

IALS Law Reform Project – A LITERATURE REVIEW

Law Reform in Northern Ireland. An Overview

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1. Introduction

There is disappointingly little law reform at present in Northern Ireland. The two bodies with the greatest potential to bring about law reform are currently not in operation. The legislature (the Northern Ireland Assembly) has been suspended for over a year due to political difficulties. The Northern Ireland Law Commission no longer functions due to budget cuts. Therefore, a warning, most of what is set out below is a description of what has been, or what could be, rather than what is at present.

2. Legal and constitutional background for Northern Ireland

Northern Ireland is a part of the United Kingdom of Great Britain and Northern Ireland¹. It is a separate legal jurisdiction. This means that its law is separate from the law of England and Wales (although those laws share many similarities) and its law is also separate from the law of Scotland. Its legal system as well as its laws is also separate from the other parts of the UK.

Northern Ireland is also a devolved jurisdiction. This means that some powers to make legislation have been devolved from the Westminster Parliament to the Northern Ireland legislature. Another aspect of devolution is that it has its own separate regional executive. From 1921 to the mid-1970s, the Northern Ireland legislature was the Parliament of Northern Ireland. That Parliament ceased to function in the mid-1970s. The current legislature is named the Northern Ireland Assembly. It was established in 1998 and has been in operation intermittently since then. The Assembly is currently suspended (since 2017) because of political disagreements between the largest political parties.

3. Persons and bodies with the power to make legislation

The main source of legislation for Northern Ireland is the Northern Ireland Assembly, and prior to that the Parliament of Northern Ireland. The Assembly makes primary legislation on matters within its legislative competence². Legislative competence is quite wide, the only matters which the Assembly can't deal with (in broad terms) are matters connected with international affairs, UK wide tax, succession to the Crown, nuclear power and other points which could be described as being of national importance.

During previous periods of time when there was no legislative assembly in Northern Ireland, the Secretary of State for Northern Ireland (a Minister of the UK government) had powers to make legislation for Northern Ireland by way of Order in Council. This could be regarded as executive legislation as it is made by a member of the executive rather than by a legislature, but it is subject to limited parliamentary oversight in the Westminster Parliament. It can also be regarded as primary legislation for Northern

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¹ For a general summary, see B. Dickson, *Law in Northern Ireland*, 2nd edn., Hart Publishing, Oxford, 2013.

² The rules on legislative competence are set out in the Northern Ireland Act 1998. This is the Act which devolved legislative authority to Northern Ireland as well as establishing the Assembly.

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Ireland as it deals with subjects which would normally be the subject of primary legislation. However, during the current period of suspension of the Northern Ireland Assembly, there are only extremely limited powers for the Secretary of State to make any legislation for Northern Ireland.

The Westminster Parliament, acting as the legislative assembly for the whole of the United Kingdom also has the power to pass legislation for Northern Ireland. This power is generally exercised for legislation which is designed to apply to all of the United Kingdom, for example tax legislation. It also passes legislation specifically for Northern Ireland which is outside the competence of the Northern Ireland legislature. This power has also been exercised to pass legislation which is politically sensitive, for example in a previous period, legislation on policing and justice.

Finally, secondary legislation can be enacted by Departments in the Northern Ireland government. Without Northern Ireland Ministers to authorise new policies, there is currently limited secondary legislation.

At present, and since the collapse of the Northern Ireland executive in 2017, there has been very little legislative activity, in large part because there is no Northern Ireland Assembly.

4. Sources of law reform

For these purposes, a body can be a source of law reform if it can develop the policy, start the process of law reform, or introduce law reform legislation, even if it can't necessarily enact it. I also take a broad approach to what constitutes law reform. The following are the sources of law reform in Northern Ireland:

1. Northern Ireland executive
2. Northern Ireland Assembly
3. UK government
4. UK Parliament
5. Northern Ireland Law Commission
6. UK law reform bodies
7. Internal Northern Ireland government law reform bodies

In practical terms, the Northern Ireland executive is the largest initiator of law reform. It has the resources and the political legitimacy to bring forward law reform projects. Departments and Ministers work together to develop new policies within government. These may not always be officially termed "law reform" but in many cases they are proposals to reform the law by enacting new legislation in specific areas. For example, we have legislation to amend the law on drink driving³, and legislation to amend the existing law on welfare payments⁴.

These proposals are developed, scrutinised and consulted upon before being introduced into the Assembly. Given that the government will normally command a majority within the Assembly, those proposals have a high chance of being turned into law.

In more recent years, the Northern Ireland Assembly itself has begun to initiate law reform. This is not law reform begun by government, but law reform begun by individual legislators and committees within the Assembly. This is a small fraction of government initiated law reform, but it is still sizeable. For example, the Committee for the Executive Office initiated law reform on the current system of public

³ Road Traffic (Amendment) Act (NI) 2016.

⁴ Welfare Reform Act (NI) 2010.

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complaints which consolidated existing legislation⁵. An individual legislator developed and introduced legislation as a Private Members' Bill to reform the processes and procedure for the Assembly⁶.

The UK government, in developing UK wide law reform can sometimes extend that law reform to Northern Ireland. For example, the primary purpose of one UK wide Act was to reform company law and restate the greater part of the enactments relating to companies⁷. By agreement with the Assembly, this legislation extended to Northern Ireland. The UK government also introduced significant reform to policing in Northern Ireland, reform which would have been impossible at that time to have been enacted within Northern Ireland⁸.

The UK Parliament itself has been much less willing to initiate law reform for Northern Ireland, being unwilling to encroach on the work of the Northern Ireland legislatures. There have been occasional calls for Westminster to step in, particularly in reform to abortion law in Northern Ireland, but no actual laws have been changed at present⁹.

The Northern Ireland Law Commission is the most obvious law reform body in Northern Ireland, and I deal with that in the following section, along with a consideration of other internal law reform bodies.

The Law Commission for England and Wales previously had responsibility for law reform for those parts of Northern Ireland law which were outside the competence of the Northern Ireland legislature¹⁰. So if the devolved parliament could enact legislation in an area, the Law Commission for England and Wales wouldn't look into it, only if the devolved parliament couldn't act would the Commission act. In practice, the Law Commission for England and Wales tended to avoid making law reform proposals for Northern Ireland¹¹. When the Northern Ireland Law Commission was established, the jurisdiction of the Law Commission for England and Wales over Northern Ireland ended¹². With the Northern Ireland Law Commission now in cold-storage (see further below), this means there is now a black hole when it comes to law reform – in essence there is no body with official law reform responsibilities over Northern Ireland law. Aside from the main problem of there being no law reform body for Northern Ireland, this caused a secondary problem for the Law Commissions of England and Wales and Scotland – there is no “partner” for them in Northern Ireland with whom they can work to reform UK wide law. See in particular the complaint made by Lord Lester by a letter to *The Times* newspaper¹³.

5. The Northern Ireland Law Commission

Before 1965, there was no formal law reform body. From 1965 up until the establishment of the Northern Ireland Law Commission, there was a Director and Office of Law Reform, and then a Law Reform Advisory Committee for Northern Ireland¹⁴. The Northern Ireland Law Commission (NILC) was established by the Justice (Northern Ireland) Act 2002¹⁵. It is to be chaired by a high court judge, with 4

⁵ Public Services Ombudsman Act (NI) 2016.

⁶ Assembly and Executive Reform (Assembly Opposition) Act (NI) 2016.

⁷ Companies Act 2006.

⁸ Police (NI) Act 2003.

⁹ See for example M.-L. Connolly, “NI abortion law should be reformed by Westminster”, <<https://www.bbc.co.uk/news/uk-northern-ireland-45799163>> (accessed 23 October 2018).

¹⁰ S. 1 Law Commissions Act 1965.

¹¹ G Gretton, “Of law commissioning”, *Edinburgh Law Review*, Vol. 17, No. 2, 2013, p. 119, fn19.

¹² Justice (NI) Act 2002.

¹³ Lord Lester of Herne Hill, Pannick & Lexden, ‘Rethink Needed’, *The Times*, 10 November 2014

¹⁴ N. Faris, Fifty years of law reform – a note on the Northern Ireland style, in M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, Hart Publishing, Oxford, 2016.

¹⁵ V. Iyer, ‘Promoting Law Reform in Northern Ireland’, *Commonwealth Law Bulletin*, Vol. 35, 2009, p. 715.

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commissioners (a barrister, a solicitor, a teacher of law and a non-lawyer)¹⁶. Its purpose is to keep under review the law of Northern Ireland with a view to its systematic development and reform, including in particular by:

- (a) codification,
- (b) the elimination of anomalies,
- (c) the repeal of legislation which is no longer of practical utility, and
- (d) the reduction of the number of separate legislative provisions, and generally by simplifying and modernising it¹⁷.

NILC prepares programmes for law reform¹⁸ which are submitted to the Secretary of State (or Department for Justice depending on the type of reform). There is then a formal process for these being laid before either the Northern Ireland Assembly or the Westminster Parliament (again depending on the nature of the proposals and when they were laid)¹⁹. NILC is mainly independent – the government has input over what areas of law reform NILC considers, although not what the content of its recommendations are²⁰. Faris sees independence in law commissions as being one of their strengths²¹.

NILC made law reform proposals in respect of the following (none of which ultimately became legislation):

- A major project of reform of Northern Ireland's land law;
- Reform proposals for aspects of Northern Ireland's business tenancy protection law;
- Proposals for protection for vulnerable witnesses in civil litigation;
- Proposals for reform of bail law in criminal proceedings in Northern Ireland;
- A report on unfitness to plead;
- Review of the law on apartments in Northern Ireland²².

6. The non-operational NILC

NILC hasn't been abolished, and the legislation establishing it has not been repealed. However, its home page states «Due to budgetary pressures within the Department of Justice the Northern Ireland Law Commission has been non-operational since April 2015»²³. So, although on paper it still exists, in practice it has ceased to be. Stark and Faris frame the question thus – is it Cheshire cat (only its smile exists, a reference to the Lewis Carroll books) or Potemkin village (a village artificially created so that the Czar can see how industrious the peasants are)²⁴?

¹⁶ S. 50, Justice (NI) Act 2002.

¹⁷ S. 51(1) Justice (NI) Act 2002.

¹⁸ Northern Ireland Law Commission, *First Programme of Law Reform: June 2009 to March 2011*, 2009; Northern Ireland Law Commission, *Second Programme of Law Reform: May 2012 to March 2015*, NILC 11, 2012.

¹⁹ Responsibility for policing and justice has bounced between the Westminster Parliament and the Northern Ireland Assembly as part of the Northern Ireland political process.

²⁰ Fais (2016).

²¹ N. Faris, 'Law Commissions – What is the essence of their law reform role', *IALS Student Law Review*, Vol. 2, No. 1, 2014.

²² See publications on NILC website at <<http://www.nilawcommission.gov.uk/publications.htm>> (accessed 24 October 2018).

²³ <<http://www.nilawcommission.gov.uk/>> (accessed 24 October 2018).

²⁴ S.W. Stark & N. Faris, 'Law Reform in Northern Ireland: Cheshire Cat or Potemkin Commission?', *Public Law*, No. 4, 2016, p. 650.

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Law reform has now been taken back inside government, although it is questionable whether any actual law reform is taking place²⁵. Stark and Faris (a former Northern Ireland Law Commissioner) regard this situation as very unsatisfactory²⁶.

7. Types of law reform

The law reform tools in Northern Ireland are similar to those used in the rest of the common law world. Below I set out what these terms mean in a Northern Ireland context (which may be different from the way they are used in other jurisdictions).

7.1. *New legislation*

The most common type of law reform is essentially a new Act on a subject which has previously been legislated upon. It may contain some provisions from older statutes, but these are generally modernised and restructured and combined with the newer policies and provisions. New Acts rarely explicitly state that they are reforming the law on that subject, but that is normally their effect.

7.2. *Codification of case law*

Codification of case law means taking the principles established in cases (what can be termed judge-made law) and merging, harmonising and synthesising them into legislation. For example, the Bail Bill (a law reform proposal from NILC) sought to codify many common law principles²⁷.

7.3. *Consolidation*

Consolidation means taking the law contained in several earlier statutes (which may have amended or repealed each other) and restating it as a single piece of legislation. In the course of consolidating these older statutes, there can sometimes be substantive amendments to the law.

7.4. *Consolidation with amendments*

As above, but making further changes to the law, both in terms of form and substance.

7.5. *Keeling schedules*

This is a very specific type of law reform. A Keeling schedule is a schedule in a new statute which restates the provisions of an old statute which has been amended several times. It sets out an up to date statement of the law as amended by way of a schedule in the new statute. It is used rarely in Northern Ireland²⁸.

²⁵ L. Clarke 'Law reform body's axing could make Northern Ireland a legal backwater', *The Belfast Telegraph*, 15 November 2014.

²⁶ S.W. Stark & N. Faris (2016).

²⁷ Northern Ireland Law Commission, *Consultation Paper: Bail in Criminal Proceedings*, NILC 7, 2010.

²⁸ R. Cormacain, 'Keeling Schedules and Clarity in Amending Legislation', *European Journal of Law Reform*, Vol. 15, No. 1, 2013, p. 96.

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7.6. *Statute law repeals*

A repeals Act repeals previous legislation on an area (for example because it is no longer of practical utility²⁹.

²⁹ For example, Mortmain (Repeals) Act (Northern Ireland) 1960.

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Literature review on Law Reform in Northern Ireland

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- Lord Kilbrandon 'The Prospects of Law Reform', *Northern Ireland Legal Quarterly*, Vol. 17, 1966, p. 484 *et seq.*
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3. Tools

3.1. Codification

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3.2. Others

Articles

- R. Cormacain, 'Keeling Schedules and Clarity in Amending Legislation', *European Journal of Law Reform*, Vol. 15, No. 1, 2013, p. 96 *et seq.*