice to the community in Northern Ireland and the delivery of effective and efficient justice.

The Northern Ireland Department of Justice sponsors the Law Commission in support of the Northern Ireland Executive's overall aims for the delivery of a fair and impartial system of justice to the community in Northern Ireland and the delivery of effective and efficient justice.

It is now an appropriate time to undertake a 'light touch' review of the Law Commission in line with Department of Finance and Personnel Guidance 1. The review is also timely in terms of the current focus on value for money and the role of arms length bodies in providing advice and delivering services. Key issues that should be addressed within the review are outlined below. The review process should include consultation with the Commission itself, the Department of Justice and the Law Commission's key stakeholders.

Issues to be addressed

(i) Organisational options

The bigger picture – to what extent does the Law Commission contribute to the delivery of wider Departmental and Executive objectives? Does the Law Commission's strategic aim best describe the aim of the organisation; if not, how should it be amended?

Links with others – what links does, or should, the Law Commission have with other organisations. To what extent has the Law Commission fulfilled its statutory obligation to confer with equivalent organisations in England and Wales, Scotland and Ireland.

Past performance – how has the Law Commission performed against its aims, objectives, key financial and other targets and quality standards? How does it compare with other bodies performing similar functions? How has it used the freedoms and flexibilities it enjoys? How successful have its relationships been with its sponsor Department (DoJ) and Minister, with other Executive Departments and Ministers and, where appropriate, with Whitehall Departments?

Stakeholders' views – what do the Law Commission customers and other interested parties think about its role and performance?

The future organisation – how should the Law Commission services be delivered in the future? Which organisational option is best suited to delivering responsive, efficient and quality services in the future? The report should consider models in other jurisdictions.

Good practice – what examples are there of good practice in how the Law Commission has delivered its services?

(ii) Improving performance

Performance targets – how far do they reflect the Law Commission's aims and objectives? Are they sufficiently comprehensive and stretching to drive improvement? Is there sufficient continuity from one year to the next? How is performance validated?

Partnership working – should the Law Commission in performance of its functions, responsibilities and duties develop joint working arrangements with other bodies and, if so, where could the Law Commission develop such joint working arrangements and with which other bodies to enhance the efficiency and effectiveness of service delivery?

New technology – should the Law Commission make better use of new technology and social media to improve the delivery of its services and functions?

Stakeholders' views – have the Law Commission's main stakeholders any suggestions about how the organisation delivers its services and functions?

Openness and accountability – how far is the Law Commission accountable to its customers and other stakeholders for the service it provides? How does it consult on its ways of working and the services it offers and could this be improved? Does it hold open meetings when appropriate? How does the Law Commission perform in relation to its duties under the Freedom of Information Act 2000?

Freedoms and flexibilities – how could the Law Commission benefit from different freedoms? Could it improve the delivery of its services and functions if it was given more flexibility? How has it exercised the responsibility which it already enjoys?

Corporate Governance and reporting – how well are the Law Commission, DoJ and Ministerial roles and reporting arrangements defined and how could this be improved? Do they provide proper support to operational and policy work? Are there sufficient structures in place to enable the Law Commission to meet corporate

governance requirements, and manage risk? Are Nolan principles followed in terms of register of member's interests? Is the division of functions, responsibilities and duties between Chairman, CEO and Commissioners well defined and how has this worked in practice?

Sustainable Development – Where relevant, does the Law Commission consider how its services affect sustainable development including as regards to social exclusion?

Obtaining views

As part of the review, the Reviewer will wish to take account of a wide range of views such as:

- The Department of Justice
- The Law Commission including Commissioners, the CEO and staff
- The Office of the Lord Chief Justice
- The Office of the Attorney General for NI
- Departments of the NI Executive with an interest in the NILC
- The Universities of Northern Ireland
- The Law Reform Commission of Ireland
- The Scottish Law Commission

Timescale

It is anticipated that the review should take around 3 months to complete taking account of the Reviewers other time commitments.

Report

The Reviewer will provide an interim report by end of November or early December 2012. The final report should make an assessment of the Law Commission's performance against each of the key issues outlined above and identify recommendations for the future strategic development of the Law Commission. The report should be drafted in a format suitable for publication.

Ownership of the Report and the outputs of the review will reside with the Criminal Justice Policy and Legislation Directorate of the DoJ as the sponsoring Division for the Law Commission. The draft report will be shared with the Law Commission for comment and factual accuracy.

Document 4

**FROM: WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
5 March 2013**

Copy list below

- 1. GARETH JOHNSTON GWJ 7/iii/**
- 2 DAVID FORD**

**THE HUNTER REPORT AND OPTIONS FOR THE NORTHERN IRELAND
LAW COMMISSION (NILC)**

Issue: Seeking your views on the review of the NILC following your recent meeting with John Hunter; and requesting a meeting with you to consider a range of options.

Timing: Routine

Presentational issues: None at this point although we will consider how best to announce the impact of your decision in due course. Press Office have seen and agreed the content of this submission.

FOI implications: Likely to be exempt under s 35 (formulation of government policy).

Financial implications: Not yet known although initial impressions are that the costs of implementing the Hunter Report will be affordable to the Directorate see Annex A. This will be explored in more detail when work is taken forward in the form of a business case.

The indicative costs identified are affordable within existing resources

The recruitment of Commissioners will incur one-off costs which are available from the Division's budget for next year. These costs would have been incurred in any event as two Commissioners are approaching the end of their terms.

FSD has reviewed and is content with this submission.

Legislative

Implications:	Implementation of one of John Hunter's recommendations would require legislative change. This would not preclude the implementation of key recommendations on a transitional basis. Any change in status of the NILC from an NDPB would likely require legislative change.
Justice/Executive Referral:	You will want to inform the Justice Committee, Executive colleagues and the Attorney General of your decision in due course.
Shared future Implications:	None identified
Recommendation:	You are invited to consider the options presented, one of which is the implementation of the Hunter Report and agree to discuss these options with officials who will then prepare a proportionate business case. It is further recommended that you write to the two outgoing Commissioners to thank them for their contribution to the work of the NILC (draft letters are attached for your consideration) and call on the LCJ to seek his agreement to the appointment of a new Chair at the NILC.

Background

You have considered John Hunter's report following his review of the Northern Ireland Law Commission (NILC) and met with Mr Hunter to discuss his findings and recommendations. This submission offers some options and invites you to consider these options and discuss a way forward with officials. The options will be subject to an appraisal which will be completed by officials following your meeting.

Present and proposed arrangements at the NILC

2. My earlier submission provided a summary of the Hunter report. Briefly, the NILC is currently an advisory NDPB chaired by a High Court Judge supported by four other commissioners. By statute the commissioners must be a High Court Judge (as Chair), a barrister, a solicitor, a teacher of law and a lay person. The Chair and three of the commissioners work one day per

week and the fourth commissioner works two days per week (this is planned to reduce to one day also). Commissioners are salaried and paid pro rata to Grade 3 in the NICS. Commissioners currently lead law reform projects and oversee the management of the NILC. The Chief Executive (who currently works three days per week) is the only permanent employee of the Commission. The remaining staff are secondees from DFP or legal officers on fixed term contracts. The CEO acts as accounting officer and manages the administrative support and legal staff on a day to day basis. The CEO reports to the Chair and Commissioners at Board level.

3. Mr Hunter's proposal is that the NILC should remain an advisory NDPB. He suggests that the Chair and Commissioners should, in future, shadow rather than lead on individual projects and that they should operate as more of an editorial board to oversee strategically the work of the NILC. Commissioners would be paid a daily attendance rate rather than a salary. He also recommends that Commissioners should be appointed on merit only without regard to the constituency from which they come. This would require legislative change.

4. This leads on to potentially the most radical recommendation that responsibility for individual law reform projects should move from Commissioners to a senior figure with the title of Director of Law Reform, who would lead NILC on a day-to-day basis. This person would be legally qualified and employed full time. S/he would oversee all of the law reform projects and the work of the NILC in general and would be accountable to the NILC Board of Commissioners. The Director would be supported by of Head of Secretariat (likely to be a lower grade than the current CEO who is a senior civil servant) who would manage the administrative team and act as accounting officer. The CEO post would therefore be suppressed and two new posts of Director of Law Reform and Head of Secretariat created. Mr Hunter clearly feels that the part-time nature of the Commissioners and the CEO has given rise to problems of internal communication and confusion over lines of responsibility.

Options

5. There are four options that you might reasonably consider. They are:

- Do nothing
- Abolish the NILC
- Change the status of the NILC from an advisory NDPB to become an agency or division of the DOJ
- Accept the Hunter Report

Each option is considered briefly below but following discussion with you they will be further explored through a proportionate appraisal.

Do nothing

6. You could decide to keep the existing arrangements in place. To do so would ignore some of the problems that we have been aware of at the Commission and identified during the Review. These include the lack of communication and co-ordination due, in part, to the part-time working of the Commissioners and the CEO. Such factors are likely to be exacerbated as reducing budgets put further pressure on Commissioner's time. To do nothing would ignore these and other issues raised by John Hunter.

Abolish the NILC

7. You could decide that the problems identified in the Hunter Report were such that the NILC should be abolished. This would suggest that the Report identified fatal flaws in the operation of the NILC. This is not the case and Mr Hunter is clear that the problems at the NILC could be rectified by reform along the lines of his report. Establishment of the NILC followed a recommendation in the Criminal Justice Review which was itself an outworking of the Belfast Agreement. The NILC is also a relatively new organisation having been established in April 2007 and it is arguable that it

should be given longer to establish itself. Abolition would also leave Northern Ireland as the only jurisdiction within the UK and Ireland without a law reform function.

Change the status of the NILC

8. The NILC is an advisory NDPB. This status was chosen to give the Commission the independence from government that is commonly held to be a requirement of an effective law reform body. A change in status would likely see the Commission brought closer to the DOJ by making it an Executive Agency or a division within DOJ. On the one hand this could result in some cost savings through amalgamation of certain administrative support. On the other, while it may be possible to create structures such as an independent oversight board, it is arguable that it would always be seen by observers as less transparent and robust than that provided by the status of an NDPB as envisaged by the Criminal Justice Review. However, this option merits consideration.

Accept the Hunter Report

9. John Hunter was commissioned to undertake a "light touch" review of the NILC as required under the governance arrangements for arms length bodies. He has presented a thorough and cogent analysis of the functions and operation of the NILC and in doing so has identified a number of deficiencies; particularly around the structure, staffing and relationships at Commissioner and CEO level. He has recognised the need for an independent law reform function in Northern and makes recommendations to boost leadership in, and delivery by, the Commission.

10. A full cost analysis of the recommendations will need to be undertaken by the NILC as the employer to evaluate the new posts of Director of Law Reform and Head of Secretariat; this would be undertaken as part of a business case. It is likely that the impact would be affordable given savings in commissioner salaries however this would be explored in greater detail as

part of the appraisal. Annex A outlines the indicative costs of the key Hunter recommendations although it is emphasised that the costs do not include all the related employer costs and must be seen as indicative only pending the preparation of a business case. The report recommends that Commissioners should no longer be drawn from particular professions/backgrounds (currently they must by statute be a High Court Judge, a solicitor, a barrister, a teacher of law and a lay person). This would require legislative change but the Hunter model could be implemented on a transitional basis by changing the terms of employment of the commissioners which is not set in legislation until legislation could be put in place. The Hunter Report therefore appears to offer a well-argued response to the deficiencies identified at the NILC.

11. One exception is that the report recommends that the Accounting Officer role should be vested in the Head of Secretariat. We think that this might be best placed with the Director of Law Reform and will take advice on this from colleagues in FSD and DFP should you accept the Hunter Report as the basis for the way forward.

Urgent issues

12. There are two urgent issues to be addressed. Firstly, as you are aware the Commission is without a Chair since the resignation of Mr Justice McCloskey in September 2012 and it is hoped that the Report's findings will persuade the LCJ to provide a nominee(s) that you may appoint as Chair to lead the transition to the new arrangements. We recommend that you call with the LCJ to discuss.

13. Secondly, there are currently three commissioners two of whom are re-appointees and whose terms of office expire on 8 March 2013; they are Bobby Hunniford and Professor Sean Doran. Both gentlemen have already been reappointed once and to do so again would require special exemption from the Commissioner for Public Appointments. Mr Hunniford is committed to other work abroad and would not be available for reappointment and we are advised that Professor Doran has not been fully engaged at the Commission.

It is therefore recommended that you write to both outgoing Commissioner to thank them for their contribution to the work of the Commission. Draft letters are attached at Annex B.

Affordability

14. Annex A outlines the indicative costs that would be incurred for the key recommendations outlined in the Hunter Report. While there would be a small financial implication in terms of the Commission's structure, these costs considered to be affordable within existing allocations. This view would be subject to the completion of the appropriate business case.

Representation by Neil Faris

15. Neil Faris was a Commissioner at the NILC until his resignation in June 2012. He contributed to John Hunter's review and has seen a copy of the final report. Mr Faris has written to officials asking that you are made aware of his concerns that the proposals in the Hunter report would compromise the independence of the Commission. His argument is centred on his view that "the centrality of the independence lies in the Commissioners themselves initiating and leading the research proposals, subject only to the Minister's approval of the Programmes of Law Reform."

16. The Hunter Report accepted the principle of independence and vested this in the Commissioners who would retain the editorial and oversight role of all projects at Board level. Mr Faris would prefer the appointment of a full time Commissioner – in effect taking on the role proposed for the Director of Law Reform. As the Director of Law Reform would be appointed by, and report to, the Commissioners it is difficult to accept that the model proposed by John Hunter would result in any material diminution of the Commission's independence. You will want however, to consider Mr Faris's comments that are made out of a genuine concern.

Recommendation

17. You are invited to consider the options presented, one of which is the implementation of the Hunter Report and agree to discuss these options with officials who will then prepare a proportionate business case. It is further recommended that you write to the two outgoing Commissioners to thank them for their contribution to the work of the NILC (draft letters are attached for your consideration) and call on the LCJ to seek his agreement to the appointment of a new Chair at the NILC.

signed

WILLIAM STEVENSON

Criminal Justice Strategy and Secretariat Branch

Copy list

Nick Perry

David Lavery

Anthony Harbinson

Geraldine Fee

Glyn Capper



INDICATIVE COST OF KEY STAFFING RECOMMENDATIONS

Current costs

Chair (1 day per week paid at High Court Judge salary)	£40,833 ¹
Commissioners x 3 (1 day per week – grade 3 salary)	£61,659 ²
Commissioner x1 (2 days per week at grade 3 salary)	£20,553 ³
Chief Executive (3 days per week at Grade 5 salary)	£57,252 ⁴
<u>Total current costs</u>	£180,297

Proposed costs

Chair (2 days per month paid at high Court Judge salary)	£18,846 ⁵
Commissioners x 4 (2 days per month at daily rate of £450)	£43,200
Director of law Reform, Full time Grade 3 *	£81,600 ⁶
Head of secretariat, Full time Grade 7 *	£45,694 ⁷
<u>Total proposed costs</u>	£189,340

¹ Based pro rata on High Court Salary of £172,753

² Based pro rata on current salary of £86,955

³ Based pro rata on current salary of £86,955

⁴ Based pro rata on current salary of £80,740

⁵ Based on High Court Judge daily rate of £785

⁶ Based on current min point of Grade 3 salary

⁷ Based on current min point of Grade 7 salary

All costs exclude any employer's contributions. Daily salary costs based on 220 days per year.

DRAFT LETTERS FOR SIGNATURE BY DAVID FORD MLA

[REDACTED]

March 2013

NORTHERN IRELAND LAW COMMISSION

Your second term of office as a Commissioner at the Northern Ireland Law Commission ends on 8 March 2013 and I am writing to thank you for your contribution to the work of the Commission since your appointment on 10 March 2008.

As one of the first Commissioners to be appointed to the Commission I am grateful for your work to establish the Commission as a credible and independent body leading on the important area of Law Reform in Northern Ireland. The range and content of the final reports produced by the Commission during your tenure is impressive.

I am particularly grateful for your involvement in the recently published report on "Bail in criminal proceedings". I would hope that this report will form the basis of new legislation and you can be rightly proud of this piece of work.

Please accept my best wishes for the future.



March 2013

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Please accept my best wishes for the future.

Document 5

From: [REDACTED]

Sent: 08 March 2013 15:06

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

Cc: Johnston, Gareth <Gareth.Johnston@dojni.x.gsi.gov.uk>; Perry, Nick <Nick.Perry@dojni.x.gsi.gov.uk>; Lavery, David A <David.Lavery2@dojni.x.gsi.gov.uk>; Harbinson, Anthony <Anthony.Harbinson@dojni.x.gsi.gov.uk>; Fee, Geraldine <geraldine.fee@dojni.x.gsi.gov.uk>; Capper, Glyn <Glyn.Capper@dojni.x.gsi.gov.uk>; Henderson,

[REDACTED]

Subject: Submission: SUB/324/2013 THE HUNTER REPORT AND OPTIONS FOR THE NORTHERN IRELAND LAW COMMISSION (NILC)

DEPARTMENT OF JUSTICE

Unclassified

From: [REDACTED]

Private Office

To: Stevenson William

Date: 08/03/2013

Action Copy: Johnston Gareth

Perry Nick

Lavery David

Harbinson Anthony

Fee Geraldine

Capper Glyn

[REDACTED]

DOJ Special Adviser

[REDACTED]

SUB/324/2013:THE HUNTER REPORT AND OPTIONS FOR THE NORTHERN IRELAND

LAW COMMISSION (NILC)

The Minister has considered and agreed your submission of 05/03/2013 and has indicated that he would welcome a meeting with officials to discuss this submission in greater detail.

[REDACTED] will contact you shortly to arrange a suitable date and time for a meeting.

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/324/2013

8 March 2013

Dear Mr Doran

NORTHERN IRELAND LAW COMMISSION

Your second term of office as a Commissioner at the Northern Ireland Law Commission ends on 8 March 2013 and I am writing to thank you for your contribution to the work of the Commission since your appointment on 10 March 2008.

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I am particularly grateful for your involvement in the recently published report on "Bail in criminal proceedings". I would hope that this report will form the basis of new legislation and you can be rightly proud of this piece of work.

Please accept my best wishes for the future.

DAVID FORD MLA
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER



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Tel: 028 90528121
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Our ref: SUB/324/2013

8 March 2013

Dear Mr Hunniford

NORTHERN IRELAND LAW COMMISSION

Your second term of office as a Commissioner at the Northern Ireland Law Commission ends on 8 March 2013 and I am writing to thank you for your contribution to the work of the Commission since your appointment on 10 March 2008.

As one of the first Commissioners to be appointed to the Commission I am grateful for your work to establish the Commission as a credible and independent body leading on the important area of Law Reform in Northern Ireland. The range and content of the final reports produced by the Commission during your tenure is impressive.

I am particularly grateful for your involvement in the recently published report on "Bail in criminal proceedings". I would hope that this report will form the basis of new legislation and you can be rightly proud of this piece of work.

Please accept my best wishes for the future.

DAVID FORD MLA
Minister of Justice

Document 7

Note of Minister's Meeting with the John Hunter to discuss the Review of the Northern Ireland Law Commission (NILC)

Wednesday 13 February 2013, Minister's Office, Castle Buildings

Attendees:

David Ford MLA – Minister of Justice

John Hunter

David Lavery – Director, Access to Justice Directorate, DOJ

Gareth Johnston – Deputy Director, Criminal Justice Policy and Legislation Division, DOJ

Key Issue – Review of the Northern Ireland Law Commission (NILC)

John Hunter:

1. Provided the Minister with a brief overview of the conclusions of his review of the NILC, highlighting that the recommendations cover two key points: performance issues; and options for the future of the NILC.
2. Expressed his belief that the NILC in its current form is not fit for purpose. He explained that the NILC is based on a model, and reflects the structures, of an organisation designed to serve a much larger jurisdiction than Northern Ireland. As a result of resource pressures the role of Commissioners has been reduced, resulting in Commissioners only working one day per week. This has created difficulties in the accountability of the overall functions of the NILC as Commissioners are responsible for individual strands of work within the law reform programme. Mr. Hunter advised that when the NILC was initially established there were collective discussions about law reform between Commissioners, but there was little evidence to suggest that this still takes place. He stated that he had discussed this matter with the former Chair of the NILC who had advised that he did not feel accountable for the overall work of the Commission or for the work of individual Commissioners.

Mr. Hunter made clear that the NILC operating under the current model was not working and was unlikely to work in the future.

3. Outlined his proposals for the future model of the NILC and explained that in his preferred model the role of the Chief Executive of the NILC would be abolished and a new role, Director of Law Reform, would be created. The Director of Law Reform would have overall responsibility and accountability for the NILC and would report to a board of Commissioners, whose role would focus on editorial and quality assurance function for law reform projects. He advised that he had engaged at length with Neil Faris on his proposals and explained that Mr. Faris opposed what he feared would cause the removal of independence from Commissioners. Mr. Hunter noted that the legal profession were broadly supportive of the role currently played by the NILC.

In response, the Minister noted that whilst the legal profession supports the work of the NILC, the introduction of a new, Director of Law Reform post would improve the corporate governance and accountability of the Commission which is currently lacking. Following a brief discussion, Mr. Hunter

acknowledged that if the wrong individual was appointed to the post of Director of Law Reform it may make the NILC vulnerable.

4. In response to a question from David Lavery, stated that he supported proposals for a fixed-term appointment to the post of Director of Law Reform. He suggested that consideration should be given to broadening the role of Government legal advisors to allow them to apply for positions within a Law Reform team, without limiting staff moves within and without NILC.
5. Stated that there may be concern about the level of representation if the number of Commissioners is low.

In response, the Minister stated that whilst he understood this concern, the issue of representativeness in a small pool is always likely to be problematic.

Minister Ford:

6. Informed Mr. Hunter that he had discussed the review of the NILC with Department of Justice (DOJ) officials. He advised that he understood the argument that the NILC should be abolished, but explained that it would be politically difficult to remove the NILC so soon after the devolution of justice. He added that the issue of independence was also a complicating factor.
7. Asked Mr. Hunter whether project managers appointed to work under the Director of Law Reform under his proposed structure would be appointed on a fixed term basis. In response, Mr. Hunter advised that a hybrid model could be adopted, where two permanent staff members would be appointed to lead on civil and criminal law reform respectively, thus ensuring resilience and consistency within the NILC. He noted that the appointment of project managers on fixed-term contracts was not without its pitfalls, but agreed that positions could be filled by secondments to the NILC on a fixed term basis.
8. Highlighted that in the long-term the DOJ intends to bring forward legislation on the NILC but in the medium term it is important to ensure the appropriate structures are put in place to improve accountability and corporate governance.
9. Thanked Mr. Hunter for the work he carried out on the review and stated that the DOJ was broadly content with the majority of the recommendations contained within it.

David Lavery:

10. Advised that if the field from which a Director of Law Reform could be appointed was widened there may be a number of non-legal professionals those who were not barristers or solicitors interested in applying for the post.
11. Asked Mr. Hunter whether the requirement that Commissioners should be selected from particular areas, such as legal professionals and academics, should be dropped.

In response, Mr. Hunter advised that there were benefits of having commissioners with specific expertise, for example, lay members whilst not always best equipped to lead projects can contribute

positively to promoting public consultations on law reforms. He agreed that consideration should be given to amending legislation to remove the requirement for commissioners to be selected from designated fields of expertise.

12. Sought Mr. Hunter's views on the field from which a Chair of the NILC can be appointed and asked whether consideration should be given to expanding this from High Court Judges. He acknowledged that the appointment of a High Court Judge brings prestige to the role of Chair of the NILC.

In response, Mr. Hunter suggested that the field could be expanded slightly to include retired High Court Judges, however, he noted that, due to the average retirement age of High Court Judges, this may not result in a significantly wider pool to choose from. In response to the suggestion that legislation could be amended to expand the pool to include other judges, he noted that not all judges have the necessary skill set to lead a public sector body.

13. Advised Mr. Hunter that the DOJ intends to bring forward a Judicature Bill in 2015/2016 which will make necessary amendments to the legislation which governs the appointment of the Chair and Commissioners of the NILC. He noted that it will be important to clarify the roles and responsibilities of the Chair and Commissioners before producing this Bill.


13 February 2013

Cc: Johnston, Gareth <Gareth.Johnston@dojni.x.gsi.gov.uk>; Perry, Nick <Nick.Perry@dojni.x.gsi.gov.uk>; Lavery, David A <David.Lavery2@dojni.x.gsi.gov.uk>; Harbinson, Anthony <Anthony.Harbinson@dojni.x.gsi.gov.uk>; Fee, Geraldine <geraldine.fee@dojni.x.gsi.gov.uk>; Capper, Glyn <Glyn.Capper@dojni.x.gsi.gov.uk>; [REDACTED]

Unclassified

Action Copy: Johnston Gareth
Perry Nick
Lavery David
Harbinson Anthony
Fee Geraldine
Capper Glyn

SUB/324/2013:THE HUNTER REPORT AND OPTIONS FOR THE NORTHERN IRELAND
LAW COMMISSION (NILC)

Following this morning's meeting the Minister has confirmed that he will await further advice on the implications of the Hunter Report before making a final decision on this issue.

Many thanks.

[REDACTED]

Castle Buildings Tel: [REDACTED]

Professor Sean Doran
Barrister-at-Law



21st March 2013

Your ref: SUB/324/2013

David Ford MLA
Minister of Justice
Minister's Office Block B
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG



Dear Minister

Northern Ireland Law Commission

I was very pleased to receive your letter of 8th March 2013 thanking me for my contribution to the work of the Northern Ireland Law Commission. It was an honour to serve as one of the first Northern Ireland Law Commissioners from 2008 to 2013. I thoroughly enjoyed the work and I will look back with particular satisfaction on the bail project.

I understand that the recent review of the structure of the Commission may result in some changes to the organisation. I do sincerely hope, however, that the basic model of an independent Law Commission for this jurisdiction, as envisaged by the Review of the Criminal Justice System in 2000, will be preserved.

With all best wishes

A handwritten signature in cursive script that reads 'Sean Doran'.

Sean Doran

**WILLIAM STEVENSON
CRIMINAL JUSTICE POLICY AND LEGISLATION DIVISION
12 April 2014**

Copy list below

1. **GARETH JOHNSTON** [Agreed: GWJ 15 iv]
2. **DAVID FORD**

REVIEW OF THE NORTHERN IRELAND LAW COMMISSION (NILC)

Issue:	Further advice following the review of the NILC by John Hunter.
Timing:	Routine
Presentational Issues:	None likely, although we will review this once your final decision is known. Press office is content with this submission.
FOI implications:	May be considered under s.36 of the Act
Financial implications:	Implementing recommendation 19 of the Hunter Report as outlined in Annex A (including costs of the CEO taking early retirement because of redundancy) would result in an overall saving of £56,000 over the five year period of the business case. There would be savings of £22,000, £43,000, £25,000 and £7,000 in years 0 to 3 respectively offset by costs of £11,000 and £30,000 in years 4 and 5. Savings in years 0 – 3 would be surrendered to the Department. The Directorate accountant has reviewed this submission and is content.
Shared Future Proofing:	Considered but not applicable
Legislative Implications:	Not required to proceed with the recommended option. You might at a later date decide to remove the legal requirement that Commissioners should have particular experience.
Justice Committee Referral:	Yes, we are committed to update the Justice Committee on the outcome of the Hunter Review. You will, as a

courtesy, also wish to inform the Executive, the Attorney General and the LCJ of your decision. Draft letters will be provided once your decision is known.

Executive referral: See above.

Recommendation: It is recommended that you accept the Hunter Review of the NILC and specifically at this time recommendation 19 that relates to the senior management structure (see Annex A recommendation 19). This would allow the remaining recommendations to be implemented by the new organisation and DOJ as appropriate.

It is further recommended that you agree to allow officials to begin the process to appoint a new Chairman and Commissioners.

Background

Following an earlier submission and discussions with officials you asked for further analysis and advice on the options available following John Hunter's review of the NILC. A list of John Hunter's recommendations is at Annex A. A copy of the full report is also attached. In the interim we have analysed five options in detail and Richard has taken political soundings.

2. The options considered were:

Option 1- Status quo

Option 2 – Abolition of the NILC in its current form

Option 3 – Implement the Hunter Review

Option 4 – Bring the Law Reform function into the DOJ as a new division, and

Option 5 – Change the status of the NILC to that of an Executive Agency of the DOJ

3. It is clear from earlier discussions with you that we were in the territory of option 2 or option 3 as option 1 is regarded as unsustainable due to problems identified with the current senior management structure.

Subsequent political soundings militated against option 2.

4. A business case has been prepared to test and cost each of the 5 options and to consider also the non-financial costs and risks. The business case has, as required, been reviewed by the directorate accountant and FSD.

5. The outcome of the business case suggests option 3 as the preferred option in terms of providing an independent and effective law reform with appropriate and proportionate management and governance functions. This option would address the deficiencies addressed by Hunter particularly in terms of the organisation model. The main impact of this would be the suppression of the current post of Chief Executive with the appointment of a new post of Director of Law Reform which would have the key role of overseeing all of the law reform projects and could lead on projects within his or her area of expertise. The role of Commissioners would move from leading individual projects to the strategic and governance- related responsibilities traditionally associated with the Board of an NDPB. Commissioners could shadow the work of particular project teams with a view to leading discussions at Board level. In arriving at this conclusion the business case examined factors including cost, political impact, public confidence, impact on staff, impact on the law reform programme, reputational damage and public reaction.

6. A key cost in terms of option 3 (and option 2) is the cost of making the Chief Executive of the NILC redundant on a voluntary basis. The Chief Executive has agreed to take early retirement on the grounds of voluntary redundancy and will retire on 30 April 2014. The costs fall under the pension arrangements prevailing before 1 April 2014 (when the terms of compensation (redundancy) scheme were reduced) as the agreement was made prior to the legislative change. The early retirement cost to the DOJ total around £140,000 in year 1 and around £31,000 each year from 2014/15 up to May 2020. Including redundancy compensation cost of adopting the Hunter report

(option 3) would see a saving of £56,000 over the five year period of the business case. The savings are primarily from staff costs including moving the Commissioners from salaried post to a daily attendance rate and the restructuring of the senior management and legal team. Savings in years 0 – 3 would be surrendered to the Department.

Recommendation

7. While it will be important to review the arguments for having a Commission in the current financial climate, on balance (given this was an recommendation of the Criminal Justice Review), our recommendation is that you accept the Hunter Review of the NILC and specifically at this time recommendation 19 that relates to the senior management structure (see Annex A recommendation 19). It is further recommended that you agree that officials may begin the process to appoint a new Chairman and Commissioners (all of which are public appointees).

8. Other recommendations around the operation of the Commission and the appointment of senior staff would be considered by the new Board and commission staff and the DOJ as appropriate. It would take some time to have all the recommendations in place but the process could begin as soon as your decision is known.

9. There has been sustained period of uncertainty for the Commission following the review and the time taken to address all of the options. This has impacted on the ability of the Commission to plan ahead including the consideration of new projects. For example, a bid from DHSSPS for the Commission to undertake a significant project on Public Health Protection has been held in abeyance pending a decision of the outcome of the Hunter report. A decision now on the way forward would allow the Commission to re-energise the work programme and provide stability and encouragement for the staff.

10. The business case is available and officials would of course be happy to discuss the recommendations and the background to them if that would be helpful.

signed

WILLIAM STEVENSON
Criminal Justice Strategy and Secretariat Branch

Copy list

Nick Perry

David Lavery

Lian Patterson

Glyn Capper



ANNEX A

RECOMMENDATIONS IN THE HUNTER REPORT

1. The Commission should undertake a two stage consultation process in the development of its Programme of Law reform with a deeper engagement with government at Stage 2 on the basis of a short list.
2. The Commission should link its projects more clearly to the government's aims and priorities.
3. The government should reflect the Commission's Programme of Law Reform in its Departmental Plans and the Programme for Government.
4. A detailed Issues Paper should be prepared for each project in conjunction with the relevant department before a PID is formally adopted.
5. Consideration is given at an early stage to the composition of the Project Team, including the availability of a Parliamentary Draftsman.
6. Consideration is given at an early stage to the formation of an expert Reference Group to provide voluntary ad-hoc advice on policy issues.
7. The Commission should embark on a limited experiment on the use of new technology for consultation purposes.
8. The Commission should explore the development of reciprocal agreements with other Law Commissions to review and quality assure completed reports.
9. The DOJ Minister should write annually to the Chair summarising the state of play in regard to completed reports, for inclusion in the Commission's Annual Report.
10. Quarterly meetings with DOJ should be programmed well in advance.
11. The Board should agree a forward work programme over the year to cover significant regular items.
12. There should be an annual meeting between the Minister and Chair to review progress.
13. The Commissioners' register of interests should be updated to include additional information on professional interests.

14. Work should be completed on the Memorandum of Understanding.
15. New Commissioners should be given a comprehensive induction programme and such further training as may be required.
16. The Commission should appoint two permanent lawyers at PLO level to lead project teams in the areas of civil and criminal law respectively with a third or fourth lawyer recruited on a fixed term contract or seconded from the Government Legal Service to lead particular projects and complementing the expertise of permanent members of staff.
17. The Commission should consider the merits of developing an intermediate lawyer grade or a senior legal researcher grade.
18. Subject to the agreement of the new organisational model the appointment of a Head of Secretariat (or business manager) as the Accounting Officer to lead the administrative team.
19. A new model for the organisation of the Law Commission based on the appointment of a director of Law Reform, supported by a Head of Secretariat, reporting to a Board of Commissioners.
20. Commissioners should no longer have responsibility for the leadership of individual law reform projects.
21. Commissioners should shadow the work of project teams with a view to leading discussion at Board level and fronting key consultation engagements.
22. Commissioners should be paid an appropriate Public Appointments rate.
23. Commissioners should be appointed solely on merit and without regard to their legal constituency.
24. More economical accommodation should be found and the overall savings invested in the lawyer team.
25. The NILC should monitor the initiative in the Law Commission for England and Wales to develop performance indicators.
26. The Commission should seek to develop its links with other Law Reform Commissions, notably the Scottish and Irish law Commissioners.
27. No change to the Commission's strategic aim.

<Nick.Perry@dojni.x.gsi.gov.uk>; Lavery, David A <David.Lavery2@dojni.x.gsi.gov.uk>; Patterson, Lian <pattersl@dojni.x.gsi.gov.uk>; Capper, Glyn <Glyn.Capper@dojni.x.gsi.gov.uk>; [REDACTED]

[illegible]

From: [REDACTED]

Date: 17/04/2014

Capper Glyn

Age Group	Percentage
18-29	85
30-39	75
40-49	70
50-59	65
60-69	55
70-79	50
80+	45

[REDACTED]

Please note the Minister has seen and agreed your submission of 12/04/2014.

Many thanks.

[REDACTED] (Private Office)

Castle Buildings Tel: [REDACTED]

**BRIEFING FOR TOPICAL QUESTION No 1 – MONDAY 19 MAY 2014
NORTHERN IRELAND LAW COMMISSION**

Lines

CEO's redundancy package

- The voluntary redundancy package offered and accepted by the outgoing CEO reflected the normal compensation payments available under the NI Civil Service pension arrangements. No additional payments were offered or sought.
- The redundancy package was offered because any of the options being considered following John Hunter's review of the NILC had no role for the CEO.
- Details of the redundancy package are personal to the postholder.
- [If pressed] I am content that withholding this information complies with DPA provisions and relevant case law.

Pending disciplinary action against the CEO

- There are no past or pending disciplinary actions against the CEO.

The Hunter Review

- I want to implement the Hunter review but have asked officials to work achieving a slimmed down and more cost effective model. When this has been done we will write to the Justice Committee and announce details of the structure and arrangements for the Commission.
- It has taken longer than I would have hoped to agree on the way forward following the Hunter review but we are now set on course to put the new arrangements in place.

Appointment of a New Chair and Commissioners

- My Department has opened discussions with the Lord Chief Justice and the Commissioner for Public appointments (CPANI) with a view to me appointing a new Chair of the NILC soon. This will help to drive forward the changes to the Commission.
- I will then begin the process to appoint new Commissioners in line with CPANI guidance.

Interim management

- Arrangements for interim management in the Commission pending the appointment of the new Director of Law Reform envisaged in the Hunter Review are in hand, with a view to an interim manager being in place very shortly.

Background

Mr Allister has asked a series of seven written questions on the NI Law Commission (NILC). These have focussed on the Commission's work programme, funding, the status of the Hunter report, and the terms and conditions of NILC employees. Questions have in particular focused on the conditions of employment of the CEO and the redundancy package provided to the CEO who retired early from the Commission on 30 April 2014.

Mr Allister appears to have been informed that the CEO was offered a redundancy package over in excess of the standard compensation arrangements. This was not the case. The CEO was offered and accepted voluntary redundancy on the basis of the Civil Service Compensation arrangements that applied in March 2014 when the settlement was agreed. No additional payments were requested or offered. (The compensation arrangements have since been reduced for packages agreed after 1 April 2014.)

You recently agreed that the recommendations in the Hunter Review should be accepted but that the budget for the Commission should be reduced. This would see the introduction of a new senior management structure with the post of CEO made redundant and replaced by a new Director of Law Reform (at a different grade) who would assume many of the duties of the CEO plus those of Commissioners in terms of leading the law reform projects. The Commissioners and the Chair would in future assume a more traditional role of setting the Commission's strategy, agreeing the work programme and providing oversight and governance of the Commission.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of

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Our ref: SUB/1158/2014

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

DATE: 24 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.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

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

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
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Our ref: SUB/1158/2014

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

24 September 2014

Dear Sir Declan

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 to 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.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of

Justice

www.dojni.gov.uk

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

Yes

David

DAVID FORD MLA
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of

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Our ref: SUB/1158/2014

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

24 September 2014

Dear John

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.

*Yours
David Ford*

DAVID FORD MLA
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref SUB/1158/2014

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

25 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.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

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**

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of

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Our ref: SUB/1158/2014

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

24 September 2014

Dear Dr Iyer

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 Northern Ireland Law Commission 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.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

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 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 its work proceeds.

I should be grateful if you could pass my thanks and appreciation on to all at the Commission.

DAVID FORD MLA
Minister of Justice



**Attorney General
for Northern Ireland**

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

Our Ref: AGNI/14/112

Your Ref: Sub/1158/2014

Date: September 26 2014

Dear David

The Northern Ireland Law Commission

Thank you for your letter of September 24 2014 informing me that you have decided to close the Northern Ireland Law Commission. The contents of your letter do not surprise.

Is it your intention to use the current Justice Bill to have the Assembly repeal the relevant provisions in the Justice (Northern Ireland) Act 2002? It would be better, I think, to have the relevant provisions (sections 50 to 52 and Schedule 9) repealed rather than leave a hollow-shelled body corporate that would still be subject to the duties created by section 51 of the 2002 Act.

Naturally I am happy to discuss.

Yours sincerely

John F Larkin

John F Larkin QC
Attorney General for Northern Ireland

CLOSURE OF THE NILC – BACKGROUND AND LINES TO TAKE

Background

You agreed recently that the NILC should close from 1 April 2015 and you have written to executive colleagues, the Justice Committee, the Attorney General and LCJ. The decision was taken in the context of the financial pressures facing the department. Up to that point we had been working towards changing the senior staffing and governance arrangements at the NILC in line with the Hunter Report.

Officials are now working with NILC staff secure an orderly run-down of the NILC to include staffing implications and the early completion or hand-over arrangements for the work in hand.

Three law reform projects are likely to span the closure date. They are:

- Defamation (referred by DFP), although the work will have been well advanced by the end of March.
- Public Health (referred by DHSSPS). Although not officially approved we had agreed that preparatory work should begin on the expectation of approval by you.
- Electoral Law (input to a UK-wide project led by the Law Reform Commission for England and Wales). This work might transfer to NIO for NI input.

We are considering the question of whether the founding legislation for the NILC needs to be amended or repealed. The Attorney General has written to you to suggest that it should. Further advice will follow on this matter.

Lines

- I have decided to close the NILC from 1 April 2015.
- My decision has been driven entirely by the budget cuts facing the DOJ.
- DOJ staff will work with the NILC to ensure smooth run-down of the Commission including the early completion or hand-over of the current work programme.
- The small number of staff (11) contracted to the NILC are either seconded from other organisations (to which they will return) or employed directly on fixed-term contracts. Staff will be consulted as part of the transition arrangements.
- I very much appreciate 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 a front-line service.
- The NILC could be re-established in the future should funds become available.
- Officials are working with departments to ensure the smooth hand over of a number of projects.
- Following closure of the NILC individual departments will be responsible for undertaking law reform within their own areas of policy. Some of this work is part-funded by departments under current arrangements.
- Closure of the NILC would realise estimated savings of around £200,000 this year and £600,000 next year.

- [If pressed] I am considering if any legislation is required.