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General warrants, thematic warrants, bulk warrants: property interference for national security purposes

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Abstract

This paper considers the powers of property interference under the Intelligence Services Act 1994 as they have been employed for the purpose of 'equipment interference' or 'hacking'. It discusses in particular the granting of 'thematic warrants' under the relevant provisions, considering them in the specific context of the common law jurisprudence on 'general warrants'. It argues that the national security context has seen the traditional common law suspicion of property interference evaded but shows that that the implications of that fact are felt also outside the national security context. It then considers these matters in relation to the new powers of equipment interference found in the Investigatory Powers Act 2016.

Keywords: property; equipment interference; general warrants; bulk warrants; national security; hacking.

When the security and intelligence agencies (SIAs) – the Security Service (MI5), the Secret Intelligence Service (MI6) and GCHQ – were first given statutory basis, the primary power granted to them by statute (the Security Service Act 1989 (the 1989 Act) and the Intelligence Services Act 1994 (ISA 1994/the 1994 Act)) was that of interfering with property.[1] This article considers the nature of and limits to that power in light of the decision of the Investigatory Powers Tribunal (IPT) relating to computer network exploitation (CNE) (i.e. hacking, now often described as equipment interference (EI)) and the changes to the regime of property interference contained in the Investigatory Powers Act 2016 (IPA 2016/2016 Act). Treatment of these matters takes place with reference to the British constitution's commitment to the value of private property rights and its suspicion of general warrants, as demonstrated most directly by the body of late eighteenth-century case law resulting from attempts to suppress seditious publications,[2] as well as the modern categories of 'thematic' and 'bulk' warrants. The article shows how the national security origins of the relevant powers have seen the common law's usual suspicion of property interferences fail to create a meaningful obstacle to their exercise, but also that, due to these powers' availability in relation to serious crime, the consequences of that failure

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1 Security Service Act 1989, s 3 (now repealed); ISA 1994, ss 5–7.

2 Amongst them: *Entick v Carrington* (1765) 2 Wils 275, (1765) 19 St Tr 1029; *Wilkes v Wood* (1763) Lofft 1, 98 ER 489; *Money v Leach* (1765) 3 Burr 1742, 97 ER 1075; *Huckle v Money* (1763) 2 Wils KB 206, 95 ER 768.

leak out of the national security context. Though the 2016 Act clarifies the law surrounding EI it does so while expanding significantly the powers in question. And, because that Act preserves the powers of property interference under the 1994 Act – and in fact extends their availability to MI6 and GCHQ – the possibility of evading the safeguards which exist on those powers' use may in fact be increased rather than diminished. Finally, there remain important questions about the compatibility of property interferences – and the regimes which govern them – with the European Convention on Human Rights (ECHR).

General warrants

In their analysis of the Security Service Act 1989,[3] Ian Leigh and Laurence Lustgarten addressed the system implemented by that statute which allowed for the authorisation, by ministers via warrant, of 'entry on or interference with property',[4] conferring on those who acted under such a warrant both criminal and civil immunity.[5] The relevant section of the Act, the authors suggested, 'amounts to statutory authorisation of ministerial general warrants for reasons of state necessity of the kind which the common law disapproved of in the celebrated case of *Entick v Carrington*'.[6] The decision in *Entick*, therefore, 'must now more than ever be regarded as an anachronism of interest mainly to constitutional historians'.[7] After that aspect of the 1989 Act was superseded by the ISA 1994, a redefinition of the functions of the Security Service (and so of its powers under the 1994 Act)[8] was described by Murray Hunt and Peter Duffy as 'tantamount to the statutory repeal of *Entick v Carrington*, reversing centuries of common law tradition on the respective roles of courts and executive in relation to the issuing of warrants'.[9] Each references the most famous of the late eighteenth-century cases relating to the legality of general warrants (though not one in which the warrant at issue was one which was truly general in the sense of failing to specify the person(s) against whom it was to be executed).[10] The Earl of Halifax had granted the King's messengers (including the eponymous Nathan Carrington) a warrant to 'to seize and apprehend' John Entick 'and to bring, together with his books and papers, in safe custody before me to be examined'.[11] Lord Camden, Chief Justice of the Common Pleas, was called upon to consider a number of questions. That which he identified as most interesting related to the legality of the warrant, for:

> . . . if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.[12]

To interfere with property is a prima facie trespass which if it is not to be unlawful must have clear legal authority (authority which one would expect to be 'clear in proportion as the

3 Ian Leigh and Laurence Lustgarten, 'The Security Service Act 1989' (1989) 52 Modern Law Review 801.

4 Security Service Act 1989, s 3.

5 Ibid s 3(1).

6 Leigh and Lustgarten (n 3) 826.

7 Ibid.

8 Carried out by the Security Service Act 1996.

9 Murray Hunt and Peter Duffy, 'Goodbye *Entick v Carrington*: The Security Service Act 1996' (1997) European Human Rights Law Review 11.

10 *Entick v Carrington* (1765) 19 St Tr 1029. On that case, see generally Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015).

11 (1765) 19 St Tr 1029, 1034.

12 Ibid 1063.

power is Exorbitant').[13] Emphasising the special status of one's private property (and in particular one's papers), Lord Camden held that there was no such authority in English law:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none . . .[14]

Neither the history of government practice since the revolution of 1689,[15] nor a bare consideration of the utility of such a power,[16] sufficed to justify what the law did not explicitly permit. Nor did the invocation of state necessity justify an interference with property for which there was no legal authority: 'the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions'.[17] As well as testifying to the common law's commitment to a requirement of legality, *Entick* stands also for the rejection of national security exceptionalism.

Similar statements as to the harmful effects of general warrants are found in other cases of the era, but in many of which the warrant, rather than identifying its subject, purported to empower the seizure of the 'authors, printers and publishers' of the seditious material and of 'their papers'. Both forms of generality – generality as to persons and generality as to property – met with displeasure from the courts. In *Entick*, Camden noted that there was no 'pretence' that:

> . . . the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, 'that all must be taken, manuscripts and all.' Accordingly, all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack.[18]

In *Wilkes v Wood* itself Camden said of the power to issue general warrants that '[i]f such a power is truly invested in the Secretary of State and he can delegate this power, it certainly may affect the person and property of every man in this kingdom and is totally subversive of the liberty of the subject'.[19] These cases amount to a clear rejection by the common law of interferences with property which neither specify the person whose property is to be subject to interference (effectively leaving the sufficiency of the evidence against any given individual to be determined by those executing the warrant rather than those granting it)[20] nor identify the specific property to be interfered with.

13 Ibid 1065–6.

14 Ibid 1066.

15 Ibid 1067–73.

16 Ibid 1073–4.

17 Ibid 1073.

18 Ibid 1065.

19 *Wilkes v Wood* (n 2) 498.

20 In *Money v Leach*, Lord Mansfield said that 'it is not fit, either upon reasons of policy or sound construction of law, that, where a man's being confined depends on an information given, it should be left to the officer to ascertain the person': *Money v Leach* (1765) 1 Bl 555, 96 ER 320, 323. The same point is made by Blackstone in his *Commentaries on the Laws of England*, IV, 288.

Entick (which we, following Leigh and Lustgarten, and Hunt and Duffy, can take as shorthand for the general warrant cases generally) is not usually treated as having laid down or attested to a rule which is special to the context of property,[21] but one which applies wherever the state wishes to interfere with an interest protected by law (whether public or private).[22] It applies, like Wade's definition of the prerogative, to acts which alter legal rights and obligations:[23] for those which do not, no legal authority is required.[24] Nevertheless, the right to property is given special status in *Entick*, as in the common law as a whole,[25] which demands legal authority for interferences with property, for the redefinition of property rights and for deprivations thereof.[26] Reflecting Lord Camden's belief that 'one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant', these things will require an authority which not merely exists but which is suitably explicit (the rule now known as the principle of legality).[27] Similarly, if property is to be expropriated without compensation, that too must be made sufficiently unambiguous that we can be sure that the relevant 'political price' has been paid within the parliamentary process.[28] From one point of view then, when *Entick* is described as having been rendered a 'constitutional anachronism' or having been subject to 'statutory repeal', we encounter a blatant misunderstanding of that case, which speaks only of the need for authority and the fact that the common law does not provide such authority. It is implicit in the judgment in *Entick* – as it is (and must be) in the various other judgments relating to the right to property at common law – that the interferences inherent in the concept of a general warrant might plausibly be authorised by (a suitably unambiguous) statute. In this sense no statute could ever 'repeal' *Entick*, but only ever affirm it (and its limits) by providing the sort of authority *Entick* holds to be required. Nevertheless, statutory regimes for interference with property might accord with the spirit of the general warrant cases to either a greater or lesser degree.

National security, property interference and 'thematic' warrants

As noted above, one of the potential bases of a power of property interference argued for in *Entick* was 'state necessity', which we would understand in contemporary parlance to include – perhaps exclusively, but certainly above all else – national security. Powers of property interference for crime-fighting purposes are contained in both the Police and Criminal Evidence Act 1984 (PACE 1984) and the Police Act 1997.[29] Though the former is more intrusive than the latter (not limiting the forms of property interference which might take place) each provides important safeguards for certain categories of material,

21 But see Keith Ewing, 'The Politics of the British Constitution' [2000] Public Law 405, 408. For a discussion of *Entick* in the context of a right to property, see Paul Scott, '*Entick v Carrington* and the Legal Protection of Property', in Tomkins and Scott (n 10). The case is placed in its national security context by Tom Hickman in his 'Revisiting *Entick v Carrington*: Seditious Libel and State Security Laws in Eighteenth-Century England' in the same volume.

22 See the discussions in Scott (n 21) and the chapters by Tomkins and Endicott in Tomkins and Scott (n 10).

23 For which, see H W R Wade, *Constitutional Fundamentals* (Stevens & Sons 1980) 47–9 and 'Procedure and Prerogative in Public Law' (1985) Law Quarterly Review 180, 190–4.

24 On the rule of law implications of the purely administrative powers of the Crown (which the author calls its 'ordinary powers'), see Adam Perry, 'The Crown's Administrative Powers' (2015) 131 Law Quarterly Review 652.

25 See Scott (n 21) and Ewing (n 21). See also Thomas Poole, 'The Constitution and Foreign Affairs' (2016) 69 Current Legal Problems 1, contrasting the treatment of property in *Entick* with that in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 15 ER 9.

26 Scott (n 21) 147–55.

27 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

28 Scott (n 21) 148–9.

29 PACE 1984, ss 8–23; Police Act 1997, Part III.

including journalistic material and that subject to legal privilege.[30] Modern law provides in the context of national security a distinct suite of powers of property interference. It was not always thus. Lord Denning, in his report on the Profumo Affair, made public for the first time the Directive, issued by Home Secretary David Maxwell-Fyfe, which defined the role of the Security Service and, in the absence of true legal regulation, governed its actions until the late 1980s. He also stated, emphatically, its legal position:

> The Security Service in this country is not established by Statute nor is it recognised by Common Law . . . The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else, they have no special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there.[31]

This latter statement was rendered false by the enactment of the Security Service Act 1989, which permitted the Secretary of State to issue, on request of the agency created by that Act (MI5), a warrant permitting the taking 'of such action as is specified in the warrant in respect of any property so specified'.[32] Those actions which might be taken in relation to property are neither limited nor illustrated by the provision in question. The theme of property interference provides the first link back from the exigencies of national security to the general warrant cases. A second is that these warrants are granted not by a judge, but by a minister. If authorised by a warrant, no 'entry on or interference with' property was unlawful.[33] A warrant could be issued where the Secretary of State thought the action in question necessary in order to acquire information which was 'likely to be of substantial value in assisting the Service to discharge any of its functions'[34] and which could not otherwise be obtained, and that suitable arrangements were in place to ensure the confidentiality of the information thus obtained.[35] The functions in question were, originally, 'the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means' and the safeguarding of 'the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands'.[36] Neither 'national security' nor 'economic well-being' has ever been given statutory definition,[37] leading to suggestions that the limitation of the Security Service's powers by reference to their functions (which continues to this day) is not a meaningful one.[38]

30 PACE 1984, ss 9–14 and Schedule 1; Police Act 1997, ss 97–100.

31 *Lord Denning's Report* (Cmnd 2152 1963) [273].

32 Security Service Act 1989, s 3(2). For the background to the 1989 Act, see *Leander v Sweden* (1987) 9 EHRR 433 and, in the UK context, *Hewitt and Harman v UK* (1992) 14 EHRR 657. The ability of the 1989 Act to ground a justified interference with the ECHR was established by *Esbester v UK* (1994) 18 EHRR CD72 .

33 Security Service Act 1989, s 3(1).

34 Ibid s 3(2)(a)(i).

35 Ibid s 3(2)(b).

36 Ibid s 1. To these has been added the support of police authorities in the prevention and detection of serious crime (s 2(4)), on which see below.

37 In *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, Lord Hoffman said (at [50]) that 'there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people.' But, he added, that 'the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy.'

38 Hunt and Duffy (n 9) 15–16.

While, for the reasons given above, a statute cannot conflict with – but only affirm – the rule in *Entick*, it remains the case that a statute authorising interferences with property might either conform to or offend against the spirit of the general warrant cases. Leigh and Lustgarten considered the 1989 Act to exemplify the latter possibility, identifying as objectionable in particular the absence of excluded categories of material (such as under PACE 1984), the failure to limit the sorts of interferences which might take place, and the fact that the 1989 Act did not require the Service to identify 'the property to be searched or interfered with (and how often), the persons who are targets, or the type of information which it is hoped to discover'.[39] The most important of their points – the supposed absence of any requirement to identify the property to be interfered with – seems (on the face of the 1989 Act) contestable, at the very least. The formulation in s 3 of 'any property so specified' – where 'so specified' is a reference back to 'specified in the warrant' – seems to require that a certain level of detail is included. Although exactly what that level of detail might be contested, that phrasing seems sufficiently demanding as to call into question the implication, carried by invocations of *Entick v Carrington*, that warrants under the 1989 Act were equivalent to general warrants, for a truly general warrant – one which does not specify the person nor the property to which it applies – would (on this reading) have been *ultra vires* the statute and acts done under it would therefore be capable of giving rise to civil (and perhaps also criminal) liability. When the powers under the 1989 Act were superseded by the ISA 1994, to the reference to interferences with property was added a power to interfere with wireless telegraphy.[40] The use of the relevant powers were no longer defined solely with reference to the functions of MI5 but also with reference to the functions of the newly statutorily established MI6 and GCHQ,[41] warrants to whom would be granted by the Foreign Secretary rather than the Home Secretary. The requirements for the granting of a warrant were modified in number of ways, as they were again by the Regulation of Investigatory Powers Act 2000 (RIPA 2000). The 1994 Act, however, retained (and retains to this day) the wording of the 1989 Act ('of such action as is specified in the warrant in respect of any property so specified'), the interpretation of which is vital to the question of whether warrants are permitted here which are reasonably compared to the sort held in *Entick* to have no existence at common law. Once again, the plain meaning of the words seems on its face to require that the property be identified to a relatively high degree of specificity within a warrant if the interference is to be *intra vires* the 1994 Act. These national security warrants should have been general neither as to the persons to whom, nor as to the property to which, they applied, and the fact of ministerial authorisation was not itself sufficient for the 1989 Act (nor the equivalent provisions of the 1994 Act) to render *Entick* a 'constitutional anachronism'. Though significantly broader than the powers of property interference under, say, PACE 1984, the powers in question might be (more or less plausibly) justified by reference to the more limited and exceptional context in which they are available.

It is therefore both surprising and concerning that the Intelligence Services Commissioner (ISC), in his 2014 report, observed that he had 'expressed concerns about the use of what might be termed "thematic" property warrants' issued under this provision.[42] Though thematic warrants are not formally defined (and their use does not seem to have been acknowledged or explained prior to the publication of that report), they

39 Leigh and Lustgarten (n 3) 825.

40 ISA 1994, s 5(1).

41 Ibid, ss 1, 3 and 5(2).

42 Rt Hon Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2014* (HC 225, 2015) 18. The Commissioner accepted that the interpretation of the various agencies was 'very arguable' and stated too that he could 'see in practical terms the national security requirement'.

can be understood as warrants which identify the persons and property to whom they apply by virtue of a theme which connects them, rather than their specific identity. Though such warrants are – as regards the interception of communication – available under RIPA 2000,[43] that possibility is created by the peculiar definition therein of 'person', which the Act states to include 'any organisation and any association or combination of persons'.[44] Although that legislative grounding is problematic in its obliqueness, there is no equivalent basis for thematic warrants in the context of section 5 of the 1994 Act.

Proceedings in the IPT

The correct interpretation of the key phrase within the 1994 Act was the subject of consideration by the IPT in *Privacy International v Foreign Secretary (Privacy/GreenNet)*,[45] relating to the legality of CNE, the avowal of the use of which by GCHQ happened only during the proceedings and led to the publication of an EI Code of Practice.[46] CNE is carried out in accordance with warrants under s 5 of the 1994 Act and authorisations under s 7 (discussed further below). The Code, as brought into force,[47] does not require that an application for a section 5 warrant contain specific details of the property to be interfered, but instead that it must contain, inter alia, 'the identity or identities, where known, of those who possess or use the equipment that is to be subject to the interference' and 'sufficient information to identify the equipment which will be affected by the interference'.[48] In holding that the approach taken by the Code was a lawful one, because the statutory language was to be understood as requiring only that 'the warrant to be as specific as possible in relation to the property to be covered by the warrant . . . so that the property to be covered is objectively ascertainable',[49] the tribunal declared that:

> Eighteenth Century abhorrence of general warrants issued without express statutory sanction is not in our judgment a useful or permissible aid to construction of an express statutory power given to a Service, one of whose principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy. The words should be given their natural meaning in the context in which they are set.[50]

It is not the case, then, that the property to which a warrant applies need be specified. Instead, the property should be 'so defined, whether by reference to persons or a group or category of persons, that the extent of the reasonably foreseeable interference caused by the authorisation of CNE in relation to the actions and property specified in the warrant can be addressed'.[51] This conclusion was justified by reference both to the – unconvincing – distinction between the term 'specified' as used in the 1994 Act and to the allegedly stronger statutory phrasing of 'particular documents specified' in the Evidence (Proceedings in Other Jurisdictions) Act 1975,[52] as well as to the fact that 'specified' in the 1994 Act was used in relation not just to 'property' but also to 'action'

43 Such warrants were first avowed in the Intelligence and Security Committee's report, *Privacy and Security: A Modern and Transparent Legal Framework* (HC 1075, 2015) [42]–[45].

44 RIPA 2000, s 81(1).

45 *Privacy International v the Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 14_85-CH (hereinafter '*Privacy/GreenNet*').

46 See the Draft EI Code of Practice (February 2015) and the EI Code of Practice (January 2016).

47 By the Equipment Interference (Code of Practice) Order 2016, SI 2016/38 (14 January 2016).

48 EI Code of Practice (January 2016) [4.6].

49 *Privacy/GreenNet* [47].

50 Ibid [37].

51 Ibid [38] (emphasis removed).

52 Ibid [39].

and 'wireless telegraphy' and therefore 'cannot have meant anything more restrictive than "adequately specified"'.[53]

As a result of this reasoning, though the 1994 Act seems on its face to accord with the spirit of *Entick v Carrington*, as interpreted by the IPT it offends against that spirit, empowering – in the tribunal's own example – the issuing of warrants which:

> . . . permit GCHQ to interfere with computers used by members, wherever located, of a group whose activities could pose a threat to UK national security, or be used to further the policies or activities of a terrorist organisation or grouping, during the life of a warrant, even though the members or individuals so described and/or of the users of the computers were not and could not be identified when the warrant was issued.[54]

Warrants under s 5, that is, may therefore be thematic, identifying specifically neither the property in question nor those to whom it belongs. Crucially absent from the IPT's reasoning is a direct consideration of Lord Camden's point that 'one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant', a principle of statutory interpretation repeatedly reaffirmed by the courts in the context of fundamental rights under the name of the principle of legality and whose robust application by the courts to interferences with private property would in other circumstances be entirely inevitable.[55] If the principle of legality is to perform the constitutional role assigned to it, it must mean not only that *some* interference with fundamental rights is clearly foreseen by the relevant statute (which is indeed true of s 5 of the 1994 Act) but that the interference which is foreseen be of the nature and extent which the statute is claimed to permit. That does not seem to be the case with s 5 and it is doubtful whether it is even the case, as the IPT suggests, that the 'natural meaning' of the words is such as to permit interferences with property on the terms it specifies.[56] *Entick v Carrington* was proof not only of the common law's adherence to the rule of law, but of the inability of national security concerns (in the form of 'state necessity') to override the need to demonstrate legal authority. Here, national security seems to operate as an exception not to the general requirements of the rule of law, but to the interpretive approach which has grown up around it, as evidenced by the otherwise gratuitous reference to the functions of GCHQ in the passage asserting the irrelevance to the question of the general warrant cases.[57] It is highly unlikely that equivalent legislation aimed at other public interest ends would be approached with the generosity that the IPT demonstrates. It would be one thing to create an explicit rule of the sort that the IPT implicitly puts into effect here – to say that the principle of legality has no application where the security of the state is at issue – but to claim that the natural meaning of the statutory language ('property so specified') is such as to permit warrants of the breadth envisaged does not convince. That there is no requirement that they be foreign-focused (as bulk acts of interception under RIPA 2000 were required to be)[58] nor that the information

53 Ibid [44].

54 Ibid [65].

55 *R v Secretary of State for the Home Department, ex p Simms* (n 27). See also Scott (n 21).

56 *Privacy/GreenNet* [37].

57 This interpretative exceptionalism would seem also to be at odds with the approach of the Supreme Court in *HM Treasury v Ahmed* [2010] UKSC 2, where the principle of legality was applied – in the context of the freezing of terrorist assets – in holding that orders made under the United Nations Act 1948 were *ultra vires* that statute, the language of which was insufficiently explicit to justify interferences with fundamental rights.

58 RIPA 2000, ss 8(4) and (5), disapplying the requirement that a warrant identify a single person or set of premises as the target where the warrant authorised 'the interception of external communications in the course of their transmission by means of a telecommunication system'.

thus acquired be examined only according to a requirement of necessity (ditto)[59] makes the phenomenon of thematic warrants under the 1994 Act particularly concerning.[60]

Serious crime and the danger of national security exceptionalism

What had originally prompted Hunt and Duffy to suggest that *Entick* had been 'statutorily repealed' was not, however, the powers contained in the 1994 Act themselves, but the modification made in 1996, when the Security Service was given the new, additional function of acting 'in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime'.[61] Given that the availability of warrants is defined with reference to the functions of the SIAs, the grant of a new function implies a greater availability of warrants. MI6 and GCHQ could, under the 1994 Act as enacted, apply for warrants on the basis of their functions relating to serious crime only where the property in question is outside the British Islands; only property interferences taking place in pursuit of their other functions could relate to property within the British Islands.[62] There was therefore a further recognition of the distinction between national security purposes and crime-fighting ones: the most intrusive powers were available (in the British Islands) only in the former context. Following the changes made by the 1996 Act, by contrast, MI5 might apply for a warrant authorising interference with property in the British Islands for crime-fighting purposes. The new provisions inserted into the 1994 Act by the 1996 Act purported to restrict the use of these powers, providing for an ostensibly limited understanding of serious crime – that which either 'involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose' or involves offences on conviction for which a person of 21 with no previous convictions could reasonably be expected to be sentenced to three or more years in prison[63] (a limit which did not apply to the work of MI6 and GCHQ in relation to serious crime abroad).[64] Notwithstanding this restriction, the effect of the 1996 Act was to make available significant powers of property interference in relation to matters of ordinary criminal law. As it was put by Lord Browne-Wilkinson in the debate on the Bill:

> So far as I can see, what has happened casually, in a House which has remarkably few people in it, is to carry over from the national security, twilight, Smiley's People world, into the every day life of policing, excessive powers of a kind that this country has always resisted and which are basic to its freedom.[65]

59 Ibid s 16.

60 Indeed, the use of thematic warrants is sufficiently frequent that the ISC has recommended that the SIAs develop a method of recording their reliance on such warrants in particular operations, something the 1994 Act does not require: Rt Hon Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2015* (HC 459, 2015) 17–88.

61 By the Security Service Act 1996, modifying s 1(4) of the Security Service Act 1989. Of the 1996 Act, Home Office Minster Baroness Blatch said that 'the Government's reading of the position is that the celebrated case of *Entick v. Carrington* established the important principle that a person's house should not be entered without lawful authority . . . Authorisation by the Secretary of State in accordance with this legislation represents lawful authority. All that has changed is that the Security Service will now be able to apply for property warrants in pursuance of its new statutory function relating to serious crime, in addition to its existing national security and economic well-being functions.' HL Deb 8 July 1996, vol 574, cols 81–2.

62 ISA 1994, s 5(3).

63 Ibid s 5(3A) and (3B). The same formulation is used in the Police Act 1997, s 93(4).

64 MI5 can also apply for warrants to do things which fall within the functions of MI6 or GCHQ rather than MI5 itself, but not where the purpose of the action is the prevention and detection of serious crime, preventing it from using its ability to substitute for the other agencies to bypass the limits upon its own actions: ISA 1994, ss 4 and 5.

65 HL Deb 27 June 1996, vol 573, cols 1043–4.

Hunt and Duffy's concerns with this new regime of property interferences within the British Islands in relation to serious crime were twofold. The first related to the definition of serious crime which, though it purported to limit the availability of domestic warrants for crime-fighting purposes, in fact amounted to a considerable expansion of powers of property interference so as to include, for example, 'virtually all investigations by Customs and Excise and the Inland Revenue' and 'industrial disputes and political demonstrations'.[66] This conclusion seems correct and yet the offending criteria remain in place, meaning that the powers of property interference in the British Islands are not restricted to the context of national security or the fight against terrorism, but in fact exist in relation to much of which falls – or should fall – in the province of the ordinary police or the National Crime Agency. Powers which were originally justified by reference to the special exigencies of national security became available outside of the context. And so when the IPT interpreted s 5 of the 1994 Act as not requiring a high degree of specification in the identification of property to be interfered with, that decision had the effect of creating a broader power of property interference also in the context of 'serious crime' – a category which, as we have seen, includes much for which that label is a misnomer. If the IPT's approach might have conceivably been justified on national security grounds, it nevertheless has major implications outside of that context, making thematic warrants available also for crime-fighting purposes. A second concern about the 1996 changes was that the availability of property interference warrants for serious crime purposes allowed the Security Service to bypass the various safeguards which existed on the powers of the police (then primarily under PACE 1984), including the need for judicial rather than executive authorisation and special protections which exist in other statutes for certain types of material – legal, journalistic and so on. In light of the interpretation of s 5 endorsed by the IPT in *Privacy/GreenNet*, this point too becomes more urgent: section 5 warrants can be used to bypass other powers (and the safeguards which exist upon them) while themselves permitting interferences with property that begin to approach the generality of the warrants against which the common law so resolutely set itself. MI5 may seek and be granted warrants which permit it to interfere with property in the British Islands for crime-fighting purposes without detailing the property which is to be interfered with, so long as the identity of the property is 'objectively ascertainable' from the terms of the warrant.

Authorisations under s 7 of the 1994 Act

Alongside warrants under s 5 of the 1994 Act, that statute empowers (in s 7) the issuing of 'authorisations' to act outside of the British Islands, extinguishing any civil or criminal liability which might otherwise arise out of 'any act' done by virtue of the authorisation.[67] They can be given only where the Secretary of State is satisfied: that any acts done under an authorisation are necessary for the discharge of some function of either MI6 or GCHQ;[68] that satisfactory 'arrangements' exist to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the discharge of such a function and that the 'nature and likely consequences' of any acts done in reliance on the authorisation will be reasonable 'having regard to the purposes for which they are carried out';[69] and, finally, that suitable arrangements are in place to guard against disclosure of

66 Hunt and Duffy (n 9) 13.

67 As well as ensuring that there exists a formal record of the political authorisation of some act or operation, which cannot for that reason take place without the knowledge and consent of the Foreign Secretary.

68 ISA 1994, s 7(3)(a). Originally, authorisations were available only to MI6; the 1994 Act was amended to make them available to GCHQ by s 116 of the Anti-terrorism, Crime and Security Act 2001.

69 ISA 1994, s 7(3)(b).

information obtained in this way.[70] Section 7 illustrates some of the ways in which an authorisation might be framed, including that it might relate 'to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified'.[71] It will be seen from that formulation that s 7 offers up a power which would wholly justify invocation of *Entick v Carrington*, going far beyond what an eighteenth-century general warrant might have contained – so as to include, for example, acts such as homicide which interfere with the right to life rather than the right to property – and similarly far beyond the thematic warrants under s 5 approved of in *Privacy/GreenNet*. Two points must be made. The first is the distinction between the 1994 Act's framing of the power to make authorisations (under s 7) and the power to grant warrants (under s 5): in the context of authorisations it was felt necessary by the drafters to clarify the sorts of acts which might be carried out and, in particular, the way in which they might be identified within an authorisation. The drafting of s 7 is therefore sufficiently explicit as to justify the sorts of 'thematic' warrants which the IPT held to be justified by the far more ambiguous s 5. Section 7 has been drafted so as to overcome the principles of statutory interpretation which mitigate interferences with public law rights; s 5 has not, and yet has been held nevertheless to evade those principles. Authorisations given for acts of a specified type (rather than specific acts) are described as 'class authorisations'. MI6 had eight class authorisations (which 'remove liability under UK law for day-to-day activity undertaken in pursuit of SIS's statutory functions, such as the identification and use of Covert Human Intelligence Sources, Directed Surveillance and interference with, and receipt of, property and documents') in place in 2014.[72] GCHQ had seven.[73]

A second point relates to the geographic aspect. Both s 5 and s 7 distinguish acts within and outside of the British Islands.[74] Section 7 applies only outside that area,[75] while s 5 (as originally enacted) limited the power of property interference for the purpose of preventing or detecting serious crime within the British Islands as compared to its possibility outside that area. On the one hand, this of course reflects the fact that the ECHR, by virtue of its Article 1, extends – in the normal course of events – only to the territory of the contracting parties.[76] On that basis, the Property Interference Code of Practice did not apply to s 7 and there is no power to issue codes of practice in relation to that provision. Now, the EI Code of Practice provides that MI6 and GCHQ should 'as a matter of policy apply the provisions of this code in any case where EI is to be, or has been, authorised pursuant to s 7 of the 1994 Act in relation to equipment located outside

70 Ibid s 7(3)(c).

71 Ibid s 7(4).

72 Intelligence and Security Committee (n 43) [233].

73 Ibid [234]. The Intelligence and Security Committee has recommended that ministers be periodically provided with a list of operations carried out under the class authorisations, but no such lists have been kept in the past: [PP].

74 Meaning, by virtue of the Interpretation Act 1978, the 'United Kingdom, the Channel Islands and the Isle of Man'.

75 Subject to an exception permitting the doing of something within the British Islands to 'apparatus' believed to be outside it (or 'in relation to anything appearing to originate from such apparatus' (ISA 1994, s 9 (inserted by the Anti-terrorism, Crime and Security Act 2001)) and another relating to property either mistakenly believed to be outside the British Islands or brought into British Islands after the making of the authorisation (ss 10–14 (inserted by the Terrorism Act 2006)). In both cases, there exists a five-day grace period between becoming aware of the property's presence in the British Islands and ceasing to interfere with it.

76 See on the question of the ECHR's extra-territorial effect, *Bankovic v Belgium* (2007) 44 EHRR SE5 and *Al-Skeini v UK* (2011) 53 EHRR 18 and, in the domestic courts, *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811.

the British Islands',[77] but makes that statement of policy 'without prejudice as to arguments regarding the applicability of the ECHR'.[78] But the geographical distinction might be thought to reflect also a further element of the decision in *Entick*, whereby it has been taken to establish (or to speak to) the inability of the Crown to justify an otherwise tortious action against a British citizen in Britain by claiming that the act was an 'act of state' to which the Crown's immunity applies.[79] The 'Crown act of state' tort defence applies only to actions abroad (and possibly, even there, only to non-nationals);[80] its application in the UK possible, if at all, only in relation to acts done to enemy aliens.[81] To speak of the spirit of *Entick v Carrington*, then, is to reference an ideal which is necessarily limited in its scope; where the modern statutes authorising property interferences make geographic distinctions, they are in that sense in keeping with rather than at odds with *Entick*. The changes introduced by the 1996 Act undercut that distinction by making possible broad property interferences in the UK, without the over-riding justification of national security considerations. Insofar, then, as the law of property interference reflects an ongoing aversion to general warrants, that aversion applies only to the home jurisdiction and, even there, to a lesser extent than was previously the case.

The compatibility of CNE with the ECHR

At common law, the absence of legal recognition for the individual's privacy interests meant that legal challenges to what were effectively privacy interferences often took place with reference to the individual's property rights.[82] Conversely, the fact that the property interference at issue here took place in order to facilitate surveillance meant that the key ECHR issue was that of compatibility with Article 8. In *Weber and Saravia v Germany*,[83] the European Court of Human Rights distilled from its own case law six questions which surveillance norms – those the full operation of which cannot be revealed to the public at large without undermining their effectiveness – must answer if they are to avoid abuses of power and meet the requirement of foreseeability implied by 'in accordance with the law'. These are:

> . . . the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when

77 EI Code of Practice (January 2016) [7.1].

78 Ibid 33, fn 18. Privacy International has, since the IPT gave judgment in *Privacy/GreenNet*, made an application to the European Court of Human Rights regarding the use of s 7, in which this question can be expected to feature prominently.

79 E C S Wade, 'Act of State in English Law: Its Relations with International Law' (1934) 15 British Yearbook of International Law 98. Collier agrees: J G Collier, 'Act of State as a Defence against a British Subject' (1968) Cambridge Law Journal 102, 111, but see Peter Cane, 'Prerogative Acts, Acts of State and Justiciability' (1980) 29 International and Comparative Law Quarterly 680, 686.

80 See, most recently, the judgment of the Supreme Court in *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 1. On the specific point about nationality, see also *Nissan v Attorney-General* [1970] AC 179.

81 *Johnstone v Pedlar* [1921] 2 AC 262. On the doctrine generally, see Paul Scott, 'The Vanishing Law of Crown Act of State' (2015) 66 Northern Ireland Legal Quarterly 367.

82 This was the case in *Entick*, but more obviously so in *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344, in which it was held that the tapping of the applicant's telephone (which had taken place at the post office) was lawful notwithstanding the absence of statutory authority because there was no common law right of privacy to be interfered with, while nothing had been done which was incompatible with his property rights.

> communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed . . .[84]

Those same requirements were in *Liberty/Privacy (No 1)*[85] applied by the IPT to the various activities of the intelligence agencies whose existence was first alleged on the basis of the Snowden disclosures of 2013[86] and it was not contested in *Privacy/GreenNet* that they apply also to CNE.[87] This is an important point: in analogising between property interferences under the 1994 Act and those in the general warrant cases, it can be easy to lose sight of the fact that the interferences in *Entick* took place openly, while those under the 1994 Act take place in secret and so are rightly assimilated to the secret interception of communication, which if it is to be effective must not be known about by its targets.[88] Though there is nothing which directly prohibits the use of section 5 warrants to carry out open interferences with property (to which the *Weber* requirements would not apply), this use would be at odds with the statute and the work of the agencies which make use of it. It will be recalled that the IPT here held that what was required of a section 5 ISA 1994 warrant was that it 'be as specific as possible', so as to permit the Secretary of State to be satisfied as to its legality, necessity and proportionality. Where a warrant fulfils that requirement, the IPT held here, it by definition satisfies the first three of the *Weber* requirements.[89]

The fourth, fifth and sixth of the *Weber* requirements cause more difficulty. The IPT had decided in *Liberty/Privacy (No 1)* that, though (in this particular field) detail of those arrangements preventing powers from being exercised arbitrarily need not be placed in full in the public domain, there must be 'a sufficient signposting of the rules or *arrangements* insofar as they are not disclosed'.[90] The two criteria that must therefore be met are, first, that '[a]ppropriate rules or *arrangements* exist and are publicly known and confirmed to exist, with their content sufficiently signposted, such as to give an *adequate indication* of it' and, second, that those rules or arrangements are 'subject to proper oversight'.[91] The nature of the political oversight of the SIAs has not varied substantially over time – the relevant bodies are the Intelligence and Security Committee (given statutory basis by the Justice and Security Act 2013) and the ISC, whose work the IPT repeatedly praised.[92] These oversight mechanisms are, however, retrospective and mostly general. The only relevant legal mechanism – a complaint to the IPT – is retrospective

83 [2008] 46 EHRR SE5.

84 Ibid [95].

85 *Liberty v Government Communications Headquarters* [2014] UKIP Trib 13_77-H.

86 Eventually holding, in *Liberty/Privacy (No 2)* [2015] UKIP Trib 13_77-H that, prior to disclosures made as part of the litigation process, certain of those activities had been unlawful.

87 The European Court of Human Rights has emphasised that the 'decisive factor' as to whether or not the requirements developed in the surveillance context apply is 'the level of interference with an individual's right to respect for his or her private life and not the technical definition of that surveillance': *RE v UK* (2016) 63 EHRR 2.

88 One important distinction, not further discussed herein, is that evidence acquired via CNE is – unlike that acquired via interception – admissible in legal proceedings.

89 [2016] UKIP Trib 14_85-CH, [57]–[59].

90 [2014] UKIP Trib 13_77-H, [41].

91 Ibid.

92 [2016] UKIP Trib 14_85-CH, [65] and [74]. Previously, complaints about the work of the Security Service could be made to the Security Service Tribunal and those about the Intelligence Service to the Intelligence Services Tribunal. There was no right of appeal the decisions of those bodies, while the relevant statutes purported to exclude judicial review of those decisions. Under RIPA 2000, complaints against the intelligence services are within the jurisdiction of the IPT (RIPA 2000, s 65) to the decisions of which the same exclusions apply (s 67(8)). When the Investigatory Powers Act 2016 comes fully into force, this will change.

and, though not general, relies on an individual having knowledge (or at least suspicion) of action having been taken against him or her, with the Commissioner enjoying no statutory power to refer section 5 warrants to the IPT, nor notify the victim of unlawful acts thereunder. Moreover, the EI Code of Practice was issued only as a result of these IPT proceedings, and so the question of compatibility divides temporally into that of compatibility of the relevant powers since the issuance of that Code and their compatibility prior to that (treated here as relating to the period since the coming into force of the Property Interference Code in August 2009). The IPT held that these further requirements of *Weber* are indeed complied with by the EI Code of Practice and so, since its coming into force, the regime of CNE had been compatible with the ECHR.[93] This left open the question of whether that regime before then was Convention-compliant. Not all of the rules relevant to that question are either contained only in the EI Code of Practice or exist 'below the waterline' (in the sense of being publicly acknowledged but not publicly disclosed); also relevant – the IPT claimed – was the work of the ISC and the statutory rules which prohibit the disclosure by GCHQ staff of the (below-the-waterline) arrangements which statute requires to be in place.[94] Others are contained in the Property Code of Practice, which dates from 2009, and so was in place at the relevant time (and still applies to EI where not impliedly repealed by the EI Code of Practice).[95] Detail of below-the-waterline arrangements given by the respondents here (some of them a gist of closed material) were held by the IPT to be 'adequate, in the context of the interests of national security, to impose the necessary discipline on GCHQ' and to provide 'adequate protection against arbitrary power'.[96] And though the existence of the below-the-waterline arrangements in respect of CNE could not have been made known before the government avowed the use of CNE in 2015, it was foreseeable that hacking as a form of property interference would fall within the range of acts authorised by ss 5 and 7 of the 1994 Act.[97] As such, though the procedural protection might have been improved (and in fact was, with the coming into force of the EI Code of Practice), whatever inadequacy there was present was insufficient to constitute a breach of the requirements of the ECHR: there was, even prior to the EI Code of Practice, sufficient protection against arbitrary interference.[98] The IPT emphasised here that to comply with the second grouping of *Weber* requirements requires 'the provision, particularly in a national security context, of as much information as can be provided without material risk to national security' and that the consequences of a holding of a violation on the basis of 'perceived procedural insufficiency' were such that a holding that the procedural requirements (or their publicity) was amenable to improvement did not necessitate a finding that the unimproved processes were incompatible with the Convention.[99]

This decision seems problematic on a number of levels. The first is on its own terms, whereby there was sufficient protection against arbitrary interference, even when there was no EI Code of Practice, before the use of CNE by the SIAs had been avowed by the government and before the below-the-waterline arrangements disclosed here had been

93 [2016] UKIP Trib 14_85-CH, [70].

94 Ibid [75]–[77].

95 EI Code of Practice (2016), [1.2].

96 [2016] UKIP Trib 14_85-CH, [77].

97 Ibid [81]. This despite the fact that the acts in question were prima facie unlawful by virtue of the Computer Misuse Act 1990. The savings provision of that statute (s 10) was amended, during the litigation period, by the Serious Crime Act 2015. The IPT, at [20], held the amendment to be merely 'clarificatory', with the 1990 Act to be read subject to the powers in the 1994 Act. I am grateful to Bernard Keenan for this point.

98 [2016] UKIP Trib 14_85-CH, [82].

99 Ibid.

made public. Either the *Weber* requirements were met or they were not – that is, either the 'minimum safeguards' existed, or they did not – and the IPT, in treating the question as a teleological one, detached from the requirements which feed into it, has impliedly asserted a right to make an overall assessment that is devoid of direct analysis and, for that reason, not amenable to later replication. This conclusion is supported by the fact that it has interpreted the 1994 Act – contrary to the principle of legality which the courts, in the context of unlimited parliamentary competence, have placed at the heart of the constitutional order, as well as several hundred years of common law aversion to warrants of such breadth – to permit interferences with property not themselves individually specified, meaning that the terms upon which property might be interfered with were not, until this case, remotely foreseeable to citizens. Indeed, the decision as to the quality of the law which permits CNE presumes that the interference with Article 8 enjoys an adequate legal basis. For the reasons given above, that may be true of some property interferences under s 5 of the 1994 Act, but it is not true of those carried out pursuant to thematic warrants. Finally, and taking at face value its holistic and teleological approach, the IPT is curiously vague on the question of how the relevant requirements were fulfilled prior to the publication of the EI Code of Practice and the (partial) disclosure of below-the-waterline arrangements, apart from in its suggestion that those arrangements add nothing material to the contents of the Property Code. The core of its reasoning seems to be found in the reference to the consequences of finding a violation on the basis of 'perceived procedural insufficiency'.[100] The consequences in question do not include the making of a declaration of incompatibility: the insufficiency was not found in the statute itself, but in the other arrangements, while the IPT does not have the power to make such a declaration and there has been no right of appeal from it to a court which does have such a power.[101] A finding that the *Weber* requirements had not been fulfilled, however, might have prompted a vast number of claims of action contrary to s 6 Human Rights Act 1998 (HRA 1998), of a sort that the IPT has been fending off since deciding, in *Liberty/Privacy (No 2)*, that the system by which intercepted material was shared with it by the American National Security Agency had previously been non-compliant with the ECHR.[102] What we witness is a second sort of national security exceptionalism (less tolerable precisely because it is implemented in a context in which the ECHR already imposes, in the form of *Weber* requirements, less onerous requirements than apply to Article 8 interferences generally), accompanied here both by a denigration of the importance of procedure and, indeed, a dubious characterisation thereof, widened so as to include quite fundamental issues regarding, for example, the use made of material obtained via CNE.

But even if the decision here were the correct one, developments in Strasbourg tend to undermine the sort of generalised surveillance made possible by the interpretation the IPT gives to the 1994 Act. First, the decision of the Grand Chamber in *Zakharov v Russia*[103] – holding that interception warrants must 'clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered'[104] and that an authority authorising surveillance 'must be

100 Ibid.

101 RIPA 2000, s 67(8); HRA 1998, s 4(5). Privacy International sought, without success, judicial review of the IPT's decision here: *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin). For discussion, see Paul F Scott, 'Ouster Clauses and National Security: Judicial Review of the Investigatory Powers Tribunal' [2017] Public Law 355.

102 See *Human Rights Watch v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib15_165-CH.

103 (47143/06) 39 BHRC 435.

104 Ibid [264].

capable of verifying the existence of a reasonable suspicion against the person' subject to surveillance measures[105] – must apply equally to exercises of the property-interference powers which constitute surveillance. Secondly, in *Szabó and Vissy v Hungary*,[106] a Chamber of the Court stated that, while the authorisation of the use of surveillance powers by a non-judicial authority can be compatible with the Convention, the supervision of their use by a 'politically responsible member of the executive, such as the Minister of Justice, does not provide the necessary guarantees' of independence.[107] The context involved provisions of domestic law which appeared capable of enabling 'strategic, large-scale interception',[108] distinguishing *Szabó* from the court's decision in *Kennedy v UK,* where the provisions in RIPA 2000 at issue did not permit the 'indiscriminate capturing of vast amounts of communications'.[109] If these elements of the recent case law crystallise as requirements to be met by all surveillance measures, thematic warrants would seem to be compatible with the 1994 Act (as interpreted by the IPT) and yet incompatible with the ECHR. It would, of course, remain possible to evade the requirement by carrying out a property interference that does not constitute surveillance, but such interferences are those where the generality is likely to be of least value to the SIAs – there is little point in being able to target a large and only loosely defined group of people with a single warrant if the interference must be carried out with their knowledge. Instead, the correct route would be to interpret – as required by s 3 HRA 1998 – the powers to issue warrants in a manner compatible with the Convention and so as incapable of grounding a thematic warrant. That is, the interpretive obligation within the 1998 Act would seem likely to mandate a conclusion diametrically opposed to that arrived at via ordinary common law principles of interpretation. This suggests either a remarkable divergence of the two regimes, or, more likely, a flawed application here of the common law's method of protecting fundamental rights.

The ISA 1994, it will be recalled, lacks safeguards in relation to confidential material (unlike PACE 1984 and the Police Act 1997). It was these safeguards (amongst other things) that Hunt and Duffy were concerned that the 1994 Act might be used to evade once the Security Service's functions had been expanded to include that of assisting in the detection and prevention of serious crime. The lack of safeguards in the Property Code had been condemned by the European Court of Human Rights in *RE v UK*.[110] It has similarly been accepted by the IPT that since January 2010 the regime under which legally privileged material was intercepted, analysed, used and destroyed was contrary to Article 8,[111] as it was accepted that the acquisition and use of legally privileged material via CNE was so contrary.[112] The EI Code of Practice, however, addresses the issue of legally privileged material and other confidential material,[113] providing greater safeguards than are contained even in the revised Property Code. The IPT here held that the new safeguards are sufficient to bring the CNE regime in line with Article 8 as regards legally privileged material. The possibility of using the 1994 Act to evade the safeguards

105 Ibid [277].

106 (2016) 63 EHRR 3.

107 Ibid [77].

108 Ibid [69].

109 (2011) 52 EHRR 4, [160].

110 (2016) 63 EHRR 2, relating to surveillance of solicitor–client conversations, rather than interception or property interference.

111 *Belhadj and Others v the Security Service* [2015] UKIP TRIB 13_132–8.

112 [2016] UKIP Trib 14_85-CH, [80] and [84], accepting that the concession in *Belhadj* applies also here.

113 EI Code of Practice (January 2016) 15–20.

applicable to other interference regimes is therefore belatedly diminished. Like those made above, however, the point is rendered less urgent by the enactment of the IPA 2016.

Property interference under the IPA 2016

The IPA 2016 creates a new and specific regime for the authorisation of EI of a sort recommended by the ISC in its report into the intrusive capabilities of the SIAs.[114] Contrary to the ISC's recommendation,[115] however, the 2016 Act does not create an exhaustive regime for the exercise of all of the relevant powers, but leaves the 1989 and 1994 Acts in place.[116] The primary form of authorisation is a 'targeted interference warrant' which 'authorises or requires the person to whom it is addressed to secure interference with any equipment for the purpose of obtaining' either communications, equipment data, or other information.[117] They can be issued only where the Secretary of State considers that the warrant is necessary on certain specified grounds including 'national security' and for 'the purposes of preventing and detecting serious crime',[118] that the conduct it authorises is proportionate,[119] that satisfactory arrangements regarding disclosure are in place,[120] and (except in urgent cases) where it has been approved by one of the new Judicial Commissioners.[121]

Where there was much doubt as regards the 1994 powers, the 2016 Act is entirely explicit in its intention to allow targeted warrants to be 'thematic', relating to, for example, equipment 'belonging to, used by or in the possession of a particular person or organisation', that 'belonging to, used by or in the possession of a group of persons who share a common purpose or who carry on, or may carry on, a particular activity' (or more than one such group, if the interference is part of a single investigation or operation), and equipment 'in a particular location' (or more than one, subject to the same proviso).[122] There is, therefore, no absolute requirement to specify either the persons or the property with whom these interferences will be carried out – 'general warrants' are in this way, and for one specific form of property interference, explicitly revived and beyond the specific context of national security. That it was felt necessary to make such explicit provision in a statute, the first draft of which was published before the decision in *Privacy/GreenNet*

114 Intelligence and Security Committee (n 43) [CC].

115 Ibid [XX].

116 Subject to the amendments contained in Investigatory Powers Act 2016, s 251, and discussed further below.

117 IPA 2016, s 99(2). For the definition of 'equipment', see s 135(1), which provides that it means 'equipment producing electromagnetic, acoustic or other emissions or any device capable of being used in connection with such equipment'. This definition was described by Liberty during the passage of the Act as 'unfathomably open-ended': see Liberty, *Written Evidence to the Joint Committee on the Draft Investigatory Powers Bill* (IPB 0143) [92]. The same might be said of 'communication', which includes 'anything comprising speech, music, sounds, visual images or data of any description' and 'signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus' (s 135(1)). For the definition of 'equipment data', see s 100.

118 IPA 2016, s 102(1)(a). The grounds on which a warrant might be necessary are found in s 102(5): they also include the interests of the UK's 'economic well-being' insofar as those interests are relevant to national security.

119 IPA 2016, s 102(1)(b).

120 Ibid s 98(2).

121 Ibid, s 102(1)(d). The Judicial Commissioners must apply 'the same principles as would be applied by a court on an application for judicial review' in reviewing the decisions as to necessity and proportionality: IPA 2016, s 108(1) and (2). This mechanism (the so-called 'double lock'), which applies to many other powers in the IPA 2016, was the source of much controversy during the passage of the Act, particularly as to the question of whether it was equivalent to 'true' judicial authorisation, or represented some lesser form of judicial control of warrants. It would nevertheless seem to fulfil any requirement imposed by Article 8 ECHR that surveillance be subject to prior judicial authorisation.

122 IPA 2016, s 101.

was handed down, shows again how unconvincing was the IPT's decision as to the correct interpretation of the 1994 Act. Targeted EI warrants may be granted also – under similar conditions – to the Chief of Defence Intelligence[123] and – under less similar conditions[124] – to law enforcement officers (in which case they are issued not by a Secretary of State but by the relevant 'law enforcement chief').[125] These too may be thematic. To that extent, powers Lord Browne-Wilkinson thought better suited to the world of *Smiley's People* have been regularised within the 'every day life of policing'.

The 2016 Act, however, does more than simply give explicit basis to those (thematic) warrants already employed by the SIAs. It also authorises 'bulk' EI, by which is meant EI 'not targeted against particular person(s), organisation(s) or location(s) or against equipment that is being used for particular activities'.[126] It was clarified, during the passage of the 2016 Act (when the government, prompted by a report of the Joint Committee on the Investigatory Powers Bill, published its operational case for the bulk powers), that the distinction between targeted and bulk warrants is as follows:

> A bulk EI warrant is likely to be required in circumstances where the Secretary of State or Judicial Commissioner is not be [*sic*] able to assess the necessity and proportionality to a sufficient degree at the time of issuing the warrant . . . This might be for example where the purpose of the operation is target discovery and the security and intelligence agencies do not know in advance the identity of the new subjects of interest who threaten the security of the UK and its citizens.

That is, bulk EI warrants fill the space beyond the outer limit of targeted warrants, which is the same as exists on section 5 ISA 1994 warrants. A bulk EI warrant is a general warrant in perhaps the truest sense – general as to both the persons and property to whom it applies, with no individualised requirement of necessity or proportionality imposed. Such a thing is no less pernicious simply because the particular form of property interference which it authorises is limited to that of interference with equipment. Besides being limited to the SIAs, the conditions for the granting of a bulk EI warrant differ in two key ways. First, the Secretary of State must be satisfied that the 'operational purposes' for which the material collected will be examined are necessary (as is its examination).[127] Second, as with

123 Ibid s 104.

124 Ibid s 106. Targeted EI warrants are available to law enforcement officers for the purpose of preventing or detecting serious crime, but also for various other purposes around preventing or mitigating death or damage to health: s 106(3).

125 Only on publication of the draft Bill was it admitted that the police already carried out CNE, under the thin authority of s 93 of the Police Act 1997; the IPA 2016 amends the 1997 Act so as to prevent its use for the purpose of obtaining communications, private information, or equipment data: s 14. This does not, of course, prevent it being used for other forms of CNE.

126 Draft Investigatory Powers Bill 2015: Explanatory Notes, 83. Bulk CNE was raised in the *Privacy/GreenNet* case, though the IPT reserved for consideration 'on particular facts and when questions of jurisdiction are examined, whether an individual complainant might be able to mount a claim' regarding the use of s 7 of the 1994 Act for that purpose: [2016] UKIP Trib 14_85-CH, [63]. See also above (n 78): in the application to the European Court of Human Rights mentioned there, the question of bulk CNE under the 1994 Act can be expected to figure prominently. What is said by the Strasbourg Court – particularly as regards the application of the ECHR to extra-territorial CNE – will be significant for any assessment of the Convention-compatibility of bulk EI under the 2016 Act.

127 IPA 2016, s 178(d). The operational purposes specified in a bulk EI warrant restrict the examination of the material obtained thereunder. They must be chosen from amongst those found in a list maintained by the heads of the SIAs, to which new operational purposes cannot be added except with the authority of the Secretary of State, and a copy of which must be given to the Intelligence and Security Committee at quarterly intervals, and which must be reviewed by the Prime Minister annually: ISA 2016, s 183(5), (7), (9) and (11). The Secretary of State can approve the addition of an operational purpose to the list only if satisfied that 'the operational purpose is specified in a greater level of detail' than the purposes for which a bulk EI warrant may be sought: IPA 2016, s 183(8). Given the breadth of those purposes, this is not much of a hurdle.

bulk interception warrants under both RIPA 2000 and the IPA 2016,[128] the availability of warrants for bulk EI reflects the geographic separation noted above, being limited to the acquisition of 'overseas-related' material.[129] Such warrants, however, (again following a pattern set by RIPA 2000)[130] also authorise 'any conduct which it is necessary to undertake in order to do what is expressly authorised by the warrant', including (most importantly) the acquisition of data, communications, or information relating to people who are not outside Britain.[131] The effect of that provision is to potentially undermine the implicit geographical logic of *Entick* noted above.

In his review of the operational case for the bulk powers under the 2016 Act, David Anderson QC (the Independent Reviewer of Terrorism Legislation) described bulk EI as 'a fast-developing alternative to bulk interception'[132] and concluded that, though 'an operational case for bulk EI has been made out in principle', there was required 'very considerable caution', not least because of the untried nature of bulk EI and its ability to recover data which has never been sent anywhere.[133] This last point recalls some of the *dicta* from the general warrant cases quoted above and the fact that a person's papers are his 'dearest property'. There is in the UK a long history of communications being intercepted, whether in the post office (including when telephone exchanges were sited there)[134] or elsewhere, with the relevant authority found in the murky depths of the history of the Royal Prerogative,[135] or under the Interception of Communication Act 1985 and, later, RIPA 2000. Powers of EI – both targeted and bulk – are not, however, limited to communications in the sense of things communicated by one person to another, but apply also to 'stored communications' which, once the relevant definitions in the IPA 2016 are pieced together, reveals itself to be more or less anything found upon one's computer.[136] This is a qualitatively different, and in many ways more intrusive, power than that of intercepting only one communicate to another.[137] If papers were once one's 'dearest property', then how much dearer – how much more sensitive – the contents of one's hard drive?

Reflecting this, there exist certain safeguards on the use of material obtained via bulk EI, which work to ensure that the powers in question are not used to bypass the

128 RIPA 2000, s 16(2); IPA 2016, s 136.

129 IPA 2016, s 176(1)(c), (2) and (3).

130 RIPA 2000, s 5(6).

131 IPA 2016, s 176(5).

132 David Anderson QC, *Report of the Bulk Powers Review* (Cm 9326 August 2016) [7.33].

133 Ibid [7.37].

134 On this point, see *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344. For a discussion of the history of telephone interception, see Patrick Fitzgerald and Mark Leopold, *Stranger on the Line: Secret History of Phone Tapping* (Bodley Head 1987).

135 See the Report of Committee of Privy Councillors, *Interception of Communications* (Cmnd 283 1957) ('the Birkett report').

136 In relation to targeted interference, see IPA 2016, s 99(6) and (8) (the latter of which defines 'stored communication' as a communication 'stored in or by a telecommunication system (whether before or after its transmission)'); s 261(13) (defining a 'telecommunication system' as 'a system (including the apparatus comprised in it) that exists (whether wholly or partly in the United Kingdom or elsewhere) for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electromagnetic energy'); s 261(2) (defining 'communications' to include 'anything comprising speech, music, sounds, visual images or data of any description' and 'signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus'); and s 263(1) (defining 'apparatus' as including 'any equipment, machinery or device (whether physical or logical) and any wire or cable').

137 See also the discussion of the intrusiveness of EI by Liberty (n 117) [75]–[78].

requirements of a targeted EI warrant. Specifically, material obtained through bulk EI (other than equipment data or non-private information),[138] may not be selected for examination if:

> . . . any criteria used for the selection of the material for examination are referable to an individual known to be in the British Islands at that time, and the purpose of using those criteria is to identify protected material consisting of communications sent by, or intended for, that individual or private information relating to that individual.[139]

This implies, conversely, that, where the purpose of using those criteria in question is to identify material which is not 'protected material' (defined to mean, roughly, private information and the content of communications),[140] then it can take place without additional authorisation. If it is desired to select information for examination in breach of this restriction, the SIAs must seek a 'targeted examination warrant' which 'authorises the person to whom it is addressed to carry out the selection of protected material obtained under a bulk EI warrant for examination, in breach of the prohibition' described,[141] for which the preconditions are equivalent to those for the making of a targeted interference warrant, alongside the requirement that 'the Secretary of State considers that the warrant is or may be necessary to authorise the selection of protected material for examination' in breach of the prohibition.[142] A targeted examination warrant may itself be thematic: though the thematic permissions offered in the Act are fewer than are those relating to targeted EI warrants, they include nevertheless that a targeted examination warrant may relate to:

(a) a particular person or organisation;

(b) a group of persons who share a common purpose or who carry on, or may carry on, a particular activity;

(c) more than one person or organisation, where the conduct authorised by the warrant is for the purpose of a single investigation or operation;

(d) the testing, maintenance or development of capabilities relating to the selection of protected material for examination;

(e) the training of persons who carry out, or are likely to carry out, the selection of such material for examination.[143]

On one hand, the differential treatment of 'domestic' EI and 'foreign' bulk EI may appear an attempt to prevent the acquisition of bulk EI being used to bypass the limitations on the use of the targeted powers. In practice, however, the relationship between targeted and bulk EI may be exactly the opposite, given the availability of thematic targeted EI warrants. Because, as was pointed out by the Intelligence and Security Committee in its report on the Bill, a targeted warrant is 'not limited to an individual piece of equipment, but can relate to all equipment where there is a common link between multiple people, locations or organisations',[144] a thematic warrant can do much – though not, of course, all – of the work a bulk EI warrant might do, but with fewer procedural limitations. That is, targeted

138 IPA 2016, s 193(1)(c) and (9).

139 Ibid s 193(1)(c), (3)(a), and (4).

140 Ibid s 193(9) and s 198(1) (defining 'private information' to mean 'relating to a person's private or family life') and s 177 (defining 'equipment data').

141 Ibid s 99(9).

142 Ibid s 102(3).

143 Ibid s 101(2).

144 Intelligence and Security Committee, *Report on the Draft Investigatory Powers Bill* (HC 795, 2015–16) [14].

EI warrants are available to parties other than the SIAs (bulk EI warrants are not), do not require a national security purpose (bulk EI warrants do), and can be domestic-focused (which bulk EI warrants cannot be). The Independent Reviewer of Terrorism Legislation suggested in evidence to the Bill Committee that the provision for thematic warrants 'effectively import[ed] an alternative means of performing bulk EI, with fewer safeguards'[145] and that the government's explanation (that in thematic situations 'the Secretary of State and the Judicial Commissioner are likely to be able to adequately foresee the proposed interferences with privacy in relation to the data to be examined to a sufficient degree, such that the additional access controls under the bulk EI warranty regime are not required')[146] potentially 'place[s] excessive weight on the discretion of decision-makers'.[147] The Draft Code of Practice, which will apply to thematic EI warrants under the 2016 Act, states that '[t]he warrant application must also contain as much information as possible and be as specific as possible in relation to the equipment to be covered' on the basis that, as well as 'fully informing the issuing authority, this will also assist those executing the warrant so that they are clear as to the scope of what actions and equipment the warrant covers'.[148] The concepts of necessity and proportionality therefore do significant work in ensuring that there is no misuse of thematic EI warrants and much will depend on the standard of review applied by Judicial Commissioners to expressions of the Secretary of State's belief that a particular thematic warrant meets the requirements of necessity and proportionality prescribed by the 2016 Act. There are no statutory limitations on EI as regards confidential information generally, though special protections are offered to legally privileged material, both in terms of its acquisition and its examination, requiring an identification of the 'exceptional and compelling circumstances' which make it necessary,[149] and to journalistic material.[150] These latter are, however, significantly weaker than the equivalent protections in PACE 1984.[151]

The IPA 2016 does not otherwise regulate interferences with property, which will continue to take place in accordance with the ISA 1994 and the Police Act 1997. The 1994 Act will continue to contain general powers, there having been no moves towards – as was recommended by the ISC – setting out the agencies' powers 'clearly and unambiguously' so as to avoid the impression of giving them a 'blank cheque'.[152] The IPA 2016 makes the use of EI warrants by the SIAs mandatory when taking action which would otherwise be contrary to the Computer Misuse Act 1990 for the purpose of 'obtaining communications, private information or equipment data'.[153] This restriction applies, however, only where 'there is a British Islands' connection[154] and so, where there is not, there would appear to exist what the IPT has called in another context 'two lawful

145 David Anderson QC, *Written Evidence to the House of Commons Public Bill Committee on the Investigatory Powers Bill* (IP B46, 24 March 2016) [5].

146 HM Government, *Operational Case for Bulk Powers* (March 2016) [8.6].

147 Anderson (n 145) [5].

148 EI Draft Code of Practice (spring 2016) [4.18].

149 IPA 2016, s 112(4)(a) (targeted EI warrants) and s 194 (bulk EI warrants). For elaboration of that phrase, see s 112(6) and s 194(5).

150 Ibid ss 13, 114, and 129(8).

151 Cf Police and Criminal Evidence Act 1984, Schedule 1, which makes provision for notification of the subject of a warrant and *inter partes* argument before a judge prior to the granting of a warrant where there are reasonable grounds for believing that there is 'excluded material' (which includes certain 'journalistic material') or 'special procedure material' (which includes other 'journalistic material') on premises named in a search warrant.

152 Intelligence and Security Committee (n 43) [MM].

153 IPA 2016, s 13.

154 Ibid s 13(1)(b).

routes'[155] for the conduct of EI – the IPA not being directly incompatible with the 1994 Act, it seems unlikely that the later Act will be held to have impliedly repealed the earlier one to the extent it permits the carrying out of EI.[156] Though the IPA 2016 amends the 1994 Act so as to put MI6 and GCHQ in the same position as MI5 as regards their ability to carry out property interferences in support of the prevention or detection of serious crime in the UK,[157] the 'British Islands connection' rule prevents that change being used to bypass limitations contained in the IPA 2016. That does not counter fully the fear once expressed by Hunt and Duffy; other limits in other contexts may nevertheless be bypassed on this basis.

If EI must now (subject to the exceptions described) take place only under the new IPA 2016 powers, it is impossible to know exactly what activities might (continue to) take place under the residual ISA 1994 powers of property interference. In the first place, it will include the sort of breaking and entering which Peter Wright had in mind when he wrote in *Spycatcher* that he and his colleagues had 'bugged and burgled our way across London at the State's behest, while pompous bowler-hatted civil servants in Whitehall pretended to look the other way';[158] other elements will be interference with property (including EI) or wireless telegraphy where the purpose is not to acquire communications, or equipment data, or other information.[159] That is, CNE which seeks not to acquire data but simply to destroy or otherwise manipulate the functioning of electronic systems can still be authorised under the 1994 Act. What is clear, therefore, is that the decision of the IPT – as to the requirements that section 5 warrants must meet, as well as to the ability of warrants to conform with the ECHR even as regards the heightened requirements which apply to norms permitting surveillance – ensures that the scope for legitimate use of these residual powers is far greater than would otherwise have been the case.

Conclusion

The common law's opposition to general warrants does not logically preclude their statutory existence. On the contrary, legislation which empowers the making of such warrants is an affirmation of the decisions in *Entick v Carrington* and those cases which share the distaste expressed therein for warrants which are general as to the property and, especially, the persons to which they apply. Nevertheless, the decision of the IPT in *Privacy/GreenNet* indicates that the common law has (for now at least) lost some of its suspicion of broad powers of property interference, in a way which conflicts more generally with the spirit of those cases. General terms in the ISA 1994 have been held to be capable of justifying interferences with property even where specific details of the property in question are not found in the warrant. This approach might be justified by reference to the considerations of national security which are reflected in the statutory powers – though a close reading of *Entick v Carrington* would seem to require a suspicion also of such appeals to state necessity – but the powers of the SIAs have never been limited to national security ends and the domestication of the powers to interfere with property by the Security Service Act 1996 and the IPA 2016 for purposes related not to national security but to the prevention and detection of serious crime means that the

155 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 15_110-CH, [57].

156 For the rule of implied repeal, see *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 and the discussion of it in Adam Tomkins, *Public Law* (Oxford University Press 2003) 107.

157 IPA 2016, s 251, amending ss 3 and 5 of the ISA 1994.

158 Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer* (Viking 1987) 54.

159 An example given by a commentator on the Investigatory Powers Bill (the identity of whom I can no longer trace) is that of disabling burglar alarms in order to facilitate entry into property.

broad powers now recognised as existing are liable to be invoked even outside that particular context. Some of the effect of the IPT's decision is superseded by the 2016 Act's creation of powers of EI which are unambiguously thematic, accompanied by new and (even) more intrusive bulk EI powers. In this sense, we are perhaps closer to truly general warrants than at any time since *Entick* was decided, with the relatively limited form of the property interference empowered doing little to dispel the impression that what has happened is in many ways equivalent to what was feared by Lord Camden: 'the secret cabinets and bureaus of every subject in this kingdom' have been 'thrown open to the search and inspection of a messenger' – though, given the geographic distinctions at work, this is truer of thematic than of bulk warrants. Alongside these new powers, there stand also the powers under the 1994 Act, as expanded in 1996 and 2016 (both s 5 and s 7 of which permit property interferences which are authorised thematically though not bulk interferences). The common law may well have set its face against general warrants, but statute now grounds a series of powers which are at least as damaging to the sanctity of property and – more importantly – the privacy of the individual which property helps to secure.

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Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform

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Abstract

Decades of systemic failure to take environmental protection seriously has brought Northern Ireland to the brink of environmental, and now political and economic disaster. This article will consider the reasons why environmental governance in this jurisdiction has continued to be so problematic and the cost of government failure in this context for the people of Northern Ireland. It will set out the environmental, economic and socio-political consequences of the epic failures of successive devolved administrations to take environmental governance seriously, to respond to critiques of the performance of the environmental regulator and to ensure the effective enforcement of environmental law. Finally, it will consider options for dealing with this ongoing problem in a turbulent political environment where collapsing political institutions at Stormont and wider constitutional issues associated with the UK's plans to leave the EU may continue to stymie reform or present a unique opportunity to reinvent environmental governance and begin the process of remedying the damage caused by years of neglect.

Keywords: environmental governance; Northern Ireland; enforcement; regulation; waste crime.

1 Introduction

Recent scandals including the Renewable Heat Incentive (RHI) debacle[1] and the discovery of illegal dumping on a massive scale[2] have catapulted Northern Ireland's

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1 The RHI scandal and its implications will be discussed below, but essentially involved the mismanagement and alleged corruption of a funding scheme designed to incentivise the installation of renewable heat technologies (particularly wood-pellet stoves). A failure to apply proper cost controls has resulted in a predicted overspend of hundreds of millions of pounds. The scheme was delivered by the (then) Department of Enterprise, Trade and Investment from 2012 until its suspension in 2016 and the departmental minister who oversaw its implementation was Arlene Foster – First Minister when the scandal broke in late 2016. For an overview of the RHI scheme and key dates in the timeline see 'Q&A: What is the Renewable Heat Incentive (RHI) Scheme' *BBC News* (13 December 2016) <www.bbc.co.uk/news/uk-northern-ireland-38307628> and Thomas Muinzer, 'Incendiary Developments: Northern Ireland's Renewable Heat Incentive and the Collapse of the Devolved Government' (March/April 2017) 99 UKELA E-Law 18.

2 Ciara Brennan, 'The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' (2016) 28(3) Journal of Environmental Law 471–96. Discoveries of more illegal dumps continue to be made, and in early 2017 the *Irish News* reported that the NIEA was currently

environmental governance failures into the public eye. The financial implications of these failures – which extend far beyond recent news headlines – are so epic in scale that they have played a key role in the destabilisation of Stormont's political institutions and now threaten the economic viability of the state.[3] To many the impending crisis is no surprise and the problematic nature of environmental governance in Northern Ireland has been well documented over the last 30 years. Official scrutiny bodies such as the House of Commons Environment Select Committee,[4] Northern Ireland Audit Office (NIAO),[5] the Northern Ireland Affairs Committee (NIAC),[6] the Public Accounts Committee (PAC)[7] and the Criminal Justice Inspectorate (CJI)[8] have all published reports that have highlighted serious deficiencies both in how arrangements for environmental governance have been designed and how environmental regulation has been delivered. There have also been high-level governance reviews (commissioned by both the environmental non-governmental organisation (ENGO) community and government) which have set out clear and achievable options for reform.[9] For over a decade Northern Ireland's ENGO community has campaigned without success for an independent environmental regulator to enhance the protection of the jurisdiction's natural resources.[10] Academic analysis has highlighted significant issues with Northern Irish environmental law and its implementation.[11] Even the

(*n 2 continued*) investigating over 700 illegal dumping incidents involving an estimated 500,000 tonnes of waste. See, John Monaghan, 'More than 700 Live Investigations into Illegal Dumping in Northern Ireland' *Irish News* (Belfast, 4 January 2017) <www.irishnews.com/news/2017/01/04/news/more-than-700-live-investigations-into-illegal-dumping-in-northern-ireland-862958/>.

3 The extent to which the RHI scandal caused the collapse of the devolved government is disputed. Sinn Féin's narrative characterises RHI (specifically Arlene Foster's refusal to step aside as First Minister while the issues with RHI were investigated) as the 'straw that broke the camel's back', but DUP policy decisions relating to Brexit, legacy issues, cutting of Irish Language funding, the delay in introducing an Irish Language Act, the failing health of Sinn Féin party leader Martin McGuinness and worsening DUP/Sinn Féin relations throughout 2016 were also clearly significant factors. The DUP disputes any wrongdoing on the part of Arlene Foster and, at the time of writing, the matter is due to be investigated via public inquiry. See Chris Page, 'Stormont: All You Need to Know about NI's Latest Political Crisis' *BBC News* (16 January 2017) <http://www.bbc.co.uk/news/uk-northern-ireland-38612860>.

4 House of Commons Select Committee on the Environment, *Environmental Issues in Northern Ireland (First Report of the Environment Committee* (Rossi Report) HC 1990–91, 39).

5 NIAO, *Control of River Pollution in Northern Ireland* (HC 1997–98, 693); NIAO, *Areas of Special Scientific Interest* (HC 2003–2004, 499); NIAO, *Northern Ireland's Waste Management Strategy* (HC 2005–06, 88).

6 House of Commons NIAC, *Waste Management Strategy in Northern Ireland* (HC 2004–05, 349-I).

7 Northern Ireland Assembly PAC, *Control of River Pollution in Northern Ireland* (Third Report 2001) <http://archive.niassembly.gov.uk/public/reports/report3-00r.htm>.

8 CJI, *Enforcement in the Department of the Environment* (2007) <www.cjini.org/getattachment/6e35e56d-68e5-41d3-b099-c33586abf0dd/Enforcement-in-the-Department-of-Environment.aspx>; CJI, *Enforcement in the Department of the Environment Northern Ireland: A Follow Up Review of Inspection Recommendations* (2011) <www.cjini.org/CJNI/files/d7/d71473bc-2dc9-4ff5-b957-d410ff851852.pdf> 9; CJI, *A Review of the Northern Ireland Environment Agency's Environmental Crime Unit* (2015) < www.cjini.org/getattachment/776ee5fc-b3c0-4759-8fbe-18a72a8f31e5/A-review-of-the-Northern-Ireland-Environment-Agenc.aspx> 35.

9 Richard Macrory, *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland* (UCL Press 2004) and Tom Burke, Gordon Bell and Sharon Turner, *Foundations for the Future: The Review of Environmental Governance* (2007) <www.ukela.org/content/doclib/135.pdf>.

10 For a detailed discussion of this campaign, see Sharon Turner and Ciara Brennan, 'Modernising Environmental Regulation in Northern Ireland: A Case Study in Devolved Decision Making' (2012) 63 Northern Ireland Legal Quarterly 509.

11 Ibid and e.g. Sharon Turner, 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' (2006a) 18 Journal of Environmental Law 55; Sharon Turner, 'Transforming Environmental Governance in Northern Ireland Part Two: The Case of Environmental Regulation' (2006b) 18 Journal of Environmental Law 245; Sharon Turner, 'The Review of Environmental Governance in Northern Ireland' (2009) 2 Environmental Law Review 10–16; Brennan (n 2).

environmental regulator has commissioned reports which have identified significant problems with its own performance.[12] Perhaps the most damning indictments of the current governance systems have come from within government itself. One former Environment Minister, Alex Attwood, described the structures of the Northern Ireland Environment Agency (NIEA) in 2013 as not being fit for purpose.[13] Another recent (former) Environment Minister, Mark H Durkan, said in 2015 that the present environmental governance models were in need of radical review and needed to be replaced quickly.[14] However, despite evidence of serious regulatory dysfunction stretching back over three decades, unacceptable levels of non-compliance with environmental law and significant degradation of environmental quality, Northern Ireland's political class, as a whole, ultimately seems unwilling or unable to actually instigate any real change.

To some degree, the relegation of environmental concerns down the list of political imperatives in societies emerging from conflict is not surprising and has been recognised in other jurisdictions.[15] However, 20 years after the Good Friday Agreement and in the face of a long history of warnings, criticism and debates on this issue in the intervening years, failure to engage with the need for effective environmental governance and respond with meaningful reform now seems difficult to justify.[16] With the fall-out from the RHI scandal still looming over Northern Ireland's increasingly fragile political institutions and as the financial legacy of the years of regulatory neglect of the environment begins to become clear, Northern Ireland's taxpayers will ultimately now have to pay the price for the government's failure to protect their environment. However, amidst ongoing negotiations about Northern Ireland's political future, the issue of environmental governance could now be 'back on the table'. Faced with dramatic political and economic uncertainty in the wake of the Brexit vote and Stormont's collapse, a unique moment in time may have been created where there are opportunities to reform environmental governance structures, remould political attitudes to the environment and set in place a plan for full-scale renovation of Northern Ireland's approach to environmental protection. On the other hand, continued sidelining of these issues will have serious implications for decades to come.

This article will unravel the complexities of the environmental governance debate in Northern Ireland. It will firstly consider characteristics of 'good' environmental governance and set out an analytical framework that can be used to assess this quality and

12 Christopher Mills, *A Review of Waste Disposal at the Mobuoy Site and the Lessons Learnt for the Future Regulation of the Waste Industry in Northern Ireland* (Mills Report, DOE 2013).

13 Northern Ireland Assembly, Private Members Business, 21 January 2013 <http://www.theyworkforyou.com/ni/?id=2013–01–21.7.1>.

14 Northern Ireland Executive, 'Durkan Opens Debate for an Independent Environment Protection Agency' (Press Release, 22 September 2015) <https://ciwm-journal.co.uk/ni-proposes-independent-environment-protection-agency/>.

15 E.g. Ken Conca and Jennifer Wallace, 'Environment and Peacebuilding in War-torn Societies: Lessons from the UN Environment Programme's Experience with Post-Conflict Assessment' (2009) 15(4) Global Governance: A Review of Multilateralism and International Organizations 485–504. For discussion of the impact of the conflict on environmental governance in Northern Ireland, see Sharon Turner and Karen Morrow, *Northern Ireland Environmental Law* (Gill & Macmillan 1997); Karen Morrow and Sharon Turner, 'The More Things Change, the More They Stay the Same? Environmental Law, Policy and Funding in Northern Ireland' (1998) 10(1) Journal of Environmental Law 41–59.

16 One of the UK's foremost environmentalists argued in 2015 that Northern Ireland should no longer use its troubled past as an excuse for failings over the environment. Jonathon Porritt said on the BBC that 'while there had been a justifiable focus on the political process, things needed to change. There's no excuse any longer for relegating the environment to a second-division issue.' 'Jonathon Porritt: Troubles "No Excuse for Environmental Failings"' *BBC News* (7 June 2015) <www.bbc.co.uk/news/uk-northern-ireland-33025054>.

facilitate an evaluation of the degree of divergence from this model in Northern Ireland. The article will then identify the core problems with the current environmental governance arrangements, drawing from documented evidence of regulatory and policy dysfunction stretching back over 30 years which reflects an unequivocal political failure to take the protection of the environment seriously in this jurisdiction. Three key themes which have featured most prominently in the governance debate in this jurisdiction will be considered: problematic environmental regulation structures; outdated or ineffective environmental law and policy; and unsatisfactory delivery of environmental regulation in practice. The analysis will then move on to examine the environmental impact, economic risks and consequences and political and social implications of weak environmental governance. The impact of political developments and, in particular, some of the potential threats and opportunities attached to the unfolding Brexit situation will then be explored. Finally, mechanisms through which environmental protection efforts in Northern Ireland can be improved, but also insulated from the political maelstrom in which the jurisdiction is currently engulfed, will be proposed. The article will conclude by mapping a pathway through which an ambitious programme of environmental governance reform in Northern Ireland could be achieved.

2 Evaluating environmental governance 'success'

Environmental governance is a concept that has inspired a continuously evolving interdisciplinary field of theoretical debate, as well as extensive empirical research examining the regulatory processes, mechanisms and organisations that influence environmental management and outcomes at global, regional and domestic levels.[17] The distinction between government and governance, the shift to 'new' policy instruments and the need for collaboration between private, public and non-governmental stakeholders to achieve environmental outcomes have been prominent themes in recent environmental governance discourse.[18] However, what constitutes environmental governance 'success' in a more general sense has proven more difficult to pin down. The absence of consensus on a definition of environmental governance coupled with its complex, multi-dimensional nature have exacerbated difficulties in establishing an accepted evaluative framework.[19] While key features of what is considered 'good' environmental governance generally include (in various forms) 'effective collaboration, participation, deliberation, learning and new, more horizontal, forms of accountability', it is also widely acknowledged that these criteria are, in themselves, difficult to appraise.[20]

17 Maria Carmen Lemos and Arun Agrawal, 'Environmental Governance' (2006) 31 Annual Review of Environmental Resources 297–325, 298.

18 Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Routledge 2013); Andrew Jordan, Rüdiger K W Wurzel and Anthony R Zito, 'New Instruments of Environmental Governance: Patterns and Pathways of Change' (2003) 12(1) Environmental Politics 1–24; Philipp Pattberg and Fariborz Zelli (eds), *Environmental Politics and Governance in the Anthropocene: Institutions and Legitimacy in a Complex World* (Routledge 2016); Marleen Buizer, Bas Arts and Kasper Kok, 'Governance, Scale and the Environment: The Importance of Recognizing Knowledge Claims in Transdisciplinary Arenas' (2011) 16(1) Ecology and Society 21; Magali A Delmas and Oran R Young, *Governance for the Environment: New Perspectives* (Cambridge University Press 2009).

19 John Vogler and Andrew Jordan. 'Governance and the Environment' in Frans Berkhout, *Negotiating Environmental Change: New Perspectives from Social Science* (Edward Elgar 2003) 137–58.

20 Holley et al (n 18) 12.

Although there are inherent difficulties in developing a framework that can evaluate the success of a concept as expansive as environmental governance, the integration of environmental concerns across policy areas is widely perceived as central to achieving effective environmental governance and sustainable development and is, in some respects, more straightforward to assess.[21] Environmental policy integration (EPI) can thus be considered as one of 'the guiding axioms of green thinking and practice' and the extent to which EPI has occurred can provide insights into wider environmental governance considerations.[22] On one level, the concept is an important policy-making principle, but it has been argued that the enhanced legal grounding bestowed upon EPI in some contexts (e.g. within the EU) has elevated its status to a quasi-constitutional 'standard to be observed'.[23] As a result, academics and policy-makers have sought to develop systematic analytical frameworks that can shed light on the extent to which EPI has occurred in a given context.[24] One of the most comprehensive of these has been created by the European Environment Agency (EEA). The features identified within the EEA framework include political commitment and strategic vision; administrative culture and practices enabling environmental co-operation, coordination and transparency; environmental integration into policies and programmes; availability of environmental information; mechanisms for engagement in consultation and participation; effective use of policy instruments; monitoring and learning from experience; mechanisms for environmental policy evaluation; state of the environment reporting; and appropriate and coherent use of environmental indicators and feed-back mechanisms.[25] By considering how these features operate in a specific context, insights into the overall level of EPI can thus demonstrate strengths and weaknesses in systems of environmental governance.

In Northern Ireland scrutiny reports published over the last three decades have highlighted significant problems with how the environment is managed and protected.[26] There have also been reviews that have explicitly sought to demonstrate environmental governance failures and which have highlighted directions for reform.[27] These scrutiny reports and reviews have been analysed in detail elsewhere.[28] This article will focus on three dominant themes that have characterised critiques of environmental governance in this jurisdiction: problematic environmental regulatory structures; outdated or ineffective

21 Hens Runhaar, Peter Driessen and Caroline Uittenbroek, 'Towards a Systematic Framework for the Analysis of Environmental Policy Integration' (2014) 24(4) Environmental Policy and Governance 233–46; Gerard Mullally and Niall P Dunphy, *State of Play Review of Environmental Policy Integration Literature* (Research Series Paper 7, National Economic and Social Development Office 2015) <http://files.nesc.ie/nesc_research_series/Research_Series_Paper_7_UCC.pdf>.

22 Andrew Jordan and Andrea Lenschow, 'Environmental Policy Integration: A State of the Art Review' (2010) 20(3) Environmental Policy and Governance 147–58, 156.

23 Ibid 148. Under Article 6 of the European Community Treaty, 'environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities . . . in particular with a view to promoting sustainable development'.

24 William Lafferty and Eivind Hovden, 'Environmental Policy Integration: Towards an Analytical Framework' (2003) 12(3) Environmental Politics 1–22; Måns Nilsson and Åsa Persson, 'Framework for Analysing Environmental Policy Integration' (2003) 5(4) Journal of Environmental Policy and Planning 333–59.

25 EEA, *Environmental Policy Integration in Europe: State of Play and an Evaluative Framework* (Technical Report 2/2005, EEA 2005) <www.ieep.eu/work-areas/environmental-governance/environmental-policy-integration/> 50–5.

26 NIAO (n 5); NIAC (n 6); PAC (n 7); CJI 2007, CJI 2011 and CJI 2015 (n 8).

27 Macrory (n 9) and Burke et al (n 9).

28 Ciara Brennan, *The Enforcement of Environmental Regulation in Northern Ireland: A Story of Politics, Penalties and Paradigm Shifts?* (PhD thesis, Queen's University Belfast 2013); Turner 2006a, 2006b and 2009 (n 11); Turner and Brennan (n 10); Brennan (n 2).

environmental law and policy; and unsatisfactory delivery of environmental regulation in practice. These themes are not mutually exclusive, nor are they the only problems to have been identified. However, they do represent the most recurrent 'headline' issues raised in the Northern Irish context and also broadly mirror the key policy levels considered within other recent environmental governance research.[29] Examining these issues through the lens of the EEA's EPI framework at a time of significant political turmoil will assist in clarifying features of Northern Ireland's existing environmental governance arrangements that are in particular need of reform and highlight pathways towards delivering these reforms in practice.

3 A history of environmental governance dysfunction

3.1 Political manoeuvring, power-sharing and structures of environmental governance

The structural arrangements for the delivery of environmental regulation in Northern Ireland remain enigmatic within the UK and Ireland and are perceived with deep dissatisfaction by ENGOs, academics, almost all of Northern Ireland's political parties and public scrutiny bodies.[30] The most obvious difference (and one around which environmental governance debates have coalesced) is the lack of an 'independent' environmental protection agency (IEPA), where environmental regulation is delivered by a body at arms-length from central government.[31] The rationale for this separation (which exists in all other parts of the UK and Ireland) is essentially to prevent political interference in regulatory decision-making, but also to create a body that can act as a champion for environmental interests and whose decision-making is guided by the need to protect the environment rather than any other factors.[32] However, uniquely within the UK, the NIEA carries out the bulk of regulatory activities relating to the environment as an executive agency within a central government department.[33] Although the presence of an IEPA is not necessarily a prerequisite for effective environmental protection, many of the regulatory failures that have occurred over the past 30 years have been attributed to this feature of Northern Ireland's environmental governance arrangements.[34] Particularly problematic issues have been the creation of 'poacher–gamekeeper' scenarios within environmental regulation,[35] allegations of political interference in regulatory decision-making[36] and inconsistent environmental policy-making dependant on the political

29 Wurzel, Zito and Jordan, for example, adopt an institutionalist approach which examines organisational structures, policy style and policy goals/strategies in Austria, Germany, the Netherlands and the UK and how these factors have influenced and are influenced by environmental policy instruments: Rüdiger K W Wurzel, Anthony R Zito and Andrew J Jordan, *Environmental Governance in Europe: A Comparative Analysis of the Use of New Environmental Policy Instruments* (Edward Elgar 2013) 47.

30 Turner and Brennan (n 10).

31 Typically, in the form of a non-departmental public body (NDPB).

32 Burke et al (n 9) 50–3.

33 Ibid 50.

34 Ibid.

35 For example, one highly criticised arrangement meant that district councils in Northern Ireland held responsibility for both operational and regulatory functions associated with waste management until 2004. This was identified as very problematic as far back as 1990 by a report of the House of Commons Select Committee (n 4).

36 This problem has been raised by the CJI on a number of occasions: CJI 2007, CJI 2011 and CJI 2015 (n 8).

allegiance of successive environment ministers.[37] The recent reorganisation of government departments has also arguably enhanced the risk of agency-capture by increasing the proximity between the regulator and the regulated community within the new Department of Agriculture, Environment and Rural Affairs (DAERA).[38]

Resistance to any change to the current arrangements and particularly to the externalisation of environmental regulation in Northern Ireland has been persistent and is demonstrative of the gross politicisation of environmental issues in this jurisdiction. Historically, maintaining a viable workload for the old Department of the Environment (DOE) arguably required the presence of the NIEA, which represented a large part of its daily business.[39] This consideration was particularly relevant in the mid-2000s, when removal of the NIEA would have essentially forced the very unstable power-sharing Executive to undertake a review of how executive responsibilities were divided across government departments.[40] Until recently therefore, it could be argued that preserving the NIEA within the DOE was essential to maintaining the correct number of government departments in support of power-sharing arrangements. Given the constitutional and political balancing act that surrounded the make-up of various departments and the need to 'spread out' responsibilities for key government functions across departmental and political divides, this was undoubtedly one of the primary (although not officially acknowledged) reasons for maintaining the status quo for many years.[41] However, although this particular driver for a centralised environmental regulator was removed after departmental reshuffles in 2016 when the NIEA was subsumed within the new DAERA, political resistance to externalisation of the regulatory function has nevertheless been retained.[42]

The explanations for this tenacious resistance to independent environmental regulation are varied. However, it is worth noting that all political parties (and direct rule ministers) have indicated support for an IEPA at some point within the last decade – except for the Democratic Unionist Party (DUP) which has persistently halted debates around the issue in the face of both political opposition and overwhelming public

37 Turner and Brennan (n 10). Recent examples throw this issue into sharp resolution. With the transfer of the NIEA to the new DAERA, concerns surrounding the ability of the NIEA to effectively regulate agricultural pollution have been rife. The SDLP Minister for the Environment, Mark Durkan, halted negotiations surrounding a Memorandum of Understanding (MOU) between the NIEA and the Ulster Farmers Union (UFU) due to concerns that it would force the NIEA to treat agricultural polluters with more leniency than other industries. This decision was supported by ENGOS, but was simply reversed when the DUP Minister Michelle McIlveen took over the running of the Department in May 2016. See 'Ulster Farmers Union Seeking to Reverse SDLP Minister's Veto on Agricultural Pollution Plan' *Irish News* (Belfast, 30 May 2016) <www.irishnews.com/news/2016/05/30/news/ulster-farmers-union-seeking-to-reverse-sdlp-minister-s-veto-on-agricultural-pollution-plan-537872/>.

38 Turner and Brennan (n 10). The political influence that major industry or other stakeholders (e.g. the agricultural community) hold over regulators and rule-makers, as well as common interests between the regulated community and the regulator, have been identified as key triggers for agency-capture. See Philip Lowe, Judy Clark, Susanne Seymour and Neil Ward, *Moralizing the Environment: Countryside Change, Farming and Pollution* (UCL Press 1997). This risk has clearly been exacerbated by the merging of DARD and the DOE and the continued location of the NIEA within this new department.

39 Turner and Brennan (n 10) 523.

40 Ibid. In 2008, when Arlene Foster (who was at that time the DUP Minister for the Environment) rejected the need for an IEPA, devolution had only been recently restored after its collapse between 2002–2007.

41 Ibid.

42 Minister for Agriculture, the Environment and Rural Affairs, Michelle McIlveen, stated in September 2016 that she had no intention of establishing an IEPA. 'Oral Answers to Questions — Agriculture, Environment and Rural Affairs' in the Northern Ireland Assembly at 3:15 pm on 20 September 2016 <www.theyworkforyou.com/ni/?id=2016-10-25.3.76>.

support.[43] With DUP ministers holding the environmental portfolio intermittently over the last decade,[44] any consultative exercises examining the issue of an IEPA carried out by environment ministers from other parties (notably the Social Democratic and Labour Party's (SDLP) Alex Attwood[45] and Mark H Durkan)[46] have simply been discontinued once the ministerial portfolio has changed hands to the DUP. In the face of such forceful rebuttal from Northern Ireland's largest political party,[47] the frustration of attempts to establish an IEPA has thus far been successful. It has been suggested that the reasons for the DUP's pronounced antipathy towards the establishment of an IEPA relate to its aggressive focus on economic development (which it presumably believes would be stymied by interference from an environmental regulator) and the party's need to appease sections of its electorate that might benefit from 'light-touch' regulation.[48] The party itself has in the past stated that it 'take[s] the environment too seriously' to externalise regulation. However, given the tidal wave of criticism that has engulfed the performance of the environmental regulator in recent history (not to mention the RHI scandal), this particular assertion seems increasingly difficult to justify.[49]

3.2 A SHORT-SIGHTED AND FRAGMENTED APPROACH TO ENVIRONMENTAL LAW AND POLICY-MAKING

Another recurring theme in critiques of Northern Ireland's environmental governance relates to numerous policy decisions made by the devolved government that have had, or have the potential to have, a negative environmental impact. The resistance to making political commitments relating to climate change,[50] ineffective policy-making surrounding

43 Turner and Brennan (n 10) 517.

44 At the time of writing (early June 2017) there was no DAERA Minister in place as the Stormont institutions had not yet been established following their collapse in January 2017. Prior to the collapse of the devolved assembly, the Minister for Agriculture, Environment and Rural Affairs was Michelle McIlveen (DUP) who took ministerial responsibility for the newly formed DAERA in May 2016. Before the formation of DAERA in May 2016, Mark H Durkan (SDLP) was the Minister for the Environment for the DOE. Durkan was preceded by Alex Attwood (SDLP) who held the office from May 2011 until July 2013. When devolution was restored in 2007, the DUP held the environment portfolio until May 2011 when the SDLP took over. DUP Environment Ministers during this period were Edwin Poots (July 2009–May 2011), Sammy Wilson (June 2008–June 2009) and Arlene Foster (May 2007–June 2008).

45 DOE, *Environmental Governance in Northern Ireland: A Discussion Document* (DOE 2011).

46 DOE, *Environmental Governance in Northern Ireland: Discussion Document* (DOE 2015) <www.daera-ni.gov.uk/sites/default/files/consultations/doe/environmental-governance-paper.pdf>.

47 While the DUP remains Northern Ireland's biggest political party in terms of first preference votes, Sinn Féin's strong performance in the most recent election (March 2017) means that there is now only one assembly seat between the two parties. Henry McDonald and Jamie Grierson, 'Sinn Féin Makes Major Gains in Northern Ireland Elections' *The Guardian* (London, 4 March 2017) <www.theguardian.com/politics/2017/mar/03/dup-and-sinn-fein-on-course-to-dominate-northern-ireland-assembly>.

48 The DUP has persistently sought relaxation of agricultural regulation, see Turner and Brennan (n 10) 521; Brennan (n 2) 495. Most recently, establishing a highly criticised MOU with the UFU (n 37).

49 Ministerial Statement on Environmental Governance, *Minutes of the Northern Ireland Assembly* (27 May 2008) <http://archive.niassembly.gov.uk/record/reports2007/080527.htm>.

50 Sharon Turner, 'Northern Ireland's Consent to the Climate Change Act 2008: Symbol or Illusion?' (2013) 25(1) Journal of Environmental Law 63–93; Sharon Turner, 'Committing to Effective Climate Governance in Northern Ireland: A Defining Test of Devolution' (2013) 25(2) Journal of Environmental Law 203–34; Thomas Muinzer, 'Warming Up: Northern Ireland's Developing Response to Climate Change in the Context of UK Devolution' (September/October 2016) 96 UKELA E-Law 19.

mineral abstraction,[51] policies that have failed to protect important natural resources,[52] policy proposals with the potential to erode public participation in environmental decision-making[53] and planning decisions that have resulted in damage to important natural (and cultural) heritage sites[54] have all been well documented. In addition, although Northern Ireland has an abundance of environmental policies and strategies, there is a lack of any overarching strategic policy or vision of the environment in this jurisdiction and policy (like arrangements for enforcement) is produced in a siloed and fragmented way.[55] This has contributed to a confusing, and sometimes conflicting, policy framework in areas such as transport, environment, land-use planning, education and social

51 A litany of concerns has surrounded the process whereby planning permission was granted to Dalradian for an exploratory gold mine near Gortin, Co Tyrone. Connla Young, 'Tyrone Residents Voice Fears over Cyanide Goldmine Plan' *Irish News* (Belfast, 5 February 2016) <www.irishnews.com/news/2016/02/05/news/tyrone-residents-voice-fears-over-cyanide-gold-mine-plan-407011/> and for detail on the alleged procedural irregularities <https://www.foe.co.uk/sites/default/files/downloads/10-concerns-about-dalradian-gold-mine-75430.pdf>.

52 For example, government support of the controversial exploratory drilling for oil at a site near Woodburn Forest near Carrickfergus in 2016 attracted criticism from environmental activists across Ireland, who feared water pollution and the release of contaminants. Ultimately, no exploitable oil was discovered. However, the DUP's Sammy Wilson (a previous Northern Ireland Environment Minister) said of the explorations: 'I hope they find as much oil in Carrickfergus as there is in Texas. If it becomes the centre of the oil industry in the UK I will be over the moon in terms of investment for the area, jobs for the area, the potential for spin-off industry. It will be like Christmas come early.' Gerry Moriarty, 'Environmental Battle as InfraStrat hunt for Antrim Oil' *Irish Times* (Belfast, 23 May 2016) <http://www.irishtimes.com/news/environment/environmental-battle-as-infrastrata-hunts-for-antrim-oil-1.2656902>.

53 For example, in 2013 the Department of Justice issued a consultation on proposals to revise the costs-capping scheme for eligible environmental challenges. The Northern Ireland Environment Link (representing many of Northern Ireland's environmental NGOs) issued comments on the proposals expressing concern that they would unnecessarily (further) frustrate the ability of environmental NGOs to challenge environmental decisions via judicial review in a context where very few environmental decisions were being challenged in this way. Northern Ireland Environment Link, 'Costs Protection in Environmental Cases: Department of Justice Proposals to Revise the Costs Capping Scheme for Eligible Environmental Challenges – Comments by Northern Ireland Environment Link (February, 2016) <www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf>.

54 A recent example relates to the widespread campaigning targeted at the upgrading and rerouting of the A6 motorway from Belfast to Derry through the Lough Beg Wetlands which is designated as a Ramsar site, an Area of Special Scientific Interest and a Special Protected Area. In addition, the area is of cultural significance as the homeland of the renowned poet Seamus Heaney. Despite concerted campaigning by Friends of the Earth (NI) and a legal challenge brought by a private individual against the government's decision, the development looks set to go ahead – even though, at the time of writing, there is no government in place and the development is based on an environmental assessment over 10 years old. Friends of the Earth (NI) 'Disrespecting Everyday Miracles and the Living Past: The Lough Beg Wetlands and the A6 Road' (Urgent Briefing, March 2017) <www.foe.co.uk/sites/default/files/downloads/lough-beg-wetlands-a6-road-103190.pdf>; Alan Erwin, 'Environmentalist Loses Challenge to Derry Dual Carriageway' *Irish Times* (Belfast, 28 March 2017) <www.irishtimes.com/news/crime-and-law/environmentalist-loses-challenge-to-derry-dual-carriageway-1.3028046>.

55 For example, DOE, *Valuing Nature. A Biodiversity Strategy for Northern Ireland to 2020* (DOE 2015); Northern Ireland Executive, *Everyone's Involved. Sustainable Development Strategy* (Northern Ireland Executive 2010); DOE, *Delivering Resource Efficiency: Northern Ireland Waste Management Strategy* (DOE 2015); Department for Regional Development, *Sustainable Water: A Long-Term Water Strategy for Northern Ireland* (Department for Regional Development 2014).

development.[56] The problem is compounded by a lack of integration, cooperation and communication relating to environmental issues within the Northern Ireland Executive.[57] The RHI scandal represented a classic example of this fragmented approach to environmental governance, where a deeply flawed renewable energy incentive scheme produced by one department (the Department of Enterprise Trade and Investment) was being promoted by another department (the Department of Agriculture and Rural Development (DARD)) that appeared blissfully unaware of its catastrophic economic implications.[58] The DOE at the time seemed to have very little input into what was essentially an environmental scheme. However, as well as highlighting an inherently disorganised and fragmented approach, the RHI scheme in Northern Ireland also demonstrated a more fundamental cultural problem that characterises political attitudes towards the environment in this jurisdiction and seems to underpin policy decisions. While in principle the RHI scheme was designed to assist businesses in moving towards renewable energy resources, in Northern Ireland this principle was implemented with a more central focus of providing economic support to industry.[59] Any environmentally beneficial aspect to the scheme was at best sidelined and at the worst reversed, so businesses could profit from funds designed to promote renewable energy – in some cases allegedly heating empty sheds to generate the profits from using more and more renewable energy resources through the scheme.[60] The corruption of the 'cash for ash' RHI scheme is thus indicative of a dominant perception within Northern Ireland's political class that environmental costs are merely overheads in the business of promoting or supporting economic development and that funding schemes and policies are there to be manipulated for financial gain.

The fragmented policy landscape is also underpinned by a legislative framework that remains some years behind other parts of the UK and a legislature that has been under constant pressure to keep 'up to speed' with EU standards of environmental protection. On the one hand, important developments such as waste management licensing, an integrated system of environmental permitting and reform of environmental sanctions

56 A key example of conflicting policies relates to planning decisions and protection of nature conservation areas, see, for example, Friends of the Earth (NI) (n 54). Restructuring and reform of the planning system (involving the transfer of responsibility for preparation for Local Development Plans to local councils) and the publication of the recent Strategic Planning Policy Statement for Northern Ireland have the potential to significantly improve the strategic approach to planning: DOE, 'Strategic Planning Policy Statement for Northern Ireland' (DOE September 2015) <www.planningni.gov.uk/index/policy/spps_28_september_2015-3.pdf>.

57 Burke et al (n 9) 42.

58 Sean O'Driscoll and Claire O'Boyle, 'Sinn Féin's Michelle O'Neill in Firing Line over RHI as Role of her Department in Hyping Faulty Scheme Revealed' *Belfast Telegraph* (Belfast, 28 January 2017) <www.belfasttelegraph.co.uk/news/rhi-scandal/sinn-Féin s-michelle-oneill-in-firing-line-over-rhi-as-role-of-her-department-in-hyping-faulty-scheme-revealed-35404342.html>. The NIAO reported on the flawed scheme in July 2016 and again in June 2017, ultimately concluding that there are 'significant concerns about the operation of this scheme and the serious systemic weaknesses in controls that have facilitated the possibility of funding that is at best not in line with the spirit of the scheme and at worst is fraudulent'. Although a revised subsidy tariff introduced in 2017 has the potential to vastly reduce the annual cost of the scheme to the Northern Ireland block from £30 million per year to £2 million, the new tiered rate is subject to an ongoing judicial review which has challenged the ability of the department to significantly vary the subsidy rates: NIAO, *Department for the Economy Resource Accounts 2016–2017* (NIAO June 2017) <www.niauditoffice.gov.uk/sites/niao/files/media-files/CAG%20Report%202016–17%20Final.pdf>.

59 Muinzer (n 1).

60 Ibid 19–20.

have been gradually introduced, or are in the process of being introduced.[61] However, these developments have occurred belatedly and there are still aspects of environmental law in Northern Ireland which require significant updating to bring them into line with other parts of the UK.[62] In addition, the well-known practice of directly replicating Westminster's environmental legislation into Northern Irish environmental law with minimal local input is problematic. Although there are practical reasons for this approach given the mammoth task of transposing EU directives and the limited resources available to do so, failure to develop a context-specific legislative framework for environmental protection makes it difficult to implement and there is a risk that the actual legal thinking and understanding of the legislation will not be passed on or inform actual practice.[63]

On the other hand, the pivotal role that the EU has played as a driver for environmental law development in Northern Ireland has always been evident, but has been thrown into sharp resolution in the wake of the UK referendum to leave the EU.[64] Although the UK as a whole would be in breach of its EU law obligations if environmental directives are not transposed and implemented in Northern Ireland, subsequent to the Northern Ireland Act 1998 the devolved government rather than Westminster is liable for the cost of any financial sanctions imposed for this failure.[65] The potentially crippling financial implications of this responsibility have essentially driven environmental law reforms in subsequent years. An impressive programme of legislative modernisation in the early 2000s occurred only in response to infraction threats from the European Commission for failure to transpose environmental directives.[66] Specific problems existed in relation to the Bathing Waters Directive, the Waste Framework Directive, the Integrated Pollution Prevention and Control Directive and the Drinking Water Quality Directive.[67] Between 2001 and 2004, 45 separate pieces of legislation were adopted to remedy these deficiencies in direct pursuit of compliance with EU law and to

61 Criticism of Northern Ireland's failure to modernise its environmental legislation began back in 1990, when the House of Commons Select Committee on the Environment highlighted the extent of the antiquation within Northern Ireland's environmental law regimes: House of Commons Select Committee on the Environment (n 4) paras 32–3.

62 For example, the overly complex laws relating to packaging waste regulation and producer responsibility. The DAERA is currently consulting on consolidation of these rules. See, DAERA, *Consultation Document on Consolidation of the Producer Responsibility Obligations (Packaging Waste) Regulations* (Northern Ireland) 2007 (as amended) (2016) <www.daera-ni.gov.uk/consultations/packaging-waste-regulations-northern-ireland-2016>. Another critical issue is the absence of a properly functioning contaminated land regime. See, Brian Jack, 'Environmental Law in Northern Ireland' in Stephen McKay and Michael Murray, *Planning Law and Practice in Northern Ireland* (Routledge 2017) 154–5. One positive recent development is the provision for the integration of permitting systems via the Environmental Better Regulation Act (NI) 2016.

63 An example of this occurred when the rush to copy over waste legislation by DOE policy-makers in the early 2000s in order to avoid EU infraction proceedings was entirely at odds with the ability of the Environment and Heritage Service (EHS) to effectively enforce and implement the legislation within the necessary timeframe: Brennan (n 2) 478.

64 The potential impact of Brexit on environmental governance in Northern Ireland more generally will be discussed in more detail in section 5.

65 As a function of the MOU and supplementary agreements relating to devolution, Northern Ireland is liable for payment of any infraction fines imposed by the European Commission on the UK for failure to implement European directives that fall within the responsibility of the Northern Ireland Assembly: Office of the Deputy Prime Minister, Memorandum of Understanding and Supplementary Agreements: between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5420, 2001) para B4.25.

66 Turner 2006a (n 11).

67 Jack (n 62) 155.

avoid infraction proceedings and subsequent fines.[68] Since this unprecedented period of legislative modernisation, the spectre of EU infraction fines has continued to exert pressure on Northern Ireland's environmental legislators to update water, air, pollution prevention and control and biodiversity regimes – albeit slowly and imperfectly.[69] While concern about the risk of post-Brexit dilution of environmental standards has been expressed across the UK (and will be addressed in more detail below), the EU's role as the primary motivating force behind any form of legislative modernisation in Northern Ireland arguably elevates the chances of its environmental law and policy framework stagnating, or even decaying in a post-Brexit scenario.

3.3 Catastrophic regulatory and enforcement failures

Possibly the most persistent theme that has dominated discussions surrounding environmental governance in Northern Ireland is the real and perceived failure to implement environmental regulation in practice and the resistance, or lethargy, with which government has responded to reports that have criticised its performance. This demonstrates not only antipathy towards environmental protection, but also blatant disregard for the scrutiny bodies established to audit and monitor regulatory performance.[70] The problematic approach to regulation does not relate to any one distinct category of environmental harm but is endemic and indicative of a systemic failure to regulate environmentally harmful activities. While recent commentary has focused on the particularly visible issue of waste management,[71] critiques of regulation span all areas of the environment including illegal quarrying and mineral extraction, planning,[72] water pollution from agriculture and sewage, and the protection of designated conservation sites.[73] Although the entire process of regulation has been problematic, one of the most criticised functions of the NIEA has been its approach to enforcement of environmental law, almost all aspects of which have been the subject of intense condemnation.[74] Key issues relate to the NIEA's enforcement policy, its fragmented internal structure, the lack of an internal legal team, problems with prosecution of environmental crime by both the NIEA and the Public Prosecution Service (PPS) and the

68 Turner 2006a (n 11) 65.

69 Jack (n 62) 155.

70 For example, in relation to water pollution, the NIAO report published in 1998 (n 5) criticised DOE for failing to respond to the Halcrow Report (William Halcrow, *Efficiency Study of the Environmental Protection Division of the Department of the Environment (NI)* (Department of the Environment 1989) and the PAC report published in 2000 (n 7) similarly criticised the department for failing to respond to the NIAO recommendations. In 1990 Milton (K Milton, *Our Countryside, Our Concern: Policy and Practice of Conservation in Northern Ireland* (Northern Ireland Environment Link 1990)) reported only a 'partial' implementation of the previous Balfour recommendations (J Balfour, *A New Look at the Northern Ireland Countryside* (HMSO 1984) relating to nature conservation in 1984). In 2006 the PAC (House of Commons Committee of Public Accounts, *Northern Ireland's Waste Management Strategy* (HC 2005–06, 741)) criticised the DOE for failure to respond to the recommendations of the WMAB in 2004 (Waste Management Advisory Board for Northern Ireland, *Waste Management Strategy Review Report* (EHS 2004)). In 2007, CJI (n 8) criticised the DOE generally for its failure to respond to previous criticisms.

71 Brennan (n 2); CJI 2015 (n 8); and Mills (n 12).

72 Planning functions were transferred to local councils in 2015. For analysis of this process, see Stephen McKay and Michael Murray, *Planning Law and Practice in Northern Ireland* (Routledge 2017). Enforcement of planning law has historically been highly problematic, e.g. Stephen McKay and Michael Murray, 'In Pursuit of Regulatory Compliance: A Study of Planning Enforcement Structures in Northern Ireland' (2014) 85(3) Town Planning Review 387–410.

73 For a detailed analysis of reports into the problems with environmental regulation across these areas, see Brennan (n 28) 19–50.

74 Ibid.

sentences imposed in environmental prosecutions.[75] Despite significant effort from regulatory staff working within the NIEA, current regulatory arrangements are notably falling behind those in neighbouring countries.

The enforcement policy of the NIEA is not sufficiently detailed to provide a transparent account of the agency's overall approach.[76] While the policy has been reformed in recent years, it remains a short and undetailed document which contrasts significantly with the comprehensive policy and guidance documents produced by, for example, the English Environment Agency (EA).[77] This has the potential to create uncertainty about the NIEA's approach to enforcement both within the agency itself and within the regulated community. This uncertainty is exacerbated by the lack of any centralised enforcement unit within the NIEA, where enforcement is fragmented across the whole organisation leading to a disparate and inconsistent approach and gaps in the enforcement response.[78] The implications of this fragmented approach were thrown into sharp resolution with the discovery of the massive illegal dump at Mobuoy in County Derry in 2014. The 'superdump', now recognised as one of the biggest illegal dump sites in Europe, was created by environmental criminals masquerading behind the front of a legitimate, licensed recycling company.[79] It has since emerged that one of the most significant problems with the regulation of the site in question was that there were essentially multiple parts of the NIEA (and local councils) with responsibility for discrete categories of environmental regulation dealing with different aspects of the operation.[80] Within the NIEA, the Environmental Crime Unit (ECU) eventually began dealing with the 'serious' crime aspect of the offending when its scale became clear in 2012.[81] The Land and Resource Management Unit issued the operators of the site with a licence and were (supposed to be) regulating the licensed activities for years before the illegal dumping was discovered.[82] The Water Management Unit had responded to reports of water pollution in the nearby River Faughan[83] and because there are designated protected sites nearby the Conservation, Designation and Protection team also had responsibilities to ensure those sites were not harmed.[84] In addition to these multiple NIEA teams, the local council had also responded to issues relating to pest control and nuisance odours emitting from the site.[85] The complex regulation of the site and a lack of an integrated approach or communication between the various teams dealing with the operations at Mobuoy essentially created a scenario where the serious offending slipped through the cracks between the remits of the numerous bodies involved.[86] This issue has been exacerbated in the context of waste regulation due to the lack of a comprehensive

75 Ibid.

76 NIEA, *Enforcement Policy* (NIEA 2011) <www.daera-ni.gov.uk/sites/default/files/publications/doe/niea-enforcement-document-2011.pdf>.

77 The EA's enforcement policy documents are available at <www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement>.

78 CJI 2007 (n 8) 5, para 2.3.

79 Brennan (n 2).

80 Mills (n 12).

81 Ibid 13.

82 Ibid 11–12.

83 Ibid 12.

84 Ibid 14.

85 Ibid.

86 Brennan (n 2) 482.

protocol between the NIEA and local government establishing a clear delineation of responsibilities for dealing with illegal disposal of waste.[87]

Another recurrent issue is that the NIEA does not have its own legal team, and the lack of any in-house lawyers means that potential prosecutions are referred to the PPS and handled by PPS staff alongside all other departmental business.[88] This practice is notably out of step with what takes place in the EA in England, Natural Resources Wales (NRW) and in the Scottish Environmental Protection Agency (SEPA).[89] While the arrangement offers flexibility in the type of advice that can be provided by PPS staff, general departmental lawyers will not have as much knowledge and experience as someone specialising in one particular area and this could generate a potential imbalance in legal specialism and a higher rate of case 'failure'.[90] In addition, the lack of a legal core in DAERA means that the legal grounding for the business of regulation is not sufficiently embedded into the culture of the department and the importance of the NIEA's enforcement function is minimised. This is clearly demonstrated by the fact that, while the NIEA's strategic priorities include reference to environmental crime, none of the strategic goals refer explicitly to this core aspect of the NIEA's role[91] and assessments of the NIEA's internal culture reflect an organisation heavily science-focused where enforcement is perceived as a secondary function.[92] The CJI in particular has highlighted the need within the NIEA for 'a stronger emphasis on upholding the law and removing any ambiguity as to the management of breaches of the law'.[93] It has also criticised how environmental enforcement has been undertaken in respect of discretion, consistency and rigour. The CJI has made numerous suggestions in this regard (across several reports) that could improve the status quo, such as strategic changes, oversight systems and better training.

The approach to, and 'success' of, prosecutions for breaches of environmental law have also been the subject of significant debate. This relates not only to a perception that the NIEA does not always prosecute when it should and instead targets 'low-hanging fruit' or easy wins, but also that the handling of environmental prosecutions once they enter the criminal justice system is highly problematic.[94] Although substantial penalties have been provided for within environmental legislation, in general, sentences imposed by the courts fall far below the maximum penalties, below any threshold that could create a deterrent to further commission of environmental crime and far below the levels of penalties imposed in other parts of the UK.[95] While sentencing guidelines were

87 Formal 'fly-tipping' protocols exist elsewhere in the UK to deal with this problem. For the fly-tipping protocol in England and Wales, see England and Wales Environment Agency and Local Government Association/Welsh Local Government Association, *Fly-tipping and Illegal Waste Activities Working Better Together Protocol Series: Protocol 6* <http://www.flytippingactionwales.org/files/8113/5877/5049/fly-tipping_protocol.pdf>. For the Scottish protocol, see Scottish Flytipping Forum, 'Fly-tipping in Scotland: A Guide to Prevention and Enforcement' (December 2010) <http://dumbdumpers.org/wp-content/uploads/2014/07/Flytipping-in-Scotland-A-Guide-to-Prevention-and-Enforcement.pdf> 34.

88 NIEA (n 58) 5.

89 Brennan (n 28) 201–7.

90 The CJI found that on average around 25% of cases referred to the PPS by the NIEA's Environmental Crime Unit failed the test for prosecution: CJI (2015) (n 8) 34.

91 Ibid. In 2015, the CJI concluded that: 'A key strategic document for the NIEA is its Strategic Priorities for 2012–22. The document states that "When standards are breached or crime detected we investigate and pursue offenders vigorously."'

92 Ibid 6.

93 Ibid.

94 Brennan (n 28) 197–276.

95 Ibid and CJI 2007 (n 8).

eventually produced in Northern Ireland in 2012, it remains unclear as to whether these guidelines have had any meaningful impact on the levels of fines imposed.[96] Northern Ireland is also well behind the rest of the UK in its ability to have an effective programme of environmental sanctions. Penalties for breaches of environmental legislation in Northern Ireland are currently nearly always applied through the criminal justice system, whereas other jurisdictions have been expanding the applicability of a wider range of sanctions (e.g. enforcement undertakings), from some discrete sectors like packaging, into new environmental regimes.[97] A commitment from (the then DUP Environment Minister) Arlene Foster in 2008 to deliver a new sanctioning regime as part of her programme of regulatory reform has yet to come to fruition.[98]

4 The impact and implications of weak environmental governance

Significant dysfunction and regulatory failure have clearly characterised Northern Ireland's environmental governance experience to date and it is clear that almost all of the features highlighted in the EPI framework are either entirely absent or seriously compromised. There is a clear lack of political commitment and strategic vision in terms of environmental protection. This has been demonstrated at all policy levels, from the failure to externalise regulation and remove the risk of political interference at a structural level, to weak environmental policy-making where economic development has unapologetically trumped environmental protection and an absence of political will to enhance environmental regulation has been displayed even in the face of catastrophic failures. There is a highly fragmented approach to environmental governance at Executive level as well as within the NIEA. This demonstrates a profound lack of policy integration and is representative of an administrative culture and set of practices that fail to enable co-operation between actors involved in environmental protection, facilitate coordination of plans and strategies and deliver environmental decision-making in a transparent way. The superficial degree of environmental policy integration also displays little concern for the long-term impacts of weak environmental governance or sustainable development. There has been a significant lack of innovation in terms of using policy instrument design and application in a context-specific way, with an over-reliance on replicating developments in other parts of the UK in spite of distinctive regional challenges (e.g. cross-border waste crime). Although monitoring and publication of state-of-the-environment reporting occurs, a key issue has been government's failure to respond to either indicators of environmental degradation or to criticism of government policy and practice by the scrutiny community. The divergence from what can be considered 'good' environmental governance is clear and the environmental, economic and socio-political consequences of these failures cannot now be overestimated.

Recently published figures portray a stark, and in many cases declining, assessment of the state of Northern Ireland's environmental and natural resources. As of 2015, only 33 per cent of Northern Ireland's rivers, 24 per cent of its lakes and 36 per cent of marine waterbodies met the Water Framework Directive targets of good ecological status.[99]

96 Available at <www.jsbni.com/Publications/sentencing-guides-magistrates-court/Pages/Environment-Offences.aspx>. In July 2017 a County Tyrone farmer was fined only £500 for the illegal disposal of over 2000 tonnes of waste in an area of birch bog on his land. 'Tyrone man fined £500 over tonnes of illegal waste' BBC News (BBC, 10 July 2017) <http://www.bbc.co.uk/news/uk-northern-ireland-40558040>.

97 Introduced by the Regulatory Enforcement and Sanctions Act 2008 in England and Wales and Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 in Scotland.

98 Ministerial Statement (n 56) 3–4.

99 DAERA, *Northern Ireland Environmental Statistics Report March 2016* <www.daera-ni.gov.uk/sites/default/files/publications/doe/ni-environmental-statistics-report-2016.pdf> 40, 54.

DAERA also reported in 2015 that the total number of reported water pollution incidents had increased by 6 per cent compared with the last reported year and the number of substantiated incidents had increased by 11 per cent compared with 2012.[100] In addition to poor water quality in rivers, lakes and marine water bodies, Northern Ireland's natural heritage sites and wildlife also appear to be at significant risk. In relation to natural heritage, 33 per cent of features in protected areas were deemed as being in unfavourable condition in 2016, compared to 30 per cent in 2015.[101] Between 1994/95 and 2013/14, the total wetland bird population of Northern Ireland is estimated to have decreased by 26 per cent with coastal populations declining by 16 per cent and freshwater populations by 41 per cent.[102] Significant concern surrounds the maintenance of Northern Ireland's biodiversity, the health of which has been ranked lowest within the UK.[103] Pollution of the terrestrial environment is also endemic and one of the most significant environmental problems in Northern Ireland relates to the illegal disposal of waste. There are hundreds of illegal dump sites in Northern Ireland containing millions of tonnes of waste (some of which might potentially leach into watercourses and drinking water in the future).[104] More than a million cubic metres of waste is estimated to be buried at the Mobuoy 'superdump' alone.[105] There does not appear to be an adequate and visibly resourced national remediation plan to deal with these sites, nor is there a fully functioning contaminated land regime to deal with historic pollution. The cumulative impact of these problems means that Northern Ireland's environment can now be considered to be an environment in crisis. However, given that evidence of serious environmental degradation has thus far been ineffective in persuading Northern Ireland's government to undertake meaningful reform, it is unlikely that environmental factors alone will sway politicians towards addressing these problems.

100 Ibid 49. Agriculture accounts for the highest proportion of water pollution incidents (26.9%), followed by industry and other (18.5% each), domestic (18.3%) and Northern Ireland Water Ltd (16.3%). Significant controversy surrounds the level of penalties imposed by the courts on Northern Ireland's single most prolific polluter Northern Ireland Water (which was prosecuted 41 times between 2011 and 2016) and also surrounding the regulation of agricultural pollution incidents: '"Repeat Offender" Northern Ireland Water Pays Out £80k on Pollution Fines in Five Years' *Belfast Telegraph* (Belfast, 25 November 2016). <www.belfasttelegraph.co.uk/news/environment/repeat-offender-northern-ireland-water-pays-out-80k-on-pollution-fines-in-five-years-35243453.html>; Suzie Cave and Des McKibbon, *River Pollution in Northern Ireland: An Overview of Causes and Monitoring Systems, with Examples of Preventative Measures* (Northern Ireland Assembly Research Paper NIAR 691–15 2016) <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016/environment/2016.pdf>; Conor Macauley, 'Farmers Union Wins Pollution Appeal' *BBC News* (7 February 2017) <www.bbc.co.uk/news/uk-northern-ireland-38895343>; Linda Stewart, 'Fury at Deal to Let Farmers Escape Fines for Pollution' *Belfast Telegraph* (Belfast, 6 April 2015) <www.belfasttelegraph.co.uk/news/environment/fury-at-deal-to-let-farmers-escape-fines-for-pollution-31119738.html>.

101 DAERA, *Northern Ireland Environmental Statistics Report March* 2017 <www.daera-ni.gov.uk/sites/default/files/publications/daera/ni-environmental-statistics-report-2017_2.PDF> 69.

102 Ibid 73. The report notes that there is significant variability in the usage of different sites by wild bird populations and shifts in population may be in some cases attributable to wider climatic change.

103 The Biodiversity Intactness Index (BII) is one measure used to assess the extent of the loss of nature due to human activities going back centuries. BII values below 90% indicate that ecosystems may have fallen below the point at which they can reliably meet society's needs. The value for Northern Ireland is 80%. Of the 218 countries for which BII values have been calculated, Northern Ireland is ranked 24th from the bottom and is ranked the lowest of the UK's four countries. State of Nature, *State of Nature Report 2016: Northern Ireland* <www.bto.org/sites/default/files/publications/state-of-nature-report-2016-northern-ireland.pdf> 3.

104 Cormac Campbell, 'Waking up to Waste: How Northern Ireland's Waste Problem Could Leave a Toxic Legacy' *The Detail* (Belfast ,7 November 2016) <www.thedetail.tv/articles/waking-up-to-waste-how-northern-ireland-s-waste-problem-could-leave-a-toxic-legacy>.

105 Details on the Mobuoy dump and documents relating to the site can be found at <https://www.daera-ni.gov.uk/articles/mobuoy-road-waste-project>.

Perhaps the consequences of environmental governance failings that provide the most political mileage for change relate to the economic costs stemming from either direct clean-up expenses associated with pollution, mitigation of harmful pollutants already emitted and, less tangibly, the value of lost benefits that could have been derived from good environmental governance. Conservative estimates suggest that resolution of the RHI commitments alone could cost the Northern Ireland taxpayer £490 million (never mind the £600 million that the rest of the UK must 'chip in').[106] A high price to pay for at best inept application and at worst alleged political corruption of a policy designed to promote sustainable energy use. Although difficult to estimate because of ongoing investigations, some repatriation costs being paid by the Republic of Ireland for cross-border waste[107] and several remediation options, the clean-up costs resulting from illegal dumping have the potential to reach the eye-watering figure of £440 million. This is comprised of an estimated £140 million to clean up the superdump at Mobuoy Road in Derry, £250 million to clean up previously discovered illegal dump sites and an estimated £50 million to remediate sites currently being investigated.[108] Cleaning up the toxic by-products of illegal fuel laundering has also cost the Northern Ireland government £960,321 between 2012 and 2015.[109] A further £28,791 was spent dealing with problems caused to the water system by toxic sludge linked to fuel smuggling.[110] Although data relating to the cost of remediation of damage to protected sites is unavailable, £1 million has already been spent on developing a remediation restoration plan after damage was caused to Strangford Lough and the Northern Ireland government was threatened with infraction proceedings for non-compliance with the Habitats Directive.[111] Combining the cost of RHI, cleaning up illegal dumping and fuel laundering gives a total and already incurred cost of over £1 billion.

Loss of tax revenue can also be considered a direct consequence of weak enforcement of environmental law. It has been estimated that illegal fuel laundering alone between 2009 and 2014 resulted in a loss of around £400 million in lost revenue.[112] For illegal waste

106 Muinzer (n 1) and Conor Macauley, 'RHI Firms: Minister Using Us as a Political Football' *BBC News* (22 February 2017) <www.bbc.co.uk/news/uk-northern-ireland-39052217>.

107 Olivia Kelly, 'Over 10,000 Tonnes of Waste to Be Repatriated' *Irish Times* (Belfast, 24 August 2011) <www.irishtimes.com/news/over-10–000-tonnes-of-waste-to-be-repatriated-1.604938>.

108 The Mills Report in 2013 (n 12) reported that the DOE had calculated that it had prosecuted 454 offenders for the dumping of illegal waste since 2003. Very little of this waste appears to have been removed or remediated. The report found that, assuming that a risk assessment required the removal of waste from 100 of these sites, with an average volume of 10,000m3 and a removal cost of £215/m3 (based on the repatriation of waste to the Republic of Ireland project), it would cost the Northern Ireland taxpayer £250 million. The estimated amount of illegal waste at the Mobuoy Road site has been reported in the Assembly and by the NIEA Stakeholders Group in November 2015 as a volume of 1,165,155m3, crudely equating to a weight of one-and-a-half-million tonnes. Whilst the estimated tonnage of illegal waste has risen at the Mobuoy Road site, there is confusion as to the final clean-up bill. The Executive and Northern Ireland Stakeholders Group have estimated clean-up costs at this site alone to be between £40 million and £140 million, pending an agreed remediation plan. As well as Mobuoy, the NIEA currently has a further 89 enforcement cases at various stages in the investigative/legal process, involving, approximately 561,644 tonnes of waste the clean-up costs of which can crudely be estimated to amount to a further £50 million. Details of ongoing cases provided by NIEA to author via email (9 December 2015).

109 Adrian Rutherford, 'Illegal Fuel Plants Bankrolling the Dissidents, Polluting Rivers and Endangering Lives' *Belfast Telegraph* (Belfast, 10 February 2015) <www.belfasttelegraph.co.uk/news/northern-ireland/illegal-fuel-plants-bankrolling-the-dissidents-polluting-rivers-and-endangering-lives-30978239.html>. This figure did not include the clean-up costs of toxic material produced at fuel plants, which had to be removed following raids.

110 Ibid.

111 NIAO, 'Protecting Strangford Lough' (Report by the Comptroller and Auditor General 31 March 2015).

112 HL Deb 15 July 2014, vol 755, col 501, Question: Northern Ireland: Illegal Petrol and Diesel' <www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140715-0001.htm#14071553000425>.

disposal, based on the quantities already discovered at illegal dumps, the lost revenue from avoided landfill taxes and charges could be crudely estimated as between £100–135 million.[113] The Quarry Products Association has estimated that illegal quarrying costs the exchequer at least £2 million per year in lost VAT and Aggregates Levy[114] and the NIAO is also currently investigating the issuance of millions of pounds in tax credits through the Aggregate Levy Credit scheme (ALCS) to extraction companies which could have been operating without all necessary planning and environmental consents.[115]

In addition to the direct costs associated with remediating environmental damage, environmental governance failures have also created a situation where Northern Ireland is seemingly at perpetual risk of infraction proceedings from the EU. As previously highlighted, although the UK as a whole would be found to be in breach of EU environmental directives should such a breach be identified, it would be the devolved government that would be liable to pay the cost of any fines imposed as a result of failure to transpose EU law.[116] Such financial sanctions may consist of both a daily penalty to induce the remedy of the breach (of up to circa €237,864 per day, a figure which is then multiplied by the duration of the breach) and a lump sum (based on an assessment of the effects of the breach for which the minimum for the UK is currently €9,982,000).[117] Given the UK's impending exit from the EU, it is unclear at what stage the 'cut-off' point for infraction proceedings will be, but until Brexit actually occurs EU law still applies. As of June 2016, there were ongoing infraction cases being brought by the European Commission in respect of breaches of the Water Framework Directive, Waste Framework Directive, Habitats Directive, Strategic Environmental Assessment Directive, Environmental Impact Assessment Directive and Urban Waste Water Treatment Directive.[118] Failure to deal with the legacy of illegal dumping specifically could also attract very significant infraction fines.[119] In addition, there have also been concerns raised in the Northern Ireland Assembly about Northern Ireland potentially being in

113 It is impossible to evaluate the exact landfill tax that has been lost with any accuracy as the precise tonnage of waste dumped is unclear and not all the waste that has been buried would have been subject to landfill tax. A crude estimation, if closer to one-and-a-half million tonnes has been buried at Mobuoy Road, is that the lost tax revenue could be over £100 million. Adding the further 561,000 tonnes of waste that has been discovered at the other 89 NIEA enforcement cases at various stages in the investigative/legal process, then this could potentially add another £35 million to the total figure of tax evaded.

114 Figure supplied by the Quarry Products Association to the authors by email (7 December 2015).

115 Freedom of Information Request about Aggregates Levy Credit Scheme from the DOE (including spreadsheet register containing information on applicants for an Aggregates Levy Credit Scheme Certificate, also letter regarding copies of documentation) (6 August 2014, copy on file with authors).

116 See n 65 above.

117 Communication from the Commission: 'Updating of Data Used to Calculate Lump Sum and Penalty Payments to Be Proposed by the Commission to the Court of Justice in Infringement Proceedings' (C 257/01, 2015) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015XC0806(01)>.

118 Official Report: Minutes of Evidence Committee for Agriculture, Environment and Rural Affairs, meeting on Thursday 16 June 2016 <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=18395&eveID=10674>.

119 Mills (n 12) also concluded that any failure to deal with the legacy of the illegal waste sites could risk infraction under the EU Waste Framework Directive. There are case precedents that indicate that if proper clean-up operations are not undertaken then this could result in heavy fines from Europe until rectified. See, for example, Case C-494/01 *Commission v Ireland* and Case C387/92 *Commission v Greece*. In Case C-196/13 *Commission v Italy*, Italy was fined €40 million for failing to tackle the dumping of illegal waste. The court also said it would impose further penalties of €42.8 million for every six months Italy failed to clean up its legacy of hundreds of waste dumps.

breach of the Nitrates Directive,[120] Safe Storage of Metallic Mercury Wastes Directive,[121] Wild Birds Directive[122] and Marine Strategy Framework Directive[123] – all of which could potentially lead to further infraction proceedings. Domestic legal action also poses a potential financial risk. Under the Aarhus Convention, if a government is perceived to not be meeting its legal obligations, then public interest groups can access the justice system and compel it to act.[124] The financial implications of going to court can be very high and resource-intensive, negative media can be generated, and it can shine a spotlight on the fact that the Executive is not acting.[125]

Less tangible are the financial benefits lost to Northern Ireland as a result of weak environmental governance. Protecting the environment is not a one-way cost and there has been very little recognition in Northern Ireland of some of the serious economic impacts that current systems of environmental governance are having. A key issue here is the potential impact on foreign direct investment (FDI). Weak environmental regulation and the failure to uphold the rule of law present critical disincentives to FDI, where a top priority for investors in the last five years has been 'stability and transparency of political, legal and regulatory environment'.[126] The creation of unfair competition from illegal operators distorts markets and undermines the development of sustainable industries, most notably in Northern Ireland across the waste industry.[127] The cost of regulating such high levels of non-compliance also inevitably increases the regulatory bill and puts further pressure on an already overstretched criminal justice system. Problems with an unstable and unfair regulatory playing field have been exacerbated by a painfully slow system for gaining planning permission.[128] In addition, it is well established that Northern Ireland is at risk of infraction proceedings from Europe arising from a lack of investment in waste-water treatment plants.[129] If treatment works are operating at, or close to capacity, new businesses cannot be connected to the plant, unless the plant's capacity is extended. So, non-compliance with environmental laws, in terms of

120 Northern Ireland Assembly, Session 2012/2013, 'Report on Statutory Committee Activity on European Issues' May 2011–August 2012, NIA 81/11–15 (21 November 2012).

121 Northern Ireland Assembly, Session 2012/2013, Committee for the Environment, Minutes of Proceedings, 14 March 2013.

122 Northern Ireland Assembly, Assembly Business, Office Report, Reports 11–12, 5 March 2012 <www.niassembly.gov.uk/assembly-business/official-report/reports-11-12/05-march-2012/>; Northern Ireland Assembly, Assembly Business, Office Report, Reports 12–13, 21 January 2012 <www.niassembly.gov.uk/assembly-business/official-report/reports-12-13/21-january-2013/>.

123 Northern Ireland Assembly, Assembly Business, Session 2011/2012, Committee for the Environment, Report on the Marine Bill, NIA 57/11–15 (5 July 2012).

124 William Orbinson, 'The Aarhus Convention in Northern Ireland: A Tale of Two Polities' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart 2015) 73.

125 An example of an ongoing case relates to sand dredging in Lough Neagh. Friends of the Earth (NI) is challenging the DOE's failure to stop companies from illegally extracting sand from this protected area <http://www.bbc.co.uk/news/uk-northern-ireland-38500893>.

126 Ernst and Young, 'EY's Attractiveness Survey: Europe 2015 – Comeback time' (EYGM Ltd 2015) <www.ey.com/gl/en/issues/business-environment/ey-european-attractiveness-survey-2015>.

127 Mills (n 12).

128 For example, the nine-year planning controversy surrounding the John Lewis development in Sprucefield, Jim Fitzpatrick, 'John Lewis: Questions Raised as Retailer Abandons Sprucefield Plan' *BBC News* (1 February 2013) <www.bbc.co.uk/news/uk-northern-ireland-21291369>.

129 Northern Ireland Assembly, Assembly Business, Session 2014/2015, Executive Committee Business, 10 June 2014 <www.niassembly.gov.uk/assembly-business/minutes-of-proceedings/tuesday-10-june-2014/>; Northern Ireland Assembly, Assembly Business, Session 2014/2015, Committee for Regional Development (8 October 2014) <www.niassembly.gov.uk/globalassets/documents/regional-development/minutes/2014-2015/20141008.pdf>.

investments in strategic infrastructure, also presents serious challenges to FDI and economic growth. A further risk created by a damaged environment relates to potential damage to the tourist economy in Northern Ireland (worth £723 million annually to the economy and sustaining 43,000 jobs).[130] High-profile TV and film production in Northern Ireland is also placed in jeopardy when the natural environment which has attracted that industry in the first place is damaged or at risk.[131]

In addition to serious environmental and economic consequences, the centralised nature of environmental governance and political profligacy towards environmental concerns in Northern Ireland have enfeebled the development, culture and campaigning approach of the many within the ENGO community operating in this jurisdiction. An underdeveloped ENGO sector with a traditional focus on local environmental justice issues is arguably a feature of civil society on the island of Ireland[132] and the diminution of environmental movements in post-conflict societies is a well-recognised phenomenon.[133] However, the situation in Northern Ireland has been compounded by apparent reluctance of many within the ENGO sector to engage in high-profile public criticism of environmental policy and regulatory efforts.[134]

There are a number of reasons for this. First and foremost, many ENGOs rely on funding from the government department within which the environmental regulator is located and to publicly object to any aspect of the regulator's performance could create at least a perception that criticism might place that funding in jeopardy.[135] Secondly, given the small scale of regulatory operations within the NIEA, it is easy for criticism to become highly personalised. This arguably creates an aversion to engaging in openly confrontational campaigning tactics which is intensified by the cross-pollination between existing and former government senior staff now highly placed within governance and management frameworks of ENGOs.[136] Thirdly, in the absence of a robust and vocal environmental champion (i.e. an independent environmental regulator), the 'operational risks and organisational burdens'[137] associated with environmental lobbying in Northern Ireland have been exponentially increased. This means that, on the one hand, there is a

130 The tourist economy in Northern Ireland, NI Business Info <www.nibusinessinfo.co.uk/content/tourist-economy-northern-ireland>.

131 For example, the production of HBO's *Game of Thrones* series which has attracted thousands of visitors to key natural environment features such as the Dark Hedges in Co Antrim. It has been estimated that £150 million of additional revenue has been created across the six years that the series has been filmed in Northern Ireland, <www.bbc.co.uk/news/uk-northern-ireland-36749938>.

132 See Liam Leonard, *The Environmental Movement in Ireland* (Springer 2007) and John Barry and Peter Doran, 'Environmental Movements in Ireland: North and South' in John McDonagh, Tony Varley and Sally Shorthall (eds), *A Living Countryside: The Politics of Sustainable Development in Rural Ireland* (Ashgate 2009) 321–41; Liam Leonard, Honor Fagan and Peter Doran, 'A Burning Issue? Governance and Anti-incinerator Campaigns in Ireland, North and South' (2009) 18(6) Environmental Politics 896–916.

133 Adam Fagan, 'Neither "North" nor "South": The Environment and Civil Society in Post-conflict Bosnia-Herzegovina' 15(5) Environmental Politics 787–802.

134 Turner and Brennan (n 10) 513.

135 A report by the Building Change Trust and Ulster University on the voluntary sector in Northern Ireland found that 'some organisations are moderating their critique of government or policy directions, often out of fear of losing funding': *Independence of the Voluntary Community and Social Enterprise Sector in NI: Finding a New Story to Tell* (Building Change Trust and Ulster University 2016). See also, Northern Ireland Environment Link, *Funding and the Environmental NGO Sector in Northern Ireland* (Report of Proceedings, 6 December 2010) <http://www.nienvironmentlink.org/cmsfiles/files/events/eNGO-6-decFINAL.pdf>.

136 Interview by the authors with James Orr, head of Friends of the Earth NI, 6 March 2017. See also, J Barry, '"It Ain't Easy Being Green": Sustainable Development between Environment and Economy in Northern Ireland' (2009) 24 Irish Political Studies 45–66.

137 Turner and Brennan (n 10) 513.

far weightier responsibility placed on ENGOs to act in a scrutiny and lobbying role and, on the other hand, creates far higher stakes for doing so.[138] There is a perception that some ENGOs have lost some of their distinctiveness and independence and have become (or are becoming) like an arms-length public body that is only consulted, and listened too, on a selective basis by government.

Evidence of the Northern Irish ENGO community's vulnerability to political developments is replete throughout the history of the governance debate. In the mid-2000s a high-profile public campaign for an IEPA brought together nine of Northern Ireland's most influential ENGOs in an unprecedented cooperative attempt to influence decision-making on environmental governance.[139] Despite effectively lobbying the direct rule government into agreeing to undertake a review of environmental governance, once devolution was reinstated after a period of suspension, the devolved government unceremoniously rejected the findings of the independent review panel when the DUP blocked the externalisation of environmental regulation to an IEPA.[140] The ability of one party to essentially steamroll over the combined efforts of the ENGO coalition (which, it should be noted, had the support of all other political parties) coupled with the desultory manner in which years of work had been nullified led to the rapid disintegration of the coalition and ushered in a period of dejection and timidity in environmental lobbying. A brief flurry of lobbying activity followed in the wake of funding cuts in 2014, but once funding was reinstated many in the ENGO community once again seemed placated.[141] The merging of the DOE and DARD into the new DAERA in 2016 was accompanied by significant concerns, particularly in relation to the regulation of agricultural pollution.[142] These concerns, coupled with the removal of the political need to preserve the DOE's core workload and some political support for re-examining the idea of establishing an IEPA led to a recent reignition of ENGO activity in the environmental governance debate. Since the collapse of the devolved government, however, the lobbying activity of many government-funded ENGOs seems to have once again diminished.[143]

5 Environmental governance in a shifting political landscape

Given the scale of the problems experienced in Northern Ireland and the severe consequences of environmental governance failures, it is clear that urgent reform is now

138 Ibid.

139 The coalition consisted of the Conservation Volunteers, Friends of the Earth, the National Trust, Northern Ireland Environment Link, the Royal Society for the Protection of Birds (RSPB), the Ulster Wildlife Trust, the Wildfowl and Wetlands Trust, the Woodland Trust and World Wide Fund for Nature. The campaign commissioned Professor Richard Macrory to undertake an evaluation of environmental governance arrangements in Northern Ireland. See Macrory (n 9). For a full discussion of the NGO campaign, see Turner and Brennan (n 10).

140 Turner and Brennan (n 10) 517–20.

141 Interview with Orr (n 136).

142 John Manley, 'Agreeing UFU Farm Pollution Proposal Would Be "Folly" Says Former Minister Mark H Durkan' *Irish News* (Belfast, 16 August 2016) <www.irishnews.com/news/2016/08/16/news/agreeing-ufu-farm-pollution-proposal-would-be-folly-says-former-minister-653605/>.

143 An environmental governance 'working group' was established by Friends of the Earth, the National Trust and RSPB in 2015, with the goal of commissioning some up-to-date research into environmental governance in Northern Ireland. The group commissioned a team of independent consultants (including two of the present authors) to undertake a detailed review of environmental governance arrangements and identify ways in which environmental governance could be reformed and developed. The report's findings relating to the scale of the consequences of weakened environmental governance proved politically sensitive and the mechanics of what parts of and how the report would be published also led to significant discomfort amongst the commissioning ENGOs. As of 7 July 2017, the report remains unpublished.

required. Not only is there a need to address the serious environmental impact of years of neglect and stem the tide of environmental damage still occurring because of non-compliance with environmental law, but the economic consequences of governance failures are also looming. However, given the seismic political shifts occurring not only in Northern Ireland, but on the island of Ireland, within the UK, Europe and beyond, there is a need to contextualise these problems and any suggestions for reform in the face of wider political developments. On a local level, while the collapse of the Stormont administration in December 2016 has created significant uncertainty about the future of devolved politics in Northern Ireland, it may also present an opportunity to re-insert the issue of an IEPA into political discussions.[144] The DUP's loss of the controversial petition of concern might at least offer an opportunity for other political parties which support the proposition of an arms-length regulator to achieve this long-gestating ambition should an Executive be formed.[145] However, with significant doubt remaining as to how the political situation in Northern Ireland will unfold in the short to medium term (especially given concerns surrounding the DUP–Conservative political deal in the wake of the June 2017 Westminster elections), forming a stable government is a challenge that must be overcome first.[146] With negotiations surrounding issues such as an Irish Language Act, legacy inquest funding, marriage equality and a referendum on Irish reunification leading the list of negotiating terms for Sinn Féin, and the DUP focused on stemming the nationalist voting resurgence displayed in the 2016 Assembly elections and delivering the portfolio of economic benefits controversially negotiated in exchange for supporting the Conservative government, there is a risk of environmental governance once again being sidelined from mainstream political debate.[147] Alternatively, should one of the main political parties recognise the importance of the issue and add it to their negotiating terms, the political disarray might offer an opportunity to raise the issue up the political agenda. In the event of the re-establishment of UK direct rule or some form of combined rule from Dublin and London, questions surrounding who will 'foot the bill' for the legacy of environmental governance dysfunction in Northern Ireland may play a prominent role – not least the continuing prospect of EU infraction fines.

While there is obviously a need to consider Northern Ireland, all-island and UK political dimensions to the environmental governance debate, any suggestions for reform must clearly take account of direct and tangential consequences of the Brexit process. Here, the form of the UK's Brexit deal (presuming one is actually negotiated) will dictate

144 At the time of writing (early July 2017) no agreement to form an Executive in Northern Ireland had yet been reached.

145 David Young, 'DUP Loses "Petition of Concern" Veto Power at Stormont' *Irish News* (4 March 2017) <www.irishnews.com/news/assemblyelection/2017/03/04/news/dup-loses-petition-of-concern-veto-power-at-stormont-952707/>. In brief, the petition of concern means any proposal before the Northern Ireland Assembly must be supported by a majority of both nationalist and unionist MLAs rather than a simple majority. To be valid, a petition of concern must have signatures of 30 MLAs. Prior to the 2017 Assembly elections, the DUP could unilaterally table a petition of concern because, with 38 seats, it was the only party with the required 30 signatures. In the 2017 election, this power was lost as the DUP only succeeded in winning 28 seats <www.bbc.co.uk/news/election/ni2017/results>.

146 The full agreement and supporting documents are available at <www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland>. The 'confidence and supply' deal has been criticised by both UK opposition parties and Northern Ireland parties as having the potential to breach, or at least undermine, the terms of the Good Friday Agreement as well as having a negative impact on the failed talks aimed at re-establishing the Stormont Executive which collapsed in early July 2017. Julian O'Neill, 'Stormont Talks: Brokenshire to "reflect" Amid Ongoing Deadlock' *Irish News* (Belfast, 4 July 2017) <www.bbc.co.uk/news/uk-northern-ireland-40489510>.

147 Ibid.

the future of environmental law in the UK and ultimately the degree to which the devolved governments can diverge from current standards of protection.[148] At the time of writing, this remains shrouded in significant uncertainty.[149] A critical issue will be whether the UK remains part of the Single Market, which will dictate the extent to which the UK must continue to comply with EU environmental directives.[150] If the UK remains part of the European Economic Area it will still be bound by many EU laws, including significant environmental directives such as the Waste Management Directive and the Water Framework Directive, but the UK's ability to influence future development and changes to environmental standards would be removed.[151] In principle this would limit the UK's ability to introduce variations to its own environmental standards and, because most environmental matters are devolved, would also prevent devolved administrations embarking on 'solo-runs' as ultimately large swathes of environmental management would still be subject to EU law.[152]

Conversely, and although still constrained by the UK's international legal obligations, should the UK leave the Single Market much of the legal requirement to comply with EU environmental law could be removed. Although this would be substantially mitigated by the UK's international obligations and any new arrangements negotiated as part of the Brexit agreement, the possibility of any reduction in standards of protection derived from EU law and policy has generated significant concern amongst environmentalists.[153] In evidence to the UK's Environmental Audit Committee, stakeholders have expressed fears that Brexit could lead to environmental law becoming diluted in order to reduce regulation and enhance the UK's competitiveness,[154] despite recent Conservative party assurances to the contrary.[155] Given that the DUP's 2017 election manifesto contained no reference whatsoever to the environment and its (and the Conservative government's) history of a preference for light-touch environmental regulation,[156] the prospect of unfettered devolved ability to vary environmental standards is cause for significant concern in the local context. A UK 'bonfire of regulations' would also necessarily result in EU counter-measures which could be highly detrimental to, for example, trade between

148 As of July 2017, there remains significant uncertainty surrounding not only the UK government's approach to the Brexit negotiations, but also the stability of the Conservative government which failed to secure a majority in the Westminster elections in May 2017 and has since recruited the DUP in a 'supply and demand' arrangement in order to cling on to power (n 146).

149 As of July 2017.

150 Richard Macrory, 'Brexit Unlikely to Give UK Free Rein over Green Laws' (ENDS Report 499, September 2016).

151 David Baldock, Andrew Farmer and Martin Nesbit, *Brexit: The Implications for UK Environmental Policy and Regulation* (Institute for European Environmental Policy, March 2016) <https://www.ukela.org/content/page/5736/IEEP_2016_Brexit_-_Implications_for_UK_Environmental_Policy_and_Regulations.pdf> 7.

152 Colin Reid, 'Environmental Law Outside the EU' *The Journal* (18 July 2016) <www.journalonline.co.uk/Preview/1021967.aspx#.WWY3iIjysdU>.

153 Colin Reid, 'Brexit and the Future of UK Environmental Law' (2016) 34(4) Journal of Energy and Natural Resources Law 407–15.

154 Environmental Audit Committee, EU and UK Environmental Policy, 23 March 2016 (HC 2015–16, 537), cited in House of Commons, *Brexit: Impact Across Policy Areas* (Briefing Paper Number 07213, August 2016) <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213#fullreport> 75.

155 Roger Harribin, 'Brexit Will Enhance Wildlife Laws – Gove' *BBC News* (19 June 2017) <www.bbc.co.uk/news/science-environment-40331919>.

156 Matthew Taylor, 'Michael Gove as Environment Secretary is "Fox in Charge of Hen House"' *The Guardian* (London, 12 June 2017) <www.theguardian.com/politics/2017/jun/12/michael-gove-entirely-unfit-to-be-environment-secretary-says-greens>.

Northern Ireland and the Republic of Ireland.[157] Media have reported that the UK government's threats to becoming a low tax, low regulation state in the absence of an agreement on market access[158] have already prompted the European Parliament to consider mechanisms through which any exit deal would essentially hinge upon UK maintenance of existing environmental standards and that this could be enforced through a pan-European court of arbitration.[159] Whether any enforcement mechanisms bestowed upon this court would result in devolved government financial liability for fines imposed in response to falling environmental standards would clearly be a significant driver for ensuring UK-wide compliance.[160] A connected risk is that divergence across the constituent parts of the UK would lead to a very problematic degree of fragmentation of environmental law regimes across the UK were no alternative 'brake' put on this process.[161] This could create further uncertainty for business and complicate the administration and delivery of environmental regulation.

A further issue relates to the impact of Brexit on the border between Northern Ireland and the Republic of Ireland. Identified by the EU as one of the crucial issues to be addressed in the Brexit negotiations, the difficulties and opportunities associated with how changes to the nature of the border will affect environmental governance are a prime example of the type of complex questions that will need to be addressed by Northern Irish politicians in conjunction with the Irish and British governments and the EU as the Brexit process evolves. The transboundary nature of many environmental problems, coupled with the inherent need to cooperate with neighbouring jurisdictions to ensure environmental protection is explicitly reflected in the provision for cross-border environmental governance enshrined in the Good Friday Agreement.[162] For example, Strand Two acknowledges the crucial importance of cross-border governance relationships and establishes formal cooperation across a number of areas, including the environment.[163] This reflects a clear recognition that close cooperation between neighbouring jurisdictions can create 'significant synergies and deliver beneficial environmental outcomes more cost-effectively'.[164] While there are strong arguments for enhancing cross-border environmental governance given the significant and very similar problems faced on either side of the border and the cross-border nature of issues like waste crime and river basin management, this has become problematised by the Brexit

157 Peter Walker, 'Andrea Leadsom Promises Brexit Bonfire of Regulation for Farmers' *The Guardian* (London, 4 January 2017) <www.theguardian.com/politics/2017/jan/04/andrea-leadsom-vows-to-scrap-eu-red-tape-for-farmers-after-brexit>.

158 Philip Oltermann, 'Hammond Threatens EU with Aggressive Tax Changes after Brexit' *The Guardian* (London, 15 January 2017) <www.theguardian.com/politics/2017/jan/15/philip-hammond-suggests-uk-outside-single-market-could-become-tax-haven>.

159 Daniel Boffey, 'MEPs in Bid to Force UK to Meet Environmental Regulations after Brexit' *The Guardian* (London, 31 January 2017) <www.theguardian.com/politics/2017/jan/31/european-parliament-force-uk-meet-environmental-regulations-after-brexit>.

160 Northern Ireland is currently responsible for paying any EU infraction fines imposed as a result of non-transposition or implementation of EU directives, as discussed previously (n 65).

161 Reid (n 153).

162 Good Friday (Belfast) Agreement 1998, Strand 2 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>.

163 Ibid.

164 Burke et al (n 9) 32.

process which also clearly places existing cross-border measures in jeopardy.[165] If Northern Ireland's environmental law diverges from the Republic of Ireland's EU-based legal frameworks in the future then transboundary environmental governance will become more difficult as institutional architectures and standards become potentially more diverse.[166] For example, differences in the structures and approaches to enforcement adopted either side of the border have in the past created regulatory gaps which have facilitated illegal cross-border environmental crime to germinate and flourish.[167] Management of river basins which transcend the border will also require enhanced cooperation and careful consideration of cross-border policy impacts. These issues have the potential to be magnified, dependent on the nature of Brexit and the political situation in Northern Ireland, and there is clearly a need for further, detailed investigation into what retention of the status quo (i.e. a 'soft' border), imposition of a customs/physical ('hard') border, or removal of the border altogether might mean for overall success or failures of any future environmental governance arrangements or law reforms.

The prospect of Brexit has also thrown the role that the EU has played in the context of environmental protection to date into sharp resolution. Although there is a risk of viewing what is considered an imperfect EU environmental law framework (particularly the compliance and enforcement regimes)[168] with a sense of 'nostalgia', in the Northern Ireland context the EU has played an undeniably important role.[169] Lee has identified three key functions that the EU has fulfilled to date in the context of the UK environment as 'the big sticks of Commission-plus-Court of Justice enforcement mechanisms and fines, but also a more subtle architecture of transparency and political accountability, as well as a series of EU legal principles that render judicial review before domestic courts more effective'.[170] In the Northern Ireland context, possibly the most obvious role of the EU in the context of environmental law has been its enforcement function. Despite the slow pace of EU enforcement procedures, they can (and have) resulted in the imposition of significant infraction fines[171] and the threat of these has proven crucial in forcing the Northern Irish government to introduce and attempt to maintain environmental standards.[172] Importantly, the European Commission can instigate infraction proceedings for not only failure to transpose directives, but in situations where they have not been implemented correctly or applied properly in practice. Jack highlights the case of *Commission v Ireland*[173] as demonstrative of how the

165 The Republic of Ireland has also experienced significant environmental governance, and particularly environmental regulation problems. See, for example, George Taylor, 'Conserving the Emerald Tiger: The Politics of Environmental Regulation in Ireland' (1998) 7(4) Environmental Politics 53–74; Aine Ryall, 'Delivering the Rule of Environmental Law in Ireland: Where Do We Go from Here?' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2012).

166 The difficulties associated with transboundary environmental governance have been explored in Richard Macrory and Sharon Turner, 'Participatory Rights, Transboundary Environmental Governance and EC Law' (2002) 39(3) Common Market Law Review 489–522.

167 Brennan (n 2) 479.

168 M Hedemann-Robinson, *Enforcement of European Union Environmental Law* (Routledge 2015).

169 Robert Lee, 'Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union' (2017) 29 Journal of Environmental Law 155.

170 Maria Lee, 'Accountability for Environmental Standards after Brexit' (2017) 19(2) Environmental Law Review 89–92.

171 In December 2014 Italy was fined over €40 million in EU infraction fines subsequent to the European Court's decision in Case C-196/13 *Commission v Italian Republic*, ECLI:EU:C:2014:2407.

172 Brennan (n 2) 479.

173 Case C-494/01 *Commission v Ireland*.

Court of Justice of the EU (CJEU) has applied the concept of a 'general and persistent breach' in 'bad application' cases.[174] In this case, Ireland was found to have failed to fulfil its Waste Framework Directive obligations by allowing illegal waste disposal sites to continue operations. Importantly, the CJEU found that, in order to avoid financial penalties, the general and persistent failure to enforce EU law would mean that Ireland must not only address the operation of the sites themselves, but the underlying systemic failures that had facilitated their existence.[175] In Northern Ireland there are clearly similar issues and the spectre of infraction fines has historically forced the devolved government to try and deal more effectively with, for example, serious cross-border waste crime.[176] If this threat was removed, serious questions would emerge as to where the impetus for the devolved government to maintain and enhance environmental protection efforts would stem from.

6 Pathways to effective environmental governance

With these considerations in mind, reforms must now take place across the three areas identified at the outset of this analysis, i.e. environmental governance structures, environmental law and policy, and regulatory practice. Firstly, the NIEA should be located outside a central government department and be given the status of a non-departmental public body. Although not a panacea for the myriad problems that have characterised the experience of regulating the environment in Northern Ireland, the establishment of an IEPA would at least inject some much needed credibility into regulatory efforts in the wake of years of scathing criticism. A particular advantage of removing the regulatory function from central government would be to alleviate concerns surrounding the potential for political interference in regulatory decision-making and enhance public trust in environmental regulation.[177] While not removing the risk of agency capture, locating the regulator at arms-length distance of a central government department would mitigate the degree of influence that industry (particularly the agricultural industry under the current arrangements) and politicians currently have the opportunity to exert.[178] The core rationale for this important structural change is well documented, but, given the political uncertainty that surrounds both the UK's impending exit from the EU and the collapse of the devolved administration, there is an urgent need to ensure environmental protection can continue despite the surrounding political turmoil. Not only would making this change insulate environmental protection from other political imperatives, but it would bring the governance arrangements in this jurisdiction into line with those operating both in other parts of the UK and the Republic of Ireland. Whilst the initial costs of creating and resourcing an independent agency might have short-term financial consequences and provoke opposition within the Executive, there should be significant benefits to both the environment and economy in the long term. The ability to engage more strategically and systematically might also lead to stronger and more consistent and transparent enforcement and it would allow for the streamlining and integration of functions. A higher degree of independence should also allow greater flexibility in making the necessary changes to speed up decisions and actions. An IEPA might also provide more visibility to environmental guardianship, becoming an identifiable champion for the protection and

174 Jack (n 62) 154.

175 Ibid.

176 Brennan (n 2) 482.

177 The CJI has recommended that clear procedures must be in place to ensure independence of regulatory function, so that enforcement staff are not subject to political and other internal/external pressures: CJI (2011) (n 8).

178 Lowe et al (n 38).

improvement of the Northern Ireland environment, as opposed to just another limb of a government department with multiple (and sometimes conflicting) portfolios.

A further structural innovation should be reform of the oversight bodies designed to hold the government to account in environmental matters. Within government, the Stormont Committee for Agriculture, Environment and Rural Affairs has replaced two previous committees, one of which dealt solely with the environment.[179] Given the potential conflicts between the regulation and support of the agricultural community in the wake of this merger, the performance of DAERA should be subject to ongoing review and one possible solution would be to establish an environmental (and sustainable development) audit committee in the Northern Ireland Assembly. In England, there is a House of Commons Environmental Audit Select Committee in addition to a separate Commons Select Committee on the Environment, Food and Rural Affairs.[180] The Environmental Audit Committee's role is to consider to what extent the policies and programmes of government departments and non-departmental public bodies (NDPBs) contribute to environmental protection and sustainable development and to audit their performance against government targets (and to report the findings to the House of Commons).[181] Having such a Committee in Northern Ireland should result in better environmental integration and ensure that departments are carrying out their functions within environmental limits. In addition, the environmental investigation capacity of other scrutiny bodies outside of government could be enhanced. The NIAO and the CJI in particular have to date provided valuable insights into the scale of the problems surrounding environmental governance in Northern Ireland.[182] Both bodies could establish small dedicated internal teams to focus on environmental concerns and increase scrutiny of the performance of key environmental governance structures such as the NIEA or an independent regulator.

Secondly, measures should also be taken to ensure that there is a more integrated and strategic plan to protect Northern Ireland's environment. There should be an overarching strategy on the protection of the environment in one single document, which contains strategic priorities of the Executive and outcomes to be aimed at, and be written in a style that is easily understandable. There should also be a review of institutional arrangements encompassing an examination of who does what and why, where integration between sectors and other departments applies and where it needs to be strengthened. In the absence of an independent environmental regulator, a Commissioner for the Environment could be established to ensure effective implementation and application of environmental law. Commissioners for human rights, police, children and older people have all been established in Northern Ireland and these offices have in general achieved a high level of success. An Environment Commissioner could be appointed to oversee the implementation and correct application of all EU environmental laws and to oversee sustainable development in Northern Ireland.[183] While significant streamlining of environmental regulation should be achieved as the integrated permitting regime

179 Details of the Northern Ireland Assembly Committees formed during the 2016/2017 mandate are available at <www.niassembly.gov.uk/assembly-business/committees/2016-2017/>.

180 A full list of the committees is available at <www.parliament.uk/business/committees/committees-a-z/>.

181 The role of the Environmental Audit Committee is outlined at <www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/role/>.

182 CJI 2007, CJI 2011 and CJI 2015 (n 8) and NIAO (n 5).

183 Northern Ireland previously had a Sustainable Development Commission, but this was dismantled during the 'bonfire of the quangos' initiated by the UK Coalition government in 2011 <www.independent.co.uk/news/uk/politics/bonfire-of-the-quangos-bodies-to-be-abolished-2107709.html>.

introduced in 2016 finally comes into force, some further legislative change may also be required, for example, the introduction of more flexible environmental sanctions for responding to breaches of environmental law.[184] In addition, an expert independent special advisor should also be appointed by the Minister of DAERA in support of overseeing the implementation and correct application of all EU environmental laws.

In terms of further improvements to strategic planning, a core recommendation of a review undertaken by the Northern Ireland Land Matters Task Force in 2015 is the development and implementation of a Land Strategy for Northern Ireland.[185] The vision of the Land Strategy is for land and landscapes being managed for the benefit of people's well-being and prosperity, respecting the views of communities, groups and individuals, striving for environmental excellence, and making best use of the environment's multi-functionality.[186] Before this, there had been very little recognition of the environment as an asset to the Northern Ireland people generally. The proposed strategy would aim to transcend sectoral policies and provide a framework to manage conflicting policy priorities and balance competing demands on land. A Land Strategy coupled with the Regional Development Strategy 2035 should deliver more strategic and consistent decision-making in local councils as they develop their new land-use planning powers and responsibilities gained in 2015. In addition to enhanced scrutiny of environmental decision-making, it might also be beneficial to have an entity in place that ensures effective communication, working relationships and cooperation between central government, local councils and waste management groups and which provides an oversight role to guarantee a strategic approach to land-use planning. Updated, enhanced and more easily accessible overarching strategies relating to environmental protection and sustainable development could also help alleviate the fragmentation of the current policy landscape.[187]

Thirdly, a number of significant improvements must also be made to the delivery of enforcement in practice. As suggested by Burke, Bell and Turner's review of environmental governance in 2006,[188] advocated by the CJI in 2007,[189] promised by the then Minister for the Environment in 2008[190] and again reiterated by the CJI in 2011,[191] the enforcement function of the NIEA should be delivered by one integrated entity within the NIEA. Given the strategic partnerships developed by the ECU with other enforcement agencies, such as the Police Service of Northern Ireland (PSNI) and the PPS, and the need for a professionalised approach to intelligence and concentration of skills pertaining to criminal and financial investigation, this integrated enforcement body should be structured around the existing ECU, creating a unified, consistent and proportionate enforcement response across all areas in which the NIEA has an enforcement responsibility. Enforcement staff from other units should be transferred to

184 Provision for integrated permitting was introduced by the Better Regulation Act (Northern Ireland) 2016.

185 Northern Ireland Land Matters Taskforce, *Towards a Land Strategy for Northern Ireland* (Northern Ireland Land Matters Taskforce 2015) <www.nienvironmentlink.org/cmsfiles/Towards-a-Land-Strategy-for-NI_2015-Main-Report.pdf>.

186 Ibid 11.

187 The most recent sustainable development strategy was produced in 2010 and, for example, contains no reference to ecosystem services which have become a key paradigm through which to view the benefits that the natural environment can provide to society and the economy. See <www.gov.uk/guidance/ecosystems-services>.

188 Albeit within an IEPA, Burke et al (n 9).

189 CJI 2007 (n 8) 47.

190 Ministerial Statement (n 56).

191 CJI 2011 (n 8) 9.

this unit in a staggered way over time. This would allow the agency to utilise existing expertise in relation to the various areas of responsibility, but standardise the enforcement response on a pan-agency basis. It would also go some way towards breaking down the entrenched structures within the DOE that have contributed to the inertia that has characterised attempts to reform regulatory structures and practice. As a result, the deterrent effect of the enforcement action carried out by the NIEA would be significantly strengthened. It would also serve the function of creating a degree of separation between the enforcement arm of the agency and the regulatory/compliance-based activities. In addition, being 'referred to the environmental crime unit' could act as a deterrent in itself to the regulated community. One risk of this would be that certain types of environmental offending could become marginalised if they were not classed as being one of the strategic priorities of the unit. However, steps could be taken to mitigate this risk through a priority-setting process and it is unlikely that the net effect of revised arrangements would have a negative impact on areas where little enforcement action is currently occurring. Recruitment of investigative staff with a core enforcement remit rather than scientific officers would reflect the dual role that the NIEA must play and better links with other agencies such as the PSNI, Her Majesty's Revenue and Customs (HMRC), the National Crime Agency (NCA) and law enforcement bodies operating across the border would also be beneficial.[192]

In addition, the NIEA, whether within or independent of DAERA, should embed specialist environmental lawyers into its governance structures. The benefits of employing an in-house legal team are many, but fundamentally the expertise in preparation of case files would be enhanced, alternative and novel charges could be considered and legally trained NIEA staff could act as conduits between the enforcement team and other law enforcement bodies such as the PPS and the NCA where relationships need to be improved across the whole spectrum of environmental offences. In parallel, specialist environmental law prosecutors could be developed within the PPS. The same problems that Northern Ireland is experiencing also frustrated the Scottish Environmental Protection Agency (SEPA) in Scotland for over a decade, but were eventually recognised by the Advocate General who was persuaded in 2011 to appoint lawyers in the Crown Office and Procurator Fiscal Service (COPFS) that specialised in environmental law.[193] There are now three specialists in wildlife and environmental crime spread across Scotland that work together to share knowledge and experience of cases. In Scotland, the COPFS and SEPA have introduced an agreed protocol on concluding investigations and prosecutions to ensure effective liaison and such a protocol could lessen the gap between enforcement and prosecution that exists in Northern Ireland.[194]

The NIEA should develop a more calibrated and representative enforcement policy and published information relating to the enforcement policy adopted by the agency needs to be enhanced. One approach that could be taken is to follow the example of the

192 There is currently a significant imbalance in the staffing background of the NIEA, with a heavy emphasis on scientific expertise rather than enforcement and investigation. In 2015 the NIEA had 719 FTE staff, with no lawyers. The high-level management structure of the NIEA contains 39 individuals, of whom over half (21) are scientific officers (of some form). Many of the other senior posts were for administrative-type functions like financial officers (6), and there was noticeably only one investigation officer, CJI Northern Ireland 2015 (n 8).

193 <www.crownoffice.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/296-specialist-reporting-agencies>.

194 <www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Protocol%20-%20Submission%20Processing%20and%20Monitoring%20of%20Prosecution%20Reports%20-%20COPFS%20and%20SEPA.PDF>

English Environment Agency (EA) which has published information relating to its enforcement policy in three parts.[195] Firstly, it has a short enforcement statement that gives an overarching, high-level summary of the principles of enforcement used by the agency in terms of deciding when and what form of enforcement action to take.[196] This statement is backed up by an enforcement and sanctions guidance document, providing information on the various types of enforcement response available to the agency and details on how it calculates and applies these sanctions and the various associated processes.[197] Finally, a document detailing the enforcement response options and information on how these will be applied for every offence that falls under the remit of the EA underpins the enforcement statement and guidance.[198] In Scotland, SEPA also publishes an overarching summary of its enforcement policy and this is backed up by detailed 'supporting guidance' documents relating to specific issues that fall under SEPA's remit and which include a section on enforcement.[199]

In terms of the criminal justice system and environmental prosecutions, one possibility would be to produce updated and more extensive sentencing guidelines. Northern Ireland currently has sentencing guidelines for some environmental crimes.[200] However, these guidelines only cover five separate offences in the magistrates' courts and provide significantly less detail than the equivalent guidance produced for England.[201] In 2014, new sentencing guidelines[202] which apply to the sentencing of various environmental offences in the English magistrates' and Crown courts were published in England by the Sentencing Council. The aim of these new guidelines is to ensure fines have a real economic impact and provide a stronger deterrent to re-offending. The English courts must now consider: making a compensation order for injury or loss or damage resulting from the offence; confiscation; the offence category (culpability and harm); and the tables showing the category ranges when setting a fine.[203] The range of fines has been vastly increased to reflect an offender's ability to pay. The court will review the sentence as a whole to ensure that any economic benefit that was derived from the offence (for example, avoided costs) has been removed and it is proportionate to the means of the offender to ensure significant economic impact.[204]

Finally, although there is a clear need to improve the delivery of enforcement of environmental law in Northern Ireland, there are other mechanisms that could help improve compliance levels and reduce the need for enforcement activity. In a general sense, cooperation with the regulated community and better (and earlier) provision of education and advice would assist businesses in achieving compliance and avoiding enforcement action. The establishment of a centralised enforcement body within the

195 All documents relating to the EA's enforcement policy are available at <www.environment-agency.gov.uk/business/regulation/31851.aspx>.

196 Ibid.

197 Ibid.

198 Ibid.

199 <www.sepa.org.uk/media/219242/enforcement-guidance.pdf>

200 The guidelines are available at <www.jsbni.com/Publications/sentencing-guides-magistrates-court/Pages/Environment-Offences.aspx>.

201 Ibid. The five offences for which there are currently guidelines are: (i) breach of prohibition notice; (ii) depositing waste without a licence; (iii) discharge/deposit of polluting matter; (iv) treating/keeping or disposing of waste; (v) treating/keeping or disposing of waste likely to cause pollution.

202 Sentencing Council, Environment Offences: Definitive Guideline (2014) <www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf>.

203 Ibid.

204 Ibid.

NIEA would provide a degree of separation between the enforcement and advice/persuasion elements of the agency to avoid the compromise of any enforcement and deterrent efforts. Alternatively, a separate body to the NIEA could fulfil the education and advice function to ensure a more straightforward separation of these often-conflicting roles. The optimal scenario would be for an IEPA to fulfil the enforcement function, while provision of education, advice and support continued to be delivered by DAERA. In terms of agricultural pollution, while the MOU between DAERA and the UFU has been criticised for its potential to lead to light-touch regulation, weak enforcement and the risk of agency-capture, it might also help foster better links with the agricultural community and facilitate better provision of education and advice.[205] The controversial aspect of the MOU relates to low severity agricultural pollution incidents and the NIEA's response to this category of pollution.[206] Under the EU cross-compliance rules relating to subsidy payments to farmers, any pollution will automatically result in an inspection and that can then result in a penalty being applied to a farm's subsidy payment.[207] The NIEA is seeking permission from the EU to allow farmers who cause low-level pollution to avoid the inspection and receive a fixed penalty notice or mandatory training course instead. While prima facie this seems like a reasonable suggestion and would certainly ease tensions between the NIEA and the agricultural community, the rationale behind the EU rules is significant and particularly so in Northern Ireland. While low-level agricultural pollution incidents are minor on an individual level, the cumulative impact of multiple low-level pollution incidents results in serious diffuse pollution.[208] The farm subsidies provided to farmers are incentives not to pollute and thus remain the obvious route through which to penalise pollution incidents, regardless of how minor. Removing this aspect of the MOU would make it much less controversial and ensure that robust regulation of agricultural pollution can occur.

In relation to the waste industry, the Mills Report published in 2014 has recognised widespread non-compliance with waste regulation and, clearly, raising compliance levels in this sector would decrease the problem of illegal dumping.[209] Better liaison, cooperation and information-sharing between the NIEA and local authorities would close enforcement gaps and the agreement of a clear and robust fly-tipping protocol for the entire jurisdiction should be established. The duty of care owed by public authorities in disposal of municipal waste should also be enforced more stringently to ensure reputable companies are being given the business of handling, for example, recycling waste. Enhancement and more robust enforcement of producer responsibility, legislation and recalibration or reconsideration of landfill tax may also be required.[210] Modernisation of waste regulation systems could also occur and emerging technologies offer new avenues for ensuring compliance. For example, a mandatory electronic duty of a care-based system to replace the current paper-based waste transfer notes could be imposed on operators. Electronic duty of care (eDoc) systems for waste have already been

205 Stewart (n 100).

206 Conor Macauley, 'Call for Change in Pollution Penalties' *BBC News* (7 April 2017) <www.bbc.co.uk/news/uk-northern-ireland-39527133>.

207 Details relating to the cross-compliance penalty framework are available at <www.daera-ni.gov.uk/publications/cross-compliance-penalties>.

208 Cave and McKibbon (n 100).

209 Mills (n 12)

210 For example, legislation could be introduced that would require the waste producer to ensure that the waste company produces licence documentation, information about where the waste is going to go and a certificate showing they have an authorised GPS system to record movements. Offences could be introduced where the waste producer does not adequately undertake these checks.

successfully developed in England, where they have been free to use and trials saved the companies using them time, effort and money in fulfilling their duty of care requirements for the waste.[211] Compliance with mineral extraction regulation could be enhanced via a duty on the owner of the land to put up adequate security fencing around disused quarries to stop them being illegally quarried, or to place them under a duty to do regular checks to ensure unlicensed operations are not taking place. More clarity surrounding planning policy guidance, licensing and time limits on quarrying activities could also help alleviate the current problems with illegal mineral extraction.

7 Conclusion

A model of environmental governance that is robust, promotes compliance with rules and also has greater business support will generate significant benefits (and opportunities) for Northern Ireland's economy as well as protecting its environment. In the short term, the NIAO should be asked to conduct a review examining the economic impacts of environmental regulation and value for money of public expenditure on the environment in order to clearly demonstrate this link. To further demonstrate this, the PAC might also be asked to produce a report on the long-term opportunities of looking at the economy and the environment in a more joined-up way. By making the links between environmental governance failure and potential economic crisis on one hand and good environmental governance and sustainable economic development on the other, such reports might gain more political traction than they have in the past. With the DUP/Conservative deal creating an intense lack of trust between all major political parties and recent elections demonstrating an apparent reinvigoration of tribal politics, there is growing need and increased demands for evidence-based policy-making in Northern Ireland.[212] Robust research which provides unequivocal justification for important environmental governance reforms will be increasingly difficult for politicians to ignore, especially as the actual cost of regulatory and policy failures begins to become clear.

In the short to medium term there is a need to enhance public trust in government's environmental protection efforts. One method through which this could be achieved is through the externalisation of the NIEA to a non-departmental public body. Other changes will require more clarity about the role of the environmental regulator, both internally and externally. A consistent message to the public and regulated community about the rules and regulations that the NIEA is tasked with upholding is necessary and this will not happen whilst internal enforcement arrangements are fragmented. Recent efforts within the NIEA have been made to address this issue. However, civil servants are curtailed in the degree to which major decisions are made in the absence of a devolved

211 UK Government, eDoc, electronic duty of care <www.gov.uk/government/groups/edoc-electronic-duty-of-care>.

212 The Alliance for Useful Evidence has run a series of seminars in Northern Ireland in recent years, the most recent of which 'How Can Government Make the Best Use of Evidence' took place in June 2017. A key proposal discussed at this seminar was whether 'an independent What Works Centre for Northern Ireland, aimed directly at supporting policy makers could ease the burden of finding relevant evidence and make up for the lack of local think tanks pumping out timely reports': Alan Meban, 'There is a Question about our Demand for Evidence and Strategy in Politics' (Slugger O'Toole, 20 June 2017) <http://sluggerotoole.com/2017/06/20/there-is-a-question-about-our-demand-for-evidence-and-strategy-in-politics/>. In addition, *The Detail* is a not-for-profit investigative news and analysis website which publishes in-depth data and investigations across a range of areas including health, education, politics, justice and crime, government accountability, and the legacy of conflict in Northern Ireland. A recent investigation by *The Detail* highlighted the cost of regulatory failures in the context of waste disposal, as well as publishing worrying data relating to fires at recycling facilities in the last decade. Campbell (n 104).

government.[213] There have clearly been a lot of recommendations given by many different individuals and bodies over the years as to how environmental governance and regulation might be better managed or reformed, but these have not led to many substantive or effective changes in practice. Adopting a new non-departmental public body would be a positive step, but there will be a significantly greater chance of improvements if there is the political will to implement some of the additional governance and regulatory changes (which do not attract as many political headlines), as suggested by experts like Macrory, Bell, Burke, Turner, NGOs and government bodies such as the CJI. As discussed previously in this analysis, these changes must take place across governance structures, law and policy and the delivery of environmental regulation.

Longer-term reforms will depend inherently on Brexit and the shape of the UK's exit deal. Should the UK leave the Single Market and ignite a 'bonfire of regulations', there is a risk that environmental law will be diluted and environmental standards will fall. The effect could be more profound in Northern Ireland where, given the precarious state of the environment, any reduction in environmental regulation could have potentially catastrophic impacts. For example, intensification of agriculture coupled with lax regulation of agricultural pollution could lead to increased degradation of the already at risk aquatic environment – with knock-on effects that include increased water purification costs, eutrophication and damage to protected species and habitats. Whether EU counter-measures are employed to mitigate this risk or whether the UK as a whole instigates measures to prevent fragmentation and divergence in environmental standards across its constituent parts remains to be seen. Significant uncertainty also surrounds the question of whether environmental funding provided to Northern Ireland under EU schemes such as Horizon 2020, LIFE+ and INTERREG will be matched by the devolved or UK governments after Brexit.[214] Given the uniquely challenging regulatory context, turbulent political context and the historical legacy of environmental governance failures in Northern Ireland, any reform agenda must be able to adapt to ongoing political developments, be based on robust evidence and be designed to deal with the issues faced in this jurisdiction rather than merely trying to 'catch up' with UK or EU standards of protection. In this respect two key avenues may offer opportunities to a more ambitious and long-term programme of environmental governance reform and the viability of these should be explored by government.

Firstly, there is room for engagement in a more thoughtful process of reform regarding use of new environmental policy tools. In Northern Ireland one rare environmental policy success has been the use of the plastic bag tax to reduce the number of plastic bags sent to landfill. The policy has resulted in substantial reductions in the numbers of plastic bags in circulation, as well as generating over £3 million for environmental improvement projects n 2015/16 alone.[215] However, there is a need for further engagement with the use of other new and emerging policy innovations, and

213 In April 2017, an Enforcement Branch was set up within the NIEA as a result of internal restructuring. This branch is part of a Resource Efficiency Division and includes Environmental Crime and Financial Investigation sections, but appears to still be separate from the Regulation Unit and Water Management Unit. As of July 2017, the only published details on the internal restructuring are available within a candidate booklet for an advertised vacancy within the NIEA <https://irecruit-ext.hrconnect.nigov.net/resources/documents/i/r/c/irc214254-cib-(final).pdf>.

214 Suzie Cave, *Northern Ireland's Environment – Background and Potential Brexit Considerations* (Northern Ireland Assembly Briefing Paper 58/16, NIAR 262–16, September 2016) 5.

215 'Minister welcomes sustained reduction in carrier bag use' (25 August 2016) <www.northernireland.gov.uk/news/minister-welcomes-sustained-reduction-carrier-bag-use>.

critical 'what works' evaluation of the success of existing tools.[216] For example, although the landfill tax has clearly reduced the amount of waste being disposed of in landfill sites, an unintended consequence has been the creation of a very significant illegal dumping problem across Northern Ireland and its border with the Republic of Ireland.[217] In addition, research has demonstrated significant problems with the use of criminal sanctions as a response to breaches of environmental law in Northern Ireland.[218] A growing body of literature has examined questions relating to new environmental policy instruments across Europe and valuable lessons may be gained from policy-maker engagement with a broader range of tools and detailed context-specific analysis of the tools currently employed to deliver environmental outcomes in this jurisdiction.[219] Secondly, enhanced cross-border cooperation to deal with the environmental challenges faced on the island of Ireland could present opportunities to ensure maintenance of EU standards of environmental protection post-Brexit, reduction of unnecessary duplication of regulatory services, streamlining of administrative processes associated with any alteration to the border and prevention of divergent regimes on either side of the border from creating opportunities for environmental crime. There is a constitutional basis for cross-border cooperation on environmental matters enshrined in the Good Friday Agreement. There is also political precedent for the provision of all-island services when there is a clear and pragmatic case for doing so, for example, in the provision of children's clinical services via the all-island Congenital Heart Disease Network and the associated Cross-Jurisdictional Oversight Group.[220] In addition, there are already important aspects of the environment which are being successfully managed on an all-island basis, for example, close cooperation on river basin management[221] and in relation to responding to invasive species.[222] The strong environmental, legal and political drivers for an all-island approach to environmental governance have also been highlighted by the comprehensive Review of Environmental Governance in Northern Ireland undertaken in 2007.[223] Applying this approach to environmental governance could present a significant opportunity to re-evaluate the highly criticised approaches that have been adopted on both sides of the border and develop a jointly delivered system that more effectively protects the environment on an all-island basis.

Given the political crisis currently enveloping Northern Ireland's devolved administration and, at the time of writing, little chance of the re-establishment of the Stormont assembly in the short term, it is easy to relegate environmental governance issues down the list of urgent priorities. However, a well-managed environment should be seen as a vital asset for the shared future of the people of Northern Ireland and a greater

216 Andrew Jordan, Rüdiger K W Wurzel and Anthony Zito, 'The Rise of "New" Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?' (2005) 53(3) Political Studies 477–96; Andrew Jordan, Rüdiger K W Wurzel, and Anthony R Zito, '"New" Instruments of Environmental Governance: Patterns and Pathways of Change' (2003) 12(1) Environmental Politics 1–24.

217 Brennan (n 2).

218 Brennan (n 28).

219 Rüdiger K W Wurzel, Anthony R Zito and Andrew J Jordan, *Environmental Governance in Europe: A Comparative Analysis of the Use of New Environmental Policy Instruments* (Edward Elgar 2013).

220 Draft Joint Policy Statement by the Ministers of Health, Simon Harris TD and Michelle O'Neill MLA on the 'All-island Congenital Heart Disease Network' <www.niassembly.gov.uk/assembly-business/official-report/written-ministerial-statements/department-of-health--all-island-congenital-heart-disease-network/>.

221 Katie Murphy and Grace Glasgow, 'North–South coordination in Ireland's International River Basin Districts' (2009) 109B Biology and Environment: Proceedings of the Royal Irish Academy 139–50.

222 Invasive Species Ireland is a joint venture between the NIEA and the National Parks and Wildlife Service in the Republic of Ireland. See <http://invasivespeciesireland.com>.

223 Burke et al (n 9).

focus on protecting this common (not tribal) interest would enhance confidence in power-sharing and demonstrate stability. The importance assigned to environmental protection by the public in Northern Ireland is evident in the high membership numbers of environmental NGOs in Northern Ireland. This indicates that there is clearly an appetite for environmental protection that is currently at odds with the level of importance assigned to it by the previous devolved governments. Ultimately, Northern Ireland's politicians from across the political spectrum must realise the inextricable links between environmental protection, economic development and social well-being and reflect this realisation in government priorities if and when a political settlement is reached.[224] In the meantime, there is a need for urgent action in order to avoid potentially catastrophic environmental damage and limit the spiralling economic consequences of decades of environmental governance failure.

224 Peter Doran, Jennifer Wallace and John Woods, *Measuring Wellbeing in Northern Ireland: A New Conversation for New Times* (Carnegie UK Trust 2014). This report addresses well-being, the environment and the peace process and shows the important inter-relationships between these.

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Lost in transition? Sexuality and justice in post-conflict Northern Ireland

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Abstract

Northern Ireland has pioneered the delivery of transitional justice, largely as a result of its troubled past. Efforts to guide this long-divided society towards greater inclusion have been facilitated by a range of processes (judicial and otherwise) designed to deliver truth, justice and accountability. Legal requirements to consider a broader demographical representation in consultations means that lesbian, gay, bisexual and transgender voices are increasingly evident in this transition. Yet continued political resistance to sexual minority equality, set against a backdrop of wider social integration, indicates the piecemeal approach to progress which is being adopted. This article critically analyses the socio-legal positioning of sexual minorities in Northern Ireland's ongoing processes of transitional justice. In addressing how sexual orientation fits with the driving factors underpinning a move towards a 'post-conflict' society, the analysis queries the heteronormative cultural dynamics informing this utopian future and the impact this may have on exacerbating rather than eradicating homophobic victimisation.

Key words: Northern Ireland; sexual minorities; transitional justice; marginalisation; homophobia.

Introduction

For much of the latter half of the twentieth century (1968–1998), social and political life in Northern Ireland was dominated by the often violent ethno-political conflict known as the 'Troubles'. This conflict segregated citizens along sectarian lines whereby being Protestant or Catholic, Unionist or Nationalist, or British or Irish dominated identity politics. The worst of the sustained violence abated with the signing of the Good Friday Agreement (GFA) 1998, which underpinned a commitment to move towards a more holistic, peaceful society. Processes of conflict transformation (judicial and otherwise) in Northern Ireland have involved learning lessons from the past in order to deliver truth, justice, accountability and peace to an increasingly inclusive, integrated and equal society. Therefore, while the legacy of the Troubles continues to inform contemporary socio-political life in Northern Ireland, it also renders the region particularly suited to the development and delivery of transitional justice mechanisms.

1 I wish to express gratitude and thanks to Sinéad Ring and the anonymous reviewer for their helpful comments on earlier drafts of this paper. Any errors or oversights are mine alone.

Human rights legislation has been integral to this journey, ensuring that parity, fairness and rights have been addressed beyond the identities outlined above. The social and political focus on sectarian tensions during (and since) the Troubles shielded from view many other forms of prejudice, inequality and victimisation. Over the past two decades, gradual efforts to address violence and discrimination outside of this sectarian paradigm have improved, with emerging research and theory into identity-based victimisation demonstrating the need to consider the impact of Northern Ireland's socio-cultural history more broadly, particularly in relation to the impact on homophobia.[2] The importance of invoking a culturally specific approach to ensure sexual minority rights and citizenship was first noted during the struggle for homosexual decriminalisation in Northern Ireland. The fact that this occurred in 1982 (15 years after England and Wales), and only as a result of intervention by the European Court of Human Rights, is indicative of the additional challenges and barriers to effecting sexual minority equality. More recent Northern Ireland-specific examples of these barriers include the legal struggles concerning the lifetime ban on gay male blood donations, access to equal (same-sex) marriage and securing adoption rights for civil partners. This geographical discrimination against members of lesbian, gay, bisexual and trans* (LGB&T) communities in Northern Ireland shows the need to view LGB&T rights as human rights which are deserving of recognition within and beyond the context in which they are set.

Herein lies a political paradox: resistance to LGB&T equality in Northern Ireland is set against a backdrop of rhetoric advocating for greater 'cohesion, sharing and integration'. Embedded in this rhetoric has been reference to Northern Ireland's engagement in restorative and transitional justice mechanisms; these are mostly alternative justice processes characterised as being community focused. However, while these modes of justice may offer LGB&T communities in Northern Ireland the potential for inclusion, reparation and recognition, LGB&T-specific analyses remain largely absent in mainstream conflict transformation literature generally, and in Northern Ireland specifically. This article explores the complexity of this political paradox and its impact on excluding LGB&T communities in Northern Ireland from conflict transformation processes. In doing so, it offers a culturally specific, critical analysis of sexual minorities' socio-legal positioning before juxtaposing this with the aims and values of transitional justice discourses, strategies and mechanisms. The discussion draws on the social and statutory difficulties faced by LGB&T communities which demonstrate a need for redress yet remain absent from mainstream analyses of justice. In particular, an exploration of the heteronormative cultural dynamics informing the move to a post-conflict society questions the impact this may be having on *exacerbating* rather than *eradicating* homophobic sentiment and victimisation in Northern Ireland. The article concludes with the recommendation that 'queering' transitional justice is an approach which can, and should, be adopted for the benefit of all.

Examining Northern Ireland's 'politics of the past'

Northern Ireland is routinely described as a society where 'the present is in the past', a factor which continues to shape the specific dynamics of its transition towards peace. For much of the previous century, Northern Ireland has been characterised as a deeply divided society. Established politically in 1920 from the six most north-eastern counties in the island of Ireland, Northern Ireland's approximate population of 1.85 million

2 See M Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Ashgate 2012); J Curtis, 'Pride and Prejudice: Gay Rights and Religious Moderation in Belfast' (2013) 61 Sociological Review 141.

people remains largely comprised of Protestant Unionists and Catholic Nationalists.[3] Sectarian tensions between these two communities are based on historic political, religious and national divisions rooted in the British colonisation of Ireland which still informs many modern-day community events.[4] Unionist communities derive from the sixteenth-century Protestant English and Scottish settlers; many still consider themselves British and wish to retain or enhance Northern Ireland's links to the UK. Nationalists, on the other hand, largely derive from the native Catholic Irish population; they consider themselves Irish and some seek reunification of the island of Ireland as a singular ethno-political entity. In recent years, however, a growing minority of people have chosen to identify as 'Northern Irish', indicating the changing dynamics of inclusivity in identity, positionality and subjectivity among emerging generations.[5]

The underlying tensions between communities were not just limited to ethno-national identity differences, but the discrimination arising from the unequal economic, social and political opportunities negatively impacting on Catholics. As civil rights movements began to take hold in the 1960s, these ideologies influenced Catholics to organise and mobilise against Unionist political control, most notably in housing and employment discrimination. Between 1968 and 1998, the fluctuating violence between Republican and Loyalist paramilitaries and the British Army claimed the lives of approximately 3500 people.[6] The GFA[7] in 1998 signalled a new chapter and a commitment to peace based on consociationalist politics.[8] Although the Democratic Unionist Party (DUP) was not a signatory to this agreement (and remain opposed to it), a devolved administration (the Northern Ireland Assembly) was formed with the remaining political parties who were signatories to the GFA.[9] This political arrangement sought to ensure governmental balance, redressing Northern Ireland's legacy of Unionist administrative domination and the exclusion of Nationalist representation. Nonetheless, the liberal, democratic approach set out in the GFA stipulates that the power-sharing administration requires representation from *both* cross-community parties as well as non-sectarian 'Others'.[10] Ensuring political recognition beyond the traditional binary is vital; as Campbell and Ní Aoláin illustrate, the intensive focus on a dyadic interaction between traditionally opposed political (and social) groups which foregrounds the involvement of *existing* political elites from represented parties may be detrimental to others seeking to infiltrate this insular domain.[11]

3 Northern Ireland Statistics and Research Agency, 'Northern Ireland Census: Key Statistics Summary Report 2014' (Stationery Office/Official Publications 2014) 46 <www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/2011-census-results-key-statistics-summary-report.pdf>.

4 See M Duggan, 'Sectarianism and Hate Crime in Northern Ireland' in N Hall, A Corb, P Giannasi and J Grieve (eds), *The International Handbook on Hate Crime* (Routledge 2014) 117.

5 Northern Ireland Statistics and Research Agency (n 3) 46.

6 P Dixon, *Northern Ireland: The Politics of War and Peace* (Palgrave Macmillan 2001).

7 This is also known as the 'Belfast Agreement'.

8 J McGarry and B O'Leary, *The Northern Ireland Conflict: Consociational Engagements* (Oxford University Press 2004).

9 Signatories to the agreement were the Ulster Unionist Party, Sinn Féin, Social Democrat and Labour Party, Alliance Party, Progressive Unionist Party, the Northern Ireland Women's Coalition and Labour.

10 As an indication of how heavily informed by the dominant sectarian ethno-national identity divide the political landscape is, all political candidates and parties – regardless of their adherence or otherwise to a 'sectarian' identity – must demarcate themselves as 'Nationalist', 'Unionist' or 'Other' upon entering Northern Irish politics.

11 C Campbell and F Ní Aoláin, 'Local Meets Global: Transitional Justice in Northern Ireland (2002) 26(4) Fordham International Law Journal 871–92.

Transitional justice in Northern Ireland

The social and political transition of a society towards a post-conflict status does not in itself indicate the presence of transitional justice. Instead, it is the underlying collective desire to match the desistance of violence with efforts to build a more cohesive, interactive and progressive society which demonstrates the fundamental tenets of transitional modes of justice.[12] Ensuring that the mistakes of the past are not replicated in the future when creating spaces to engage with trauma involves a holistic, longitudinal approach to transformation as opposed to implementing short-term change. Effectively addressing (and redressing) legacies of trauma, harm and human rights abuses in a meaningful and lasting way requires that these practices offer alternatives to existing justice mechanisms. This may be seen as contrasting traditionally masculinist, patriarchal and heteronormative 'justice' structures which informed the initial conflict environment. Unlike traditional justice measures, transitional approaches do not necessarily prioritise (retributive) criminal sanctions, but rather indicate the need to include a wider range of perspectives, approaches and stakeholders in reparative processes.[13] The production of international guidelines has aided countries' efforts towards democracy, legitimacy and peace while ensuring compliance with the rule of law in transitioning societies.[14] The variety of judicial and non-judicial measures available include criminal prosecutions, reparation programmes and institutional reforms, with truth commissions being by far the most popular type of transitional justice process.[15]

Discussions around truth commissions arose following the *Report of the Consultative Group on the Past*[16] which began a process of deliberation concerning how Northern Ireland's Troubled past should be addressed. A key issue of concern was policing, particularly the Royal Ulster Constabulary (RUC) which had been established in 1922 following the partition of Ireland.[17] In addition to its regular policing duties, maintaining the partition was one of the key tasks attributed to the early RUC. The organisation was comprised predominantly of officers from a Protestant background and claims of bias regarding its interactions with Catholics soon led to several clashes as a result of unfair policing practices, particularly concerning the partisan enforcement of legislation which had expanded the RUC's powers of arrest, questioning and detention.[18] The 'us and them' approach heightened during the Troubles period, with many feeling powerless to challenge, resist or report unfair policing practices. The report highlighted the contentious relationship between the RUC and the communities it policed and the fact that attitudes were polarised with respect to whether or not a formal truth recovery process should take place. Although one aim of transitional justice is to address opposing or polarised viewpoints by way of inclusion and recognition of different experience as valid, Lawther has indicated that Unionist resistance to the report's suggestion of a formal truth recovery process demonstrates a position which is in line with a broader

12 P Lundy and M McGovern 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35(2) Journal of Law and Society 265–92.

13 R Teitel, *Transitional Justice* (Oxford University Press 2000).

14 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Rule-of-Law Tools for Post-conflict States' (OHCHR 2006) <www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

15 Lundy and McGovern (n 12).

16 Consultative Group on the Past, 'Report of the Consultative Group on the Past' (CAIN 2009) http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf.

17 It remained known as such until 2001, whereupon it was renamed the Police Service of Northern Ireland as part of the swathe of reforms set out in the GFA.

18 K Boyle, T Hadden, and P Hillyard, *Ten Years On in Northern Ireland: The Legal Control of Political Violence* (Cobden Trust 1980).

Unionist disillusionment with various elements of the peace agreement.[19] Opposition is mainly founded on fears that Republicans would use the opportunity to 'revise history' and advance an agenda of political and cultural domination. Former members of the RUC also opposed the Ombudsman's suggestion due to personal perceptions that the British state sought to render the policing organisation in some way culpable for the conflict.[20] However, it is largely as a result of several contentious 'policing' issues that Northern Ireland is one of the key sites for transitional and restorative justice developments in modern society. Examples of two long-standing, community-based restorative justice projects are the Community Restorative Justice Ireland (which is Republican focused) and Northern Ireland Alternatives (which is Loyalist focused).[21] Both of these projects arose from the GFA and were designed to provide non-violent alternatives to traditional, informal punishment practices.[22] The projects are led by political ex-prisoners and former combatants from the key paramilitary groups who were active during the Troubles. The success of the projects can be traced to their operating outside of the scope of the traditional criminal justice system and its clearly defined victim/offender dichotomy, as well as seeking to address underlying causes of people's offending *generally*, rather than in relation to the conflict specifically.[23]

While a core transitional justice mechanism remains absent in Northern Ireland, the projects proposed or already in practice illustrate a focus on communities and issues linked directly or overtly to the sectarian conflict. This may be inferred as demonstrating a 'hierarchy' of intervention based on the suffering and harm incurred, as well as the visibility of need or advocates, creating difficulties for marginalised or minority groups to have their voices, experiences and fears recognised.[24] Underpinning change in both social and criminal justice domains requires a re-evaluating of processes of governance which are truly democratic, promote peace and ensure future fairness. Whereas traditional sectarian binaries may have limited the ability to adequately represent *alternative* identities, new mechanisms may prove more inclusive; this set of circumstances offers possible opportunities to minority groups and their advocates seeking to engage in emerging justice mechanisms. As a result, scholarly analyses of conflict transformation from gendered or feminist perspectives are becoming more established; yet explorations addressing the role of sexuality and sexual identity are less well developed by comparison. The following section analyses how the failure to include the persecution of sexual and gender minorities may possibly be indicative of the regard with which they are held in the society in question.

19 B Hayes and I McAllister, 'Protestant Disillusionment with the Northern Ireland Peace Agreement' (2004) 13(1) Irish Journal of Sociology 109; C Lawther, '"Securing" the Past: Policing and the Contest over Truth in Northern Ireland' (2010) 50 British Journal of Criminology 455.

20 Lawther (n 19) 456.

21 A Eriksson, *Justice in Transition: Community Restorative Justice in Northern Ireland* (Willan 2009).

22 Local paramilitary groups operated informal methods of 'community policing', often ensuring that very visual punishments were meted out to those who were considered to have contravened social norms. These punishments included tarring and feathering (often encompassing the person being shackled to a tree or lamppost with their alleged 'crime' displayed on a board around their neck), 'kneecapping' (where a person's kneecaps are shot or crushed with a heavy implement), or having their homes targeted with incendiary devices.

23 Eriksson (n 21).

24 See M Duggan and V Heap, *Administrating Victimization: The Politics of Anti-Social Behaviour and Hate Crime Policy* (Palgrave Macmillan 2014).

Policing sexuality in Northern Ireland

During the height of the conflict, segregated demarcations of space and place were a fact of life for many in Northern Ireland, with people altering their social movements either according to deeply ingrained personal safety maps or as a result of imposed barriers, curfews and restrictions. Shirlow indicates how overtly visible and covertly implied means of segregation served important purposes for those in positions of power; the reproduction of ideological differences along the Unionist/Nationalist divide appeared enhanced through visible markers of spatial segregation.[25] As well as determining spaces as belonging to one or other 'side' as part of these internalised safety maps, Northern Ireland's famous murals overtly marked out opposing territories in urban areas and city centres – most notably in Belfast. Many of these murals depicted notable members of the community, anonymous masked gunmen, historical events, and slogans indicating desires for unification with either Britain or Ireland.[26] In addition to these spatial markers, efforts to protect Northern Ireland's commercial and economic hub included the erection of a physical enclosure known as the 'ring of steel' in Belfast city centre throughout much of the 1970s. High metal railings were placed around the central area and pedestrian access was only permissible via a dedicated entrance, where enhanced security measures meant that guardsmen searched people entering the cordon. At night, the city centre was virtually deserted as trading hours ceased and people retreated back to their homes for the evening, eager to stay off the streets, avoiding suspicion and potential danger. For most people, nightly curfews became a way of life as Northern Ireland progressed further into violent conflict and marked territorial divisions.

Paradoxically, for the growing LGB&T community in Belfast, these security measures played a very important part in enabling greater freedom and eventually challenging (police) homophobia. Publicans and hotel owners in Belfast were economically affected by reduced trade as a result of imposed curfews, cordons and curtailed mobility.[27] The small but significant community of lesbians and gay men took advantage of this opportunity; discos became popular weekly events and, although publicity was limited, they were usually well attended. These discos were seen by many LGB&T patrons as safe havens and, for the most, part the evenings passed without any problems. Occasionally, however, members of the police and security forces would interrupt the discos in order to carry out a search of the premises and those occupying them. One venue in the heart of the city centre was subjected to repeated raids which led some attendees to deduce that such tactics were less about security and more akin to homophobic intimidation.[28] For many who became used to such interruptions, this proved a small price to pay for what was otherwise a hassle-free environment away from the scrutiny of morally minded, disapproving family members, work colleagues or neighbours. For others, fears of exposure were enhanced as a result of homosexuality remaining criminalised in Northern Ireland at the time; therefore knowledge about a person's sexuality could be used as grounds for an arrest of 'gross indecency'. Men were also vulnerable to blackmail from

25 P Shirlow, 'Ethnosectarianism and the Reproduction of Fear in Belfast' (2003) 81 Capital and Class 77.

26 While many murals have been replaced with newer, less violent, images, more akin to the 'new Northern Ireland', other visibly politicized indicators remain: paving stones in predominantly Unionist areas are often painted red, white and blue to complement the many Union Jack flags flying overhead, while in Nationalist areas, Irish tricolour symbolism denotes traditional Celtic designs (ibid).

27 Duggan (n 2) 59.

28 Ibid 61.

the police who sought to use them to inform on other members of the community.[29] Despite the numerous raids, actual arrests for gross indecency were rare, but the relationship between the police and members of the LGB&T community was fundamentally strained.

In England and Wales, the Sexual Offences Act 1967 had initiated the gradual decriminalisation of homosexuality. However, staunch opposition to the British government's plans to extend the law to Northern Ireland was demonstrated by DUP leader Reverend Ian Paisley via his 'Save Ulster from sodomy' campaign. His efforts worked initially, impeding activism by LGB&T groups to address this decriminalisation discrepancy. Eventually, it was the arrest of Northern Ireland Gay Rights Association (NIGRA) Secretary Jeffrey Dudgeon by the RUC for marijuana possession during a raid on his home which sparked change.[30] The police had confiscated personal diaries which indicated Dudgeon's engagement in homosexual acts which he was interrogated about at the police station. Although he was threatened with a charge of gross indecency, the prosecution service decided not to take the case any further. NIGRA used the opportunity to advance its decriminalisation efforts on the basis of police harassment and discrimination and, led by Dudgeon, brought a case under Article 8 (the right to a private life) of the European Convention on Human Rights to the European Commission of Human Rights, which in turn referred the case to the European Court of Human Rights. In 1981, the court decided that the legal prohibition of homosexual acts between male persons over 21 years of age breached the applicant's right to respect for his private life, ordering that homosexuality be decriminalised in Northern Ireland. This was to be the first of several legal developments impacting positively on LGB&T citizens in Northern Ireland which required implementation from *outside* the domestic legislative domain and the recognition of LGB&T rights as *human* rights. This allowed domestic LGB&T activists – who continue to play significant roles in securing legal protections for gender and sexual minorities in Northern Ireland – to situate their rights struggles within a broader international framework.

Of equal importance was the continued, enhanced political agency of lesbian, gay and bisexual advocates, who demonstrated harmony across otherwise segregated identity divides as highlighted by Dudgeon shortly afterwards:

> It is also very heartening that in a province where religious differences divide most of the community, the gay social scene has never been sectarian. The labels 'Protestant' and 'Catholic' do not apply: people develop relationships and friendships with each other as individuals and not as representatives of either community. This bond of a common sexuality is far stronger than adherence to sectarian differences. Heterosexual society in Ulster could well take a lesson from the homosexual minority in its midst.[31]

The noteworthiness of the campaign on these grounds, however, was largely overlooked by mainstream society. Nevertheless, this is important as sectarianism is perceived to permeate the very fabric of society in Northern Ireland, with commentators suggesting

29 Incidents of entrapment continued to impede relations between gay men and the police, being cited in later research as informing why some victims refused to report their experiences of victimisation.

30 M McLoughlin, 'Crystal or Glass?: A Review of *Dudgeon v United Kingdom* on the Fifteenth Anniversary of the Decision' (1996) 3(4)(Dec) Murdoch University Electronic Journal of Law <www.austlii.edu.au/au/journals/MurUEJL/1996/36.html>.

31 J Dudgeon, *Gay Rights in Northern Ireland: A Report* (Public Records Office Northern Ireland 1980), ref no D/3762/1/1/11.

that *nothing* is above or exempt from this.[32] Suggestions of the absence of sectarianism as a determining, dividing or denigrating force within the LGB&T community suggests that spaces were – and still may be – created outside of this paradigm.[33] The exclusion of this aspect of identity harmony and collective organising is also largely overlooked in mainstream scholarship pertaining to Northern Ireland's Troubles, illustrating the marginalised position occupied by LGB&T identities within this historical framework. It is through interrogating such processes of 'structural exclusion' which in turn feed into 'cultural imagining' of subordinated and minority groups which Perry suggests is vital in order to recognise the infrastructures facilitating the systemic violence faced by these groups.[34] This is a key issue for cultures in transition, as Fobear has also noted:

> In transitioning societies, homophobia and anti-queer violence is often ignored or placed outside of other state and local directed violences, such as in instances of ethnic or political violence. This not only ostracizes sexual and gender minorities from transitional justice processes, but allows for further violence and violations against sexual and gender minorities to be committed in post-conflict periods.[35]

Curtis asserts that the production and consequences of harmful discourses pertaining to homosexuality in Northern Ireland 'can only be understood within the local context of ethnopolitical conflict, and the ways that political rhetoric and practice are suffused with communal and religious understandings'.[36] It is this cultural imaging of LGB&T citizens which has rendered them vulnerable, yet *acceptable*, targets of persecution; something which necessitates recognition and reparation, most notably in transformative cultures seeking to attain meaningful equality and progress.

Homophobic victimisation: from rhetoric to reality

'Homophobia' as a concept is generally understood as being a way of understanding the fear and hatred felt towards homosexuality or homosexuals. George Weinberg, who is credited with coining the term in the 1960s, commented on the rationales he saw as underpinning such an emotion as being a fear that was 'associated with a fear of contagion, a fear of reducing the things one fought for – home and family. It was a religious fear and it had led to a great brutality as fear always does.'[37] Homophobia can range from overtly prejudicial attitudes through to discriminatory or victimising behaviour; the effects may be felt both directly and indirectly depending on the power, status and actions of the person harbouring the sentiments. Homophobic prejudice is informed by culturally specific social, religious and political views about homosexuality which suggest the need to protect morality, the family and the primacy of procreation.[38] Therefore, it is a prejudice underpinned by, and reliant upon, heterosexism noted by

32 R McVeigh and B Rolston, 'From Good Friday to Good Relations: Sectarianism, Racism and the Northern Ireland State' (2007) 48 Race and Class 1.

33 Duggan (n 2) 38.

34 B Perry, 'Accounting for Hate Crime: Doing Difference" in B Perry (ed), *Hate and Bias Crime: A Reader* (Routledge 2003) 17.

35 K Fobear 'Queering Truth Commissions' (2013) Journal of Human Rights Practice 1, 4.

36 J Curtis, 'Pride and Prejudice: Gay Rights and Religious Moderation in Belfast'(2013) 61 Sociological Review 141, 144.

37 G Herek, 'Beyond "Homophobia": Thinking about Sexual Stigma and Prejudice in the Twenty-first Century' (2004) 1 Sexuality Research and Social Policy 6.

38 See M Foucault, *The History of Sexuality* (Penguin Books 1976); G Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities* (Black Rose Books 1996); K Plummer, *Sexual Stigma: An Interactionist Account* (Routledge 1975).

Herek as constituting 'the belief system that allows homosexuality to be stigmatised, denigrated or ignored' whilst simultaneously privileging heterosexuality 'though societal customs, institutions and individuals' attitudes and behaviour'.[39] While this imbalance is disadvantageous to sexual minorities, Peterson outlines the practical dangers inherent in heterosexism, namely the demonising and criminalising of sexual activities and identities.[40] Therefore, attempts to address homophobia on an interpersonal basis may prove redundant if the wider socio-cultural context in which it manifests are not adequately accounted for.

Cultural and social prejudices towards homosexuality in Northern Ireland have long been informed and sustained by morally conservative religious and political discourses. Furthermore, as Hayes and Nagle highlight, homophobic prejudice and violence 'has become a common feature of societies emerging from violent and protracted conflict'.[41] These discourses were illustrated in the struggle for homosexual decriminalisation outlined above, but became increasingly notable in the decade following the signing of the GFA. Several infamous, disparaging comments against homosexuality made by high-profile political elites, usually from Unionist backgrounds, obtained significant media coverage.[42] The most notable of these occurred in 2008, when DUP MP Iris Robinson (and, at the time, wife of the First Minister Peter Robinson) was asked to comment on the brutal assault of a young gay man near Belfast. While doing so, she publicly stated that she felt homosexuality was an 'abomination', that it 'nauseated' her and that homosexuals could be 'cured'; furthermore, it later emerged that she had stated that she believed homosexuality and sodomy to be worse than paedophilia.[43] Many in the LGB&T community felt that Robinson's comments and the apparent impunity[44] with which they were made was offensive and victim-blaming. Furthermore, there were fears that such sentiments could potentially incite further acts of homophobic hate crime.

As Mason notes, the failure to condemn homophobia not only 'promotes an atmosphere that condones violence against gay men and lesbians', but such violence 'will only fail to serve a function for the perpetrators if the prejudicial attitudes undergirding such violence are no longer supported by societal norms or by religious, legal and political doctrines'.[45] Drawing specifically on the fall-out from Robinson's comments, Ashe indicates how the assessment of speech must always be located within its social and political conditions; the intent cannot be separated from the cultural environment in which it was expressed.[46] Therefore, such sentiments were illustrative of the state, struggle and stagnation of sexual politics in Northern Ireland and were instrumental in

39 G Mason, *Violence Against Lesbians and Gay Men* (Duncan Chappell 1993) 2.

40 V Peterson, 'Sexing Political Identities/Nationalism as Heterosexism' (1999) 1 International Journal of Feminist Politics 47.

41 B Hayes and J Nagle, 'Ethnonationalism and Attitudes Towards Gay and Lesbian Rights in Northern Ireland' (2016) 22(1) Nations and Nationalism 21.

42 Duggan (n 2) 71–2.

43 'DUP's Iris Robinson: Gays More Vile than Child Abusers' *Belfast Telegraph* (Belfast, 21 July 2008) <www.belfasttelegraph.co.uk/news/local-national/iris-gays-more-vile-than-child-abusers-13913517.html>; D Young, 'Gay Lifestyle is "Abomination" not a Mental Disorder: Iris' *Belfast Telegraph* (1 July 2008) <www.belfasttelegraph.co.uk/news/iris-robinson-gay-lifestyle-is-abomination-not-a-mental-disorder-28785244.html>.

44 After an investigation lasting a year, the Police Service of Northern Ireland stated that no action would be taken against Robinson for these public statements as she had done nothing wrong.

45 Mason (n 39) 6.

46 F Ashe, 'Iris Robinson's Excitable Speech: Sexuality and Conflict Transformation in Northern Ireland' (2009) 29 Politics 20.

seeking to retain this political status quo in the face of social progression. Robinson's comments indicated the depth of cross-over between some politicians' personal and professional beliefs as well as the deeper historical structural factors informing homophobia. However, they also adhered to a perspective espoused by members of her party and faith for decades and thus can be seen as in keeping with dominant ideologies in this respect. To fully understand the 'politics' behind Robinson's speech, therefore, one must scrutinise historical structures of sexual oppression and the impact of the prolonged, heteronormative, ethno-nationalist conflict on the advancement of sexual minority rights in Northern Ireland.[47]

The GFA has required that politicians divided along ethno-national and religious lines tolerate one another in order to ensure the future of the Northern Ireland Administration. Disparaging or incendiary comments made about sexual minorities may contravene and undermine anti-discrimination laws, but they are not going to undermine the ongoing *peace process* per se. The recognition of this has led some to suggest that politicians' apparent impunity when making public homophobic statements mirrors a shift in cultural practice whereby targeted victimisation has migrated from sectarianism to homophobia.[48] This, in part, may be down to the transitional nature of Northern Irish society; focusing transitional justice mechanisms on abating the primary or prioritised tensions underpinning the conflict may have negative implications for vulnerable and/or minority communities as a result of violence being *deflected* as opposed to reduced or eradicated. These sentiments were first proposed by Knox in his analysis of the violent regulation enforced by paramilitary policing within communities.[49] He questioned the state's complicity in turning a 'blind eye' to some forms of violence in order to ensure the continuance of an 'imperfect peace', suggesting that 'this raises the wider question as to whether paramilitary violence, the by-product of a negotiated political settlement in Northern Ireland, would be tolerated as a "price worth paying" in other areas of domestic, homophobic or racist violence'.[50] In other words, the primacy afforded to quelling cross-community tensions may have negative implications for other vulnerable groups with comparably less socio-political representation.

Paramilitary condemnation of 'immoral' behaviours – one of which homosexuality is considered by some to be – has been recognised as a valid cause for concern in Northern Ireland,[51] particularly due to the subtlety with which this form of 'policing' can take:

> Sexual dissidence had been seen by certain organizations, operating within some localities, to represent anti-social activity. Those who have been rumoured, or proven to be gay . . . have come under pressure to leave tightly knit, local communities, and in many cases forcibly evicted.[52]

Drawing on similar sentiments to Knox, findings from the Institute for Conflict Research's study into lesbian and gay experiences of homophobic violence described such

47 Ibid 20, 22.

48 R O'Leary, 'Christians and Gays in Northern Ireland: How the Ethno-religious Context Has Shaped Christian Anti-gay and Pro-gay Activism' in S Hunt (ed), *Contemporary Christianity and LGBT Sexualities* (Ashgate 2009); see also Duggan (n 2) 25–45.

49 C Knox '"See No Evil, Hear No Evil": Insidious Paramilitary Violence in Northern Ireland' (2002) 42 British Journal of Criminology 164.

50 Ibid 164, 181.

51 R Kitchin and K Lysaght, 'Heterosexism and the Geographies of Everyday Life in Belfast, Northern Ireland' (2003) 35 Environment and Planning A 489; N Jarman and A Tennant, *An Acceptable Prejudice? Homophobic Violence and Harassment in Northern Ireland* (Institute for Conflict Research 2003).

52 R Kitchin, 'Sexing the City: The Sexual Production of Non-heterosexual Space in Belfast, Manchester and San Francisco' (2002) 6 City 215.

victimisation as one of the last 'acceptable prejudices' in Northern Ireland.[53] High levels of fear and (often repeated) victimisation were demonstrated among respondents which had fostered a base level of tolerance that homophobia was a 'fact of life and something to be put up with'.[54] Some also noted 'a greater use of violence and a greater propensity to use violence in such attacks'.[55] In almost half the incidents the perpetrator was a person known to the victim, yet a great reluctance to inform the police was demonstrated by victims.[56] These issues were also highlighted by representatives of LGB&T groups who focused on an apparent increase in frequency and ferocity of attacks, particularly on gay men, which necessitated a stronger legal response.[57]

Legislation pertaining to sexual orientation hate crime had not been implemented at the time of the survey, but was in place soon after via the Criminal Justice (Northern Ireland) (No 2) Order 2004, SI 1991/2002. However, confidence in the police was so low that such legislation had little effect for the first few years. Mere legal change was evidently not enough; the fact that it was *homosexuality*, rather than *homophobia*, which constituted moral reprehension had a strong symbolic and regulatory impact across society. In Radford's research,[58] some of the respondents felt that members of their community would be more willing to understand (and perhaps condone) the victimisation or violence they suffered for being homosexual, regardless of the fact that they had done nothing to deserve this 'punishment' in the first place. This indicates another form of deflection, whereby the blame is situated with the victim as a result of the hierarchical status of the condemner. In sum, political rhetoric and highlighted incidents of public and paramilitary victimisation, coupled with the criminal justice system's apparent failure to adequately address homophobia, meant many LGB&T citizens living in Northern Ireland had little faith in formal mechanisms of legal protection or redress.[59]

The fear, threat or incidence of homophobic violence not only regulates sexuality and sexual expression, it also has a significant impact on perceptions and behaviours; more so, perhaps, than the actual experience of crime. Perry and Alvi[60] call this the '*in terrorem*' effect of hate crime. The LGB&T population in Northern Ireland is small; therefore knowledge of victimisation may spread quickly and can have indirectly negative impacts.[61] Studies into the mental and physical health of LGB&T people living in Northern Ireland have demonstrated significant discrepancies between the LGB&T community and the general Northern Ireland population with respect to smoking, alcohol consumption, drug use, self-harm and suicide ideation.[62] Alcohol consumption in the

53 Jarman and Tennant (n 51).

54 Ibid 58.

55 Ibid 65.

56 Ibid 29.

57 'Gay Men Targeted in Attacks' *BBC News* (19 May 2004) http://news.bbc.co.uk/1/hi/northern_ireland/3728345.stm.

58 K Radford, J Betts and M Ostermeyer, *Policing, Accountability and the Lesbian, Gay and Bisexual Community in Northern Ireland* (Institute for Conflict Research 2006).

59 Kitchin (n 52) 215; see also Duggan (n 2).

60 B Perry and S Alvi, "'We Are All Vulnerable": The *in Terrorem* Effects of Hate Crimes' (2012) 18 International Review of Victimology 57.

61 P Iganski, *Hate Crime and the City* (Policy Press 2008).

62 H McNamee, *Out on Your Own: An Examination of the Mental Health of Young Same Sex Attracted Men* (Rainbow Project 2006); E Rooney, *All Partied Out? Substance Use in Northern Ireland's Lesbian, Gay, Bisexual and Transgender Community* (Rainbow Project/Public Health Agency 2012). This research comprised an internet survey of 941 LGB&T people (319 of whom were women and 40 of whom identified as trans*) and qualitative research undertaken with 37 participants.

LGB&T community was noted as greater in volume and frequency than the general population, as was the smoking of cigarettes and the use of drugs; LGB&T people were nearly three times as likely as the general population to have taken an illegal drug at some point in their lifetime.[63] However, perhaps contrary to perception, anti-depressants, sedatives, opiates and cannabis consumed at home predominate consumption. Importantly, in each survey, respondents noted that the difficulty in coming to terms with their sexual orientation as a result of the negativity affiliated to it in their wider environment was a contributing factor in their consumption rates, with drugs and alcohol cited as a risky but effective way of 'escaping' this reality.[64]

While processes of transitioning to a truly inclusive society must recognise these 'hidden harms' and go further in efforts to protect sexual minorities' access to equality, rights and citizenship, the potentially negative and stymieing impact of unrepresentative and unsupported political power must also be rendered accountable. Breen et al indicate this in their comparison with the transitional nature of South Africa:

> While political attention in both countries is generally on hate crimes that affect the majority – sectarianism in Northern Ireland and racism in South Africa – deliberate and sustained efforts to tackle other forms of hate crime are critical in transitional societies, if the legacy of the past is to be fully addressed.[65]

One such way to effect positive change is through adherence to established human rights frameworks; in the case of Northern Ireland, this engagement with external legislatures has been vital, as the following section will indicate.

Politicising sexual equality and justice

The effective recognition and tackling of sexual minority discrimination in Northern Ireland has relied heavily upon a rights-based rhetoric informing such strategies.[66] This has been further boosted by the UN Human Rights Council narrowly voting to affirm LGB&T rights as human rights for the first time in 2011, subsequently producing its first report outlining LGB&T rights.[67] However, despite a focus on human rights violations, as noted above, the predominance of domestic sectarian issues has impeded a full understanding of violence against sexual minorities. Campaigners have had to work additionally hard to seek parity with some of the gains made elsewhere in the UK with respect to securing rights and recognising vulnerabilities. These include undergoing judicial review process to secure adoption rights for civil partners, challenging the lifetime ban on gay male blood donations, repeated calls for access to equal (same-sex) marriage rights and seeking to have transphobia recognised in law as a hate crime for the purposes of enhanced sentencing. These issues – contested by political elites – demonstrate a form of identity regulation which Fobear[68] links to broader mechanisms of control, as 'homophobia and transphobia are consistently tied to nationalist, racist/ethnic, political, and militarist agendas in which the population is managed through violent control of

63 Rooney (n 62).

64 Ibid 13.

65 D Breen, I Lynch, J Nel and I Matthews, 'Hate Crime in Transitional Societies: The Case of South Africa' in Hall et al (n 4) 129.

66 L Glennon, 'Strategizing for the Future through the Civil Partnerships Act' (2006) 33 Journal of Law and Society 244.

67 UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity* (17 November 2011) <www.refworld.org/docid/4ef092022.html>.

68 Fobear (n 35) 1, 4.

reproduction and sexuality'. Applying this framework of analysis to LGB&T equality in Northern Ireland highlights the culturally specific impact of *political homophobia* which continues to impede transformative change for LGB&T citizens.

Nonetheless, the process of conflict transformation in Northern Ireland has boosted visibility about issues of LGB&T sexual equality. The appropriation of new legal and political frameworks by LGB&T groups came as a result of the opportunities offered through several pieces of legislation emerging from the GFA 1998, specifically s 75 of the Northern Ireland Act 1998. This directed public authorities to ensure appropriate LGB&T training was available; monitor sexual orientation; consult with specialist LGB&T organisations where relevant; and undertake equality impact assessments in order to provide the required reports on how equality directives were being operationalised. It also led to the establishment of the Northern Ireland Human Rights Commission (NIHRC), a statutory body tasked with ensuring the full and firm protection of the fundamental rights and freedoms as contained in the European Convention on Human Rights and later Human Rights Act 1998.[69] Coupled with the role of the Equality Commission for Northern Ireland, these measures mean that LGB&T individuals now have far greater powers to challenge laws in the UK courts if they believe their rights have been breached by a public authority. This is important as a defining feature of legislative developments accrued thus far and a key concern for some working in the LGB&T sector is the impact of having these laws passed during periods of political instability, thus via *direct rule* from Westminster and not domestically by the Northern Ireland Assembly. Direct rule, which occurs as a result of the dissolution of the domestic government, relates to tensions between the dominant political parties which have resulted in the Assembly twice being suspended for a period of longer than 24 hours in the first seven years: first for almost four months (11 February–30 May 2000) and again for almost four-and-a-half years (14 October 2002–7 May 2007).[70] It was during these periods that significant LGB&T legislative protections and rights in Northern Ireland – such as the recognition of hate crime and civil partnerships – were bestowed by the British government, which administrated on behalf of the Northern Ireland Assembly.[71] Although these changes were not subsequently repealed once the period of direct rule ceased, it is notable that they were not initiated or implemented domestically outside of these timeframes.

The impact of obstructive domestic politics on LGB&T socio-political inclusion has been demonstrated most recently in marriage debates. Northern Ireland remains the last region in the UK where equal access to civil marriage is denied to LGB&T couples. This anomaly is further compounded as a result of the Republic of Ireland instigating such changes following a historic public vote in favour of the law. The Northern Ireland Assembly debated and rejected proposals calling for the introduction of civil marriage equality four times before finally voting in favour by a narrow majority in November

69 C Harvey, 'Human Rights and Equality in Northern Ireland' (2006) 57 Northern Ireland Legal Quarterly 215.

70 At the time of writing (spring 2017), the Assembly is currently dissolved as a result of Deputy First Minister Martin McGuinness's resignation in the wake of the controversy surrounding the renewable heat incentive. This triggered an election as Sinn Féin refused to nominate a replacement Deputy First Minister.

71 These also include the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, SI 497/2003, and the Criminal Justice (No 2) (Northern Ireland) Order 2004 which outlines increased penalties for offences motivated by hostility towards a person's sexual orientation (as well as race, religion and disability), addressing the growing levels of 'hate crime' experienced by lesbians and gay men.

2015. However, the motion was vetoed as a result of a petition of concern[72] being tabled, meaning that the motion would require a certain level of cross-community support from both Unionists and Nationalists to succeed. In other words: because the DUP is opposed to equal marriage, it will continue to veto it whilst the decision remains a domestic one with the Northern Ireland Assembly. This is an example of how, in societies such as Northern Ireland, the political domination of one group can lead to the personal and professional (or personal and political) becoming indistinguishable to the point where justice processes are used to further personal prejudices.[73]

A petition of over 20,000 signatures was presented to Stormont as part of public protests against the DUP following the most recent marriage veto. Some advocates have suggested that a referendum be held on this issue, much like the vote which secured equal marriage rights in the Republic of Ireland. Some LGB&T advocates have demonstrated resistance to proposals for a referendum as campaigning may prove prohibitively costly and resource-intensive for the already stretched organisations working to represent and support LGB&T citizens in Northern Ireland. Also, while seeking fundamental human rights through the available legal channels ensures that homophobic political elites are forced to account for their prejudice in a public forum, it also exposes LGB&T communities to vile rhetoric, as witnessed during the Irish referendum. Research into the impact of the 'No' campaign on LGBTI[74] citizens in the Republic demonstrated the elevated levels of psychological distress incurred as a result of the negative language used about LGBTI communities in advertisements and discussions.[75] Many respondents indicated that they would not want to go through a referendum again as they had been left feeling anxious, distressed and in some cases suicidal.[76] Fears that similar negative outcomes, coupled with the potential for the issue to be hijacked by sectarian concerns[77] and the fact that questions of fundamental human rights should not be decided by a popular vote, have all informed Northern Irish LGB&T advocates to resist a similar campaign in the north.[78]

Writing in advance of the current marriage debates, Ashe described an awareness around 'the need for politics and debate, not simply legal change' in relation to LGB&T

72 The GFA included several legal tools designed to ensure that a fair and representative government would ensue wherever possible. One such tool is the 'petition of concern'; this allows a Member of the Legislative Assembly (MLA) to effectively veto any motion proposed by another MLA if they believe the motion to be harmful to the ongoing peace process. However, these current arrangements, which are designed to ensure that political decision-making and related policy implementations are fair, equal and representative, may, in some cases, serve to enhance the dominance of Unionist parties' socio-political positioning. The power-sharing agreement outline a need to account for both perspectives, yet it is often the will of the Unionist parties which dominates decisions, particularly when it is a Unionist MLA who invokes a 'petition of concern' concerning a motion, or it is their failure to support a motion which leads to it being vetoed.

73 F Ní Aoláin, 'Political Violence and Gender During Times of Transition' (2006) 15(3) Columbia Journal of Gender and Law 829, 840.

74 Acronyms used in this report included people who identify as intersex.

75 S Dane, L Short and G Healy, *Swimming with Sharks: The Negative Social and Psychological Impacts of Ireland's Marriage Equality Referendum 'No' Campaign* (School of Psychology Publications, University of Queensland, Australia 2016) http://espace.library.uq.edu.au/view/UQ:408120.

76 Ibid 7.

77 Hayes and Nagle (n 41) demonstrate how ethno-nationalist groups in societies such as Northern Ireland 'may also seek to co-opt the language of gay and lesbian rights as a means to advance their own political platforms as liberal and progressive in distinction to their ethnonational rivals, who are framed as conservative and reactionary': 24.

78 Following the most recent dissolution of the Northern Ireland Assembly, marriage equality became central to the negotiations for the formation of the new Executive.

rights.[79] Such debate was in plentiful supply following a request made to a bakery for cake to form part of promotional materials calling for equal marriage.[80] The cake was to feature Sesame Street characters Bert and Ernie, along with a message saying 'Support gay marriage' and the logo of a local LGB&T organisation. Asher's bakery initially accepted the order, but subsequently refused to complete the request a little while later. The Equality Commission duly brought a case for sexual orientation discrimination under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, SI 436/2006, which it won. The failure of Asher's Bakery in Belfast to provide the service on the basis that it was against the proprietors' religious beliefs was deemed unlawful by the court. The case later prompted DUP politician Paul Givan to propose a Freedom of Conscience Amendment Bill to allow exemptions to the Equality Act on religious grounds. The proposed amendment sought to undermine equality, instigating a two-tier system with regards to prioritising appropriated doctrinal beliefs over embodied identity characteristics. No efforts were made by the DUP to engage with the Northern Ireland LGB&T sector in the lead-up to the draft consultation on the amendment. LGB&T advocacy groups indicated the biased and leading nature of the questions on the consultancy document, the lack of initial engagement with Northern Irish LGB&T groups and the lack of evidence for the multiple inferences made in the consultation document as to the strength of negative lay feeling towards sexual minorities in Northern Ireland.[81]

In fact, evidence exists to the contrary; attitudes towards LGB&T identities are improving according to the Northern Ireland Life and Times (NILT) survey. The study asks a selection of questions on social, political and religious issues; in recent years, an increasing number of these questions have focused on issues relating to homosexuality, the findings from which demonstrate significant improvements in responses to LGB&T issues. One question asks about whether sexual relations between adults of the same sex is in any way 'wrong'. In 1998 when this question was first asked, over half (58%) of respondents indicated that it was 'always wrong'; this reduced to 44% in 2004 and 2008, but had fallen to just over a quarter (27%) in 2013. Over the same period of time, the number of respondents indicating that sexual relations between two adults of the same sex is 'not wrong at all' had increased from 15% in 1998 to 24% in 2008, before doubling to 43% in 2013.[82] Questions asked in 2013 included those relating to family dynamics, such as whether lesbians should be allowed equal access to IVF treatments as enjoyed by heterosexual women, whether lesbians or gays should be allowed to adopt, and whether lesbians or gays with children count as a 'family'.[83] The results indicated positive approaches, with 50% of respondents believing that lesbian women ought to have equal access to IVF (37% opposed); a slight majority approving of the adoption of children by couples who are gay (40% for, 33% against) or lesbian (45% for, 28% against); and twice as many respondents agreeing with the statement that a lesbian couple with a child or a gay couple with a child counts as a 'family' (64% for, 32% against and 62% for, 34% against respectively). Positive attitudes were also demonstrated in the responses given for questions about teaching about LGB&T equality in schools (58% for, 31% against) and

79 Ashe (n 46) 25.

80 For a timeline review of this case, see the BBC's resource '"Gay Cake" Case Key Dates <www.bbc.co.uk/news/av/uk-northern-ireland-37753930/gay-cake-case-key-dates>.

81 Ultimately, the NIHRC indicated that the proposed 'freedom of conscience' exception would be incompatible with the ECHR on several grounds and, as a result, rendered the amendment outside the legislative competence of the Northern Ireland Assembly under the Northern Ireland Act 1998.

82 Northern Ireland Life and Times Survey <www.ark.ac.uk/nilt>. Question topics vary each year; 2013 was the most recent year in which LGB&T questions were included.

83 Ibid.

recognising same-sex marriages (59% for, 29% against). In sum, acceptance of LGB&T sexualities, rights and families has increased significantly in Northern Ireland; yet, in spite of this evidence, several prominent politicians, particularly those affiliated to the DUP and with a significant public profile, remain steadfastly opposed to enhancing the socio-legal rights of LGB&T citizens in Northern Ireland.

In 2011, changes to blood donation rules enacted in England, Wales and Scotland replaced the lifetime ban on gay and bisexual male donors with a 12-month deferral (and abstinence) period.[84] This permits donations if conditions are met, however, a review is currently underway to assess whether this deferral period should be abolished.[85] In Northern Ireland, the failure to adopt a similar position towards donors was justified by former Northern Ireland Health Minister Edwin Poots (when in post) as being based on prioritising the rights of people to receive 'safe' blood over the right of people who are deemed 'risky' to donate.[86] In his statements, the minister claimed that his decision to retain the lifetime ban in Northern Ireland was not just aimed at gay men, but at those who have had sex with someone in Africa or with a prostitute. Following judicial review, Poots was ruled to have acted in an 'irrational and unlawful' way by the High Court judge, who also highlighted the apparent bias which must be involved given that Northern Ireland accepts blood from the rest of the UK which could have been donated by gay and bisexual men.[87] However, the Court of Appeal in Belfast later dismissed this ruling and determined that the decision was to be made by Stormont's Health Minister.[88]

Poots' successor was DUP MLA Jim Wells, who had supported his predecessor's position on the blood ban issue, but only managed to remain in post for six months. In the lead-up to the 2015 general election, Wells took part in an election debate following which a short recording appeared to show him making the following comments:

> All evidence throughout the world says the best way to raise children is in a loving, stable, married relationship; the facts show that, the facts show that certainly you don't bring a child up in a homosexual relationship. That a child is far more likely to be abused or neglected. I say again, I say again, a child is far more likely to be abused or neglected in a non-stable marriage situation, gay or straight.[89]

Allegations of homophobia directed at Mr Wells were fuelled by a second incident which had taken place just two days after the election debate, where he allegedly made critical remarks to a lesbian couple about their 'lifestyle' whilst canvassing their doorstep.[90] Mr

84 Department of Health (Press Release 2011) <www.gov.uk/government/news/lifetime-blood-donation-ban-lifted-for-men-who-have-had-sex-with-men>.

85 P Predergast, 'Government to Review 12-month Deferral Period for Gay Men Donating Blood' *BBC Newsbeat* (14 June 2016) <www.bbc.co.uk/newsbeat/article/36531235/government-to-review-12-month-deferral-period-for-gay-men-donating-blood>.

86 'Poots Sticks to his Guns over Gay Blood Ban' *Newsletter* (18 June 2012) <www.newsletter.co.uk/news/poots-sticks-to-his-guns-over-gay-blood-ban-1–3962846>.

87 'Gay Blood Ban "Irrational", Judge Rules' *BBC News* (11 October 2013) <www.bbc.co.uk/news/uk-northern-ireland-24494371>.

88 [2016] NICA 20. In keeping with this ruling, the ban was finally lifted by Sinn Féin's Michelle O'Neill in September 2016 with the agreement of all parties in the Executive.

89 M Fealty, 'How We Got Jim Wells Wrong, Twitter Rage and the Redaction of Empathy . . .' <http://sluggerotoole.com/2015/10/20/how-we-got-jim-wells-wrong-twitter-rage-and-the-redaction-of-empathy; the recording can also be viewed at www.youtube.com/watch?v=exHnnSNLVMY>.

90 H McDonald and D Gayle, 'Jim Wells Resigns as Northern Ireland Health Minister over "Anti-gay" Remarks' *The Guardian* (London, 27 April 2017) <www.theguardian.com/uk-news/2015/apr/27/jim-wells-resigns-northern-ireland-health-minister>.

Wells resigned as Health Minister shortly after these events, citing his wife's ill-health as the catalyst for his decision. Meanwhile, a six-month Public Prosecution Service investigation into whether or not he had breached Article 9 of the Public Order (NI) Order 1987, SI 463/1987, during the election debate concluded that there was insufficient evidence to pursue a prosecution, based upon its review of a longer transcript of his comments.[91]

Harmful, moralistic perspectives in relation to homosexuality and parenting have fuelled discrimination towards lesbian and gay citizens' access to adoption rights in Northern Ireland. The Employment (Northern Ireland) Order 2002 bestows same-sex parents in Northern Ireland with rights as individuals in relation to adoptive/parental leave and flexible working. Families are further protected by the Civil Partnership Act 2004, which created a new legal status that allows adult same-sex couples to gain formal recognition of their relationship. Available data indicates an average of 100 ceremonies taking place annually in Northern Ireland since registration became available in 2006.[92] Approximately 2000 people from the LGB&T population in Northern Ireland are, or have been, in a civil partnership[93] over the last decade. However, until a judicial review decision in 2013, civil partners were unable to adopt as a couple due to a purposeful failure to amend existing adoption legislation to recognise and include civil partners as applicants. Article 15 of the Adoption (Northern Ireland) Order 1987, SI 2203/ 1987, as amended by the Civil Partnership Act 2004, stated that a person who is 'not married or a civil partner' can adopt *as a single person*, whereas Article 14 (which was not initially amended) stated that *only married people* can adopt as a couple. This double exclusion of civil partners was initially perceived by many to have been a mistake or oversight. During the judicial review, however, it emerged that Northern Ireland's Health Department had actually *intended* to ensure the restriction and that it was not in fact a mistake.

In their assessment of court decisions in human rights cases in Northern Ireland, Dickson and McCleave suggests that there is 'scope for further judicial activism in developing the common law in a way which brings it more into line with the UK's human rights obligations at the international level'.[94] The above highlighted case studies indicate the complexities involved for members of LGB&T communities seeking protection or the enforcement of rights as they must necessarily engage with what has historically been a persecutory legal domain. These cases, and the political rhetoric linked to them, provide useful evidence as to the factors informing and sustaining homophobia in Northern Ireland. As Kinsman[95] suggests, 'examining historical experiences and practices can help us understand from where lesbian and gay oppression and, more generally, oppressive sexual regulation has come, where it may be going, and the possibilities for transformation'. Yet legal recourse has been a necessary last resort for effecting change; in contrast, enlisting the input of minorities at policy-drafting level in order to promote

91 D McAleese, 'DUP's Jim Wells Eyes Comeback after Gay Slur case is Thrown Out' *Belfast Telegraph* (Belfast, 17 October 2015) <www.belfasttelegraph.co.uk/news/northern-ireland/dups-jim-wells-eyes-comeback-after-gay-slur-case-is-thrown-out-34116962.html>.

92 Northern Ireland Statistics and Research Agency (2014) *Marriages, Divorces and Civil Partnerships in Northern Ireland 2013* <www.gov.uk/government/statistics/marriages-divorces-and-civil-partnerships-in-northern-ireland-2013>.

93 The agency also documents the marital status of civil partnership registrants, indicating a trend exists whereby most applicants are single although a minority have previously been in a heterosexual marriage or a prior civil partnership.

94 B Dickson and T McCleave, 'Human Rights in the Courts of Northern Ireland 2009–10' (2010) 61(4) Northern Ireland Legal Quarterly 411, 429.

95 G Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities* (Black Rose Books 1996) 25.

equality among a diverse range of identities demonstrates an alternative way of enabling integration, equality and inclusion.

Redefining 'integration'

Section 75(2) of the Northern Ireland Act 1998 outlines public bodies' responsibilities to have 'due regard' to provide equality of opportunity across all nine groups identified under s 75(1)[96] and to promote 'good relations' between these different persons. Therefore, it compels the statutory sector to engage with LGB&T advocates and organisations on issues relating to the effective implementation of duties. During their drafting of the 'Cohesion, Sharing and Integration' (CSI) document,[97] the Office of the First Minister and Deputy First Minister (OFMdFM) underwent a series of community consultations in line with its obligations under s 75(2). However, it later emerged from LGB&T organisations that the government's original intention was *not* to consult with the wider LGB&T community or its representatives, yet, having done so, still managed to produce a draft document with glaring omission of considerations specific to LGB&T community members.[98] Advocates' concerns suggested that this was indicative of some politicians' failure to recognise or acknowledge either the presence of LGB&T people during the conflict or the impact of this experience on exacerbating their minority status:

> By excluding the representations made by the LGBT community throughout the process of drafting CSI, OFMdFM has only served to perpetuate the existing discrimination and disadvantage our community faces . . . OFMdFM has blatantly ignored the plethora of research repeatedly identifying the marginalisation of lesbian and bisexual women and their families, within social, economic, political and geographical structures.[99]

The omission of reference to LGB&T communities in particular areas of the document – such as its aims for empowering the next generation; respecting cultures; and building secure and cohesive communities – not only indicated a hierarchy of prejudice in terms of whose identity or experience is prioritised, but also a failure to see how LGB&T issues need to be situated *within* wider social, political, health and economic strategies to effect real and lasting change. The NIHRC indicated that the draft document made no direct reference to binding human rights standards, leading to several organisations calling for the finalised version to be underpinned by these. The CSI consultation made reference to targeted victimisation and hate incidents, but only explicitly to those of a sectarian and racist nature. The omission of trans* issues in both the initial s 75 equality policies and the CSI consultation document ignored and invalidated the needs of transgender people in Northern Ireland. Discrepancies with England and Wales are evident here too, as 'gender identity' is not recognised as a protected hate crime characteristic in Northern Ireland.[100] Although the Police Service of Northern Ireland has documented trans*

96 These are: religion, political opinion, gender, disability, race, ethnicity, sexual orientation, marital status and dependency.

97 See http://cain.ulst.ac.uk/issues/politics/ofmdfm/ofmdfm_270710_sharing.pdf.

98 See the response from the Lesbian Advocacy Services Initiative (LASI) (CSI/215/2010). The response from Queerspace also noted that a reference to LGB&T groups was made in an earlier draft, but omitted when the final document was put out to public consultation (CSI/126/2010) 7. Contact the author for copies or see the results of the consultation action plan for a round-up of key contributors and their points <http://www.niassembly.gov.uk/globalassets/documents/corporate/commission/good-relations-action-plan-2010-11.pdf>.

99 See LASI (n 98) 3.

100 In England and Wales, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 outlined provisions for gender identity to be recognised as a 'hate crime' category.

experiences of victimisation since 2006, no specific legal remedy exists to recognise the transphobic element in a prosecution or conviction, unlike crimes based on a perpetrator's hostility towards race, religion, sectarianism, sexual orientation and disability (which are legally recognised).[101]

In an attempt to respond to these criticisms, the CSI document outlined a commitment by the OFMdFM to produce a dedicated Sexual Orientation Strategy. On the one hand, this indicated a positive move, recognising the existence of sexual minorities as a distinct social group and the need for targeted decisions which reflected their requests. On the other, the separating out of sexual orientation issues suggested to some that the issues affecting sexual minorities were not perceived as relevant to the wider society, thus undermining the very nature of 'cohesion' and 'integration'. Previous attempts to enact a Sexual Orientation Strategy in 2006 had failed to come to fruition despite consultations occurring with relevant LGB&T advocacy organisations, thus the prioritising of such a venture was deemed questionable by those representing their communities' interests. LGB&T advocates indicated that outlining definitive publication dates for the strategy would go some way to restoring faith in both the project and the sentiment behind its establishment, whilst also directing ministers to Principle 26 of the Yogyakarta Principles which calls on signatory states to:

a) Take all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities; and

b) Foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.[102]

The OFMdFM finally put out for consultation a Sexual Orientation Strategy and Action Plan in 2014. The consultation document recognised the problems LGB&T people face due to prejudice and intolerance and acknowledged that good relations principles must apply to LGB&T people in the same way that they apply to people from different religious, community or ethnic backgrounds:

> Lesbian, gay, bisexual and transgender people have and do play a role in building good relations across our community. This was highlighted extensively throughout the public consultation when a number of individuals and representatives of lesbian, gay and bisexual groups, and transgender people, also spoke of the need to apply good relations principles more widely across all s 75 groupings.[103]

The report compiled from the 995 responses to the consultation indicated strong support for all five of the proposed objectives, namely:

- Countering homophobia, including homophobic harassment, hate crime, bullying, violence and abuse.

101 U Hansson and H Depret, *Equality Mainstreaming: Policy and Practice for Transgender People* (Institute for Conflict Research 2007).

102 See <www.yogyakartaprinciples.org/principle-26>.

103 OFMdFM, 'Development of a Sexual Orientation Strategy and Action Plan' (OFMdFM 2014) <www.communities-ni.gov.uk/sites/default/files/consultations/ofmdfm_dev/developing-a-sexual-orientation-strategy-consultation-document.pdf> 1.4.

- Adopting a positive and proactive approach to identifying, understanding and responding to the needs of LGB people and their families.
- Ensuring that negative stereotypes of LGB people and homophobia have no place in policy development or decision-making.
- Recognising the multiple identities of LGB people (e.g. gender identity, ethnic origin, disability, occupation) as well as the impact of these other identities on individual circumstances.
- Promoting a partnership approach to delivering effective and inclusive policies and service delivery, enabling departments, agencies, statutory bodies, NGOs, trade unions, and voluntary and community groups to work productively together and share best practice.[104]

Other issues raised within the scope of the study included a need to recognise the diversity of lesbian, gay and bisexual family units,[105] greater accountability among political representatives, as well as the separation of personal views from policy decisions.[106] Also included in the report were responses suggesting the inclusion of heterosexual people, and that such a strategy was unnecessary; these were considered outside of the scope of the consultation. The report concluded by indicating that all consultation responses and research findings would be taken into account in the development of a draft Sexual Orientation Strategy, which, if agreed upon by ministers of the Executive, would be put out for a further 12-week online consultation process.[107]

It would seem therefore that the political agency afforded to LGB&T communities in Northern Ireland has been a necessary result of transformative social, structural and statutory change, but one that is significantly shaped by Northern Ireland's socio-political past. Recognition of this is only just beginning to emerge as an area of scholarly focus, leaving plenty of scope for analysis with respect to understanding the relationship between sexual minority status and transitional justice in Northern Ireland. This dearth suggests that there is still some way to go to fully integrate LGB&T communities in transformative practices in the region, as Ashe outlines:

> Mainstream conflict transformation scholarship has not considered the effects of legal frameworks on sexual equality but has extensively scrutinised legislation on ethnic equality. It has, therefore, failed to provide a research base for sexual politics in Northern Ireland.[108]

This could change, however, with the growing recognition of sexual minority groups and the necessary intersections between sexual identity and religion and ethnicity and nationality in Northern Ireland. Also, given the victimised status of LGB&T communities when it comes to effecting rights and equalities (as detailed above), recognising that victimisation may be heightened as a result of one or more of these variables renders this a valid area for study. Given the nature of Northern Ireland, how this is addressed will have a great bearing on outcome. Just addressing sexual orientation without other identity factors could result in the marginalising or essentialising of groups and/or experiences.

104 OFMdFM, 'Report on Consultation to Develop a Sexual Orientation Strategy' (OFMdFM 2015) <www.communities-ni.gov.uk/sites/default/files/publications/ofmdfm/sexual-orientation-strategy-consultation-report.pdf> at 1.19.

105 Ibid 1.11.

106 Ibid 1.13.

107 At the time of writing, this follow-up work was still ongoing with no draft Sexual Orientation Strategy document yet released.

108 Ashe (n 46) 26.

As Fobear suggests, an 'essentializing of narrative and confining identity in a fixed construction not only limits critical analysis of the underlying social structures that allow violence to happen in both the past and the present, but also denies the diversity and plurality of experience'.[109] Certainly in Northern Ireland, there is adequate scope for exploring the heterogeneity of LGB&T experiences and to 'queer' dominant discourses from a position of inclusion.

Conclusion: queering transitional justice in Northern Ireland

Bell and O'Rourke[110] have addressed feminist concerns regarding exactly what it is that transitional justice is transitioning 'from' and 'to', indicating how 'ordinary, liberalising and restorative' theories of justice underpin transitional perspectives. In the first, ordinary, comparisons with existing justice measures account for the similarly partial nature of transitional justice, where a 'justice gap' will also feature and require toleration. The second perspective, liberalising, also addresses (and allows for) this gap in light of the ultimate goals to be achieved through transition, viewing the rule of law as a limited yet transformative and enabling process. Finally, the restorative perspective rejects accountability and legal routes for restoration and reparation of relationships and communities. Which of these approaches prove most useful largely depends on the wishes of the citizens living there, but it is important to note that in transformative societies, these spaces open up.

This paper has demonstrated how, in Northern Ireland, processes of transformation have made space to invoke queer and intersectionality theories, providing a useful framework within which to account for multiple identity factors informing and sustaining socio-legal inequalities.[111] Applying queer theoretical analysis enables a better understanding of the origins and developments of dominant identity constructions framing minority sexualities in such negative discourses.[112] Adding intersectionality theory facilitates an analysis of 'the masculinity of conflicts and the dominance of elite men, who are key influencers in state institutions empowered to enforce or impede enforcement of negotiated terms'.[113] Both inform a critical sexual analysis of transitional justice mechanisms, which in turn allows for a greater recognition of harms imparted that may otherwise remain visible under a dominant heteronormative framework of analysis, as McEvoy notes:

> A further consideration of the impact of sexuality on the study of post-conflict studies is the way that LGBT identities undermine the peacebuilding processes of wartorn communities . . . We could imagine the increased feelings of isolation that LGBT people might feel in a context in which collective community building efforts are predicated on a highly heteronormative script.[114]

The transitional justice literature indicates that the emergence of truth commissions as a popular approach is due to the acknowledgment of marginalised experiences: giving space

109 Fobear (n 35) 10.

110 C Bell and C O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 1 International Journal of Transitional Justice 23–44.

111 Fobear (n 35)

112 A Jagose, *Queer Theory* (Melbourne University Press 1996).

113 F Ní Aoláin and E Rooney, 'Under-enforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1 International Journal of Transitional Justice 338, 340.

114 S McEvoy, 'Queering Security Studies in Northern Ireland: Problem, Practice and Practitioner' in M Lavinas Picq and M Thiel (eds), *Sexualities in World Politics: How LGBTQ Claims Shape International Relations* (Routledge 2015) 146.

and priority to otherwise suppressed voices. As Fobear[115] suggests, queer theory can act as 'a much needed addition not only to truth commissions, but to research and advocacy related to transitional justice mechanisms' due to queer theory's inherently critical and critiquing nature of power relations and imposed social structures. Appropriating this tool to showcase the struggles faced by members of LGB&T communities in Northern Ireland would therefore be an appropriate starting point from which to develop a culturally specific 'history of sexuality' in the region. It would also offer a much needed counter-narrative to the dominant doctrinal and political discourses of public condemnation which still characterise much of the rhetoric around LGB&T identities in Northern Ireland. It is important that sexual minority voices, which may be silenced through fear of additional prejudice and persecution, are safely included to ensure that accountability processes embody inclusivity, impartiality and integrity. Transitional justice has demonstrated the potential for effective and inclusive mechanisms of conflict transformation, but for Northern Ireland to truly move beyond its 'politics of the past' it must acknowledge and document the lived experiences of its LGB&T citizens before the opportunity to do so is lost.

115 Fobear (n 35) 1, 13.

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Equitable allowances or restitutionary measures for dishonest assistance and knowing receipt

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Abstract

This article considers the credit given to dishonest assistants and knowing recipients in claims for disgorgement, with greater focus on dishonest assistance. Traditionally, equity has awarded a parsimonious 'just allowance' for work and skill. The language of causation in Novoship (UK) Ltd v Mikhaylyuk *[2014] EWCA Civ 908 suggests a more generous restitutionary approach which is at odds with the justification given: prophylaxis. This tension makes the law incoherent. Moreover, the bar to full disgorgement has been set too high, such that the remedy is unavailable in practice. Therefore, even if the restitutionary approach is affirmed, it must be revised.*

Keywords: disgorgement; equitable allowances; remoteness of gain; dishonest assistance; knowing receipt.

Disgorgement in equity has become more widely available. It is familiar as against a fiduciary where the profits of the defaulting fiduciary's efforts are appropriated to the principal, seen in cases such as *Boardman v Phipps*.[1] In *Novoship (UK) Ltd v Mikhaylyuk*, the Court of Appeal held that disgorgement is available in principle against accessories (meaning dishonest assistants and knowing recipients) to a breach of fiduciary duty.[2] Disgorgement is used equivalently to account of profits in this article[3] and is a gain-based remedy that takes net profit.[4] The remedy against accessories is personal, not proprietary, but is not limited to the principal sum extracted, if any. The judgment appears to support a claim in principle for full account of profits, not limited to smaller measures such as the *Wrotham Park* 'hypothetical bargain'.[5]

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1 [1967] 2 AC 46 (HL).

2 [2014] EWCA Civ 908, [2015] QB 499.

3 Peter Devonshire, *Account of Profits* (Thomson Reuters 2013) para 2.2 also argues they are equivalent. See also Paul Collins, 'Liability for Profits in Breach of Contract: Revisiting *Attorney-General v Blake*' [2015] RLR 44, 47 in n 32. Cf James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002) 72ff. Edelman identifies a distinction where the account of profits, unlike disgorgement, would include costs avoided. English law is sceptical of such a claim: *A-G v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL) 286.

4 There are other gain-based measures: see James Edelman, 'Restitutionary Damages and Disgorgement Damages for Breach of Contract' [2000] 2 Restitution Law Review 129 for a taxonomy.

5 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

In *Novoship*, the Court of Appeal decided upon a primary test of 'effective causation' to decide whether to disgorge an accessory's gain or not; asking whether the gain would have been made 'but for' the wrong was not appropriate. Gain 'effectively caused' by the wrongdoing would be disgorged, otherwise it would be credited to the wrongdoer's own legitimate efforts. In addition, there is a discretion whether to disgorge or not and disgorgement will not be ordered if it would be disproportionate to do so.[6] Causation is the language of restitution for wrongs;[7] contrast this with the traditional language of permitting a 'just allowance' in the breach of fiduciary duty cases.[8]

Where there is disgorgement, a question always follows: is the wrongdoer permitted to retain any of the gain? And if so, why and how is it measured? As Virgo points out, such questions of assessment have received insufficient attention in both cases and commentary.[9] Given the expansion of the jurisdiction to disgorge, these questions are especially due for fresh examination. Ultimately, it comes down to this: should we give accessories a generous, or parsimonious, allowance? And, having made that choice, what is the appropriate conceptual framework and language and, indeed, what, if any, is the difference between restitutionary and traditional equitable approaches? These are the questions this article attempts to answer.

This article takes the position that there is a difference in balance between the two approaches. Restitutionary approaches are often more generous, tending to allow profit-sharing, where the traditional equitable approach is more parsimonious, tending to allow only remuneration for work and skill expended. Moreover, two specific differences are identified. Both were in point in *Novoship*.

The first is the treatment of external or neutral events such as market movements. The equitable approach would exclude them from an allowance where restitutionary approaches may not. The second is that the court held that if the principal forgoes an opportunity and the dishonest assistant takes it, disgorgement of the gain would be disproportionate and thus disallowed. This is not the case for fiduciaries.

This leads to a problem. The justification for disgorgement given in the judgment was the fiduciary one: the deterrence of (or prophylaxis against) wrongdoing.[10] This is incongruous with the generosity of the tests. The problem is a lack of consistency and this makes the law difficult to apply and endangers its coherent development. It is argued that paying insufficient attention to the normative matters behind the tests adopted led to this problem.

Moreover, even if this generous approach is to be preferred, the tests adopted for disgorgement need refinement. By construing 'effective causation' so narrowly, the Court of Appeal appears to have unwittingly limited disgorgement to the hypothetical bargain measure, which arguably is not full-blown disgorgement at all.[11]

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6 *Novoship* (n 2) [119].

7 E.g. Graham Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in Charles E F Rickett (ed), *Justifying Private Law Remedies* (Hart 2008); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon 1989) 351ff.

8 E.g. *Lord Provost v Lord Advocate* (1879) 4 App Cas 823 (HL Sc) 839. See generally J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) para 5–280.

9 Virgo (n 7) 301.

10 *Novoship* (n 2) [73]–[77], [110]; F*iona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm), (2011) 108 LSG 17 [66] both citing C*onsul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (HCA) 397.

11 See e.g. Edelman (n 3) 2–3 and ch 3.

Although a less generous approach is advocated, it is these two problems with which this article is primarily concerned. The level of generosity of allowances is a matter of opinion and the courts may differ in their opinion. However, the coherence and limitation points are matters of logic and principle. One cannot be generous and parsimonious at the same time.

This argument proceeds as follows. The justification for and the approaches for defining allowances and the terminology and how it has been applied in practice are set out. This enables a close analysis of *Novoship*, which brings out the aforementioned points. Finally, how the law could be refined is considered.

1 The facts of *Novoship*

In order to hang the discussion on some concrete facts – and because specific criticism of the case will be made – a brief outline of *Novoship (UK) Ltd v Mikhaylyuk* is necessary. *Novoship* was a case of dishonesty and corruption by one of Novoship's managers, one Mikhaylyuk, who stood in a fiduciary position to them. There were two corrupt transactions. The first concerned charters ostensibly between Novoship and Petroleos de Venezuela SA, which were arranged by Mikhaylyuk (the PDVSA transaction). In reality, one Ruperti was interposed between the two, overcharging PDVSA and paying bribes to a company called Amon, which was controlled by one Nikitin. Participating was clearly a breach of fiduciary duty by Mikhaylyuk. Nikitin knew that Mikhaylyuk had required bribes as the price of chartering Novoship's vessels. This made Nikitin a dishonest assistant in respect of this transaction.

The second concerned the 'Henriot transaction' from which the gain (some $109 million) was sought. At the same time, Mikhaylyuk was arranging charters to Nikitin's other company, Henriot Finance. Nikitin spent his own money in this venture and paid as near to market rates for the head charters as mattered.[12] However, this was still a breach of fiduciary duty on the part of Mikhaylyuk because of (at the very least) the realistic possibility he was putting his own interests ahead of Novoship's. As for Nikitin, he knew enough such that it was dishonest to enter into these charterparties, which made him a dishonest assistant in respect of this transaction too. Christopher Clarke J summed it up by remarking that Mikhaylyuk 'was continuing a relationship which was corrupt in inception and had not been cleansed'.[13]

Nikitin's profit was largely due to the extraordinary rise in the market between the conclusions of the head charters and the sub-charters he entered into. What was sought was therefore the profit of the accessory, not that of the principal under some form of joint and several liability. Nikitin did not pay or receive bribes in respect of the Henriot transaction.[14] However, there was a clear causal link to his wrongdoing – without the dishonest assistance in the PDVSA transaction, Nikitin could not have made the profit because he would not have been able to secure the head charters.[15] This is referred to as the 'collateral advantage' Nikitin obtained.

The independent enterprise Nikitin ran, that of sub-chartering Novoship's vessels, was entirely legitimate, save that it was made possible by the corrupt relationship.

12 *Novoship* (n 2) [65].

13 *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) [509].

14 *Novoship* (n 2) [8].

15 Ibid [9].

Novoship had wished to charter the vessels at the then market rates in order to lay off the risk of market fluctuations.[16] This was important to the Court of Appeal's reasoning. Nikitin escaped liability for two reasons. First, because the profit was caused, according to the Court of Appeal, 'effectively' by the shipping market's rise rather than the wrongdoing (Nikitin had been a skilful businessman and had judged the market well);[17] and second, there was a discretion to refuse disgorgement and it would be exercised because it would have been disproportionate to disgorge given Novoship's desire to lay off the risk,[18] or, in other words, because Novoship had actively declined the opportunity.

2 Justifying disgorgement

2.a Fiduciaries

First consider why disgorgement is justified. This article accepts the conventional justifications for the disgorgement remedy against fiduciaries: prophylaxis and deterrence.[19] If there is a requirement to deter in all circumstances, there must be a remedy that does not depend on there being actual losses. Otherwise there would be no remedy if it is not possible to rescind a transaction (and have restitution of benefits) since there are no punitive damages in English equity. The familiar propositions as to the fiduciary rules follow. It does not matter that the principal suffered no loss:[20] '[B]etter the principal receive a windfall than that the fiduciary retain the profit.'[21] Equity will not allow a fiduciary to keep his or her wrongful gain *pour encourager les autres*.[22]

There are also principled accounts that justify disgorgement against fiduciaries for other reasons. For instance, Lionel Smith argues that a fiduciary is subject to a primary obligation to render any profit made in the relevant circumstances immediately to her principal and it is this that explains the rule that no loss is necessary. That primary obligation springs from the acquisition of part of the principal's autonomy when the fiduciary acquires legal powers to act on her behalf.[23] Because this includes profit from activities that go against the principal's interest, often variants of the somewhat fictitious 'good man theory' are pressed into service. This holds that equity treats the wrongdoer *as if* he was acting on behalf of his principal all along.[24]

2.b Accessories

One principled justification for the disgorgement of accessories can be dismissed shortly. Lionel Smith's autonomy argument requires a pre-existing fiduciary relationship, but accessories are not fiduciaries.[25] Since that relationship is absent, one might fix dishonest

16 Ibid [117].

17 Ibid [114].

18 Ibid [120].

19 E.g. *Harris v Digital Pulse* [2003] NSWCA 10, (2003) 197 ALR 626 [307]; *Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch), [287], quoting John McGhee, *Snell's Equity* (32nd edn, Sweet & Maxwell 2010) para 7–018.

20 *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223; *Regal (Hastings) Ltd v Gulliver* [1967] AC 134, [1942] 1 All ER 378 (HL); *Boardman v Phipp*s (n 1).

21 Lord Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 Cambridge Law Journal 583, 600.

22 *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [74]; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HCA) 562.

23 Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 Law Quarterly Review 608.

24 Sir Peter Millett, 'Bribes and Secret Commissions' [1994] Restitution Law Review 7, 20; *A-G for Hong Kong v Reid* [1994] AC 324 (PC).

25 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

assistants and knowing recipients with liability to disgorge through the principles of conventional accessorial liability. This would, however, make the accessory's liability duplicative of the fiduciary's, i.e. the accessory would be liable for the *fiduciary's* gain, not his own.[26] This proposition has been rejected in the case law. In *Ultraframe (UK) Ltd v Fielding*, Lewison J was concerned that holding a dishonest assistant liable to disgorge profits made by the trustee directing the breach was 'begin[ing] to look like a punitive measure'.[27] The Court of Appeal was also concerned that the remedy was not fashioned as a form of forfeiture in *Novoship*.[28]

Since the liability is for the accessory's own profits, it can only be independent or primary liability.[29] Ridge, considering dishonest assistance, argues that disgorgement can be justified as simply the appropriate remedy for a wrong.[30] Disgorgement is appropriate where the level of the accessory's culpability or closeness to the fiduciary warrants it. An example Ridge gives is the active and deliberate encouragement of the breach of fiduciary duty by the dishonest assistant.[31] The justifications (or 'pragmatic grounds') Ridge gives are: (i) an alternative claim in the event that the fiduciary is impecunious or has absconded; and (ii) the deterrence of third parties.[32] The first is applicable only to claims for compensation, so that leaves only the second for claims for disgorgement.

According to the Court of Appeal in *Novoship*, the principle of deterrence applies to accessories as well as fiduciaries. The court endorsed *dicta* in *Consul Development Pty Ltd v DPC Estates Pty Ltd* holding that:

> If the maintenance of a very high standard of conduct on the part of fiduciaries is the purpose of the rule it would seem equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duties.[33]

Although the court left open the choice between that and the other justification in *Consul Development*, namely that it would be 'inequitable' to allow the accessory to retain the profit, this is hardly a reasoned justification. Deterrence was the only substantive reason given.[34]

Consequently, the only basis to support disgorgement claims against accessories is that of deterrence. It follows that, if fiduciary prophylactic principles are to be applied to accessories, then the law should not take into account whether the principal suffered a loss or whether the principal would gain a windfall. The culpability of the accessories should, however, matter.

It also follows that knowing recipients should perhaps be treated differently to dishonest assistants. Knowing receipt may not warrant full disgorgement or disgorgement

26 Steven B Elliott and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 Modern Law Review 16, 17.

27 [2005] EWHC 1638 (Ch) [1597]–[1601], quoting Elliott and Mitchell (n 26) 41.

28 *Novoship* (n 2) [116] quoting *Murad v Al-Saraj* (n 22) [85]: 'The kind of account ordered in this case is an account of profits, that is a procedure to ensure the restitution of profits which ought to have been made for the beneficiary and not a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account.'

29 In this sense the term 'accessory' can be criticised as a misnomer: Sarah Worthington, 'Exposing Third Party Liability in Equity: Lessons from the Limitation Rules' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart 2017) (forthcoming) 'Conclusion', point 3. However, dishonest assistance and knowing receipt liability is founded on an underlying breach of trust or fiduciary duty, so these wrongdoers are accessories to a primary wrong in that sense.

30 Pauline Ridge, 'Justifying the Remedies for Dishonest Assistance' (2008) 124 Law Quarterly Review 445, 446.

31 Ibid 455.

32 Ibid 446.

33 *Novoship* (n 2) [76] quoting *Consul Development v DPC* (n 10) 397.

34 In *Fiona Trust* (n 10) [66], Andrew Smith J did not choose one basis over the other either.

at all because there will always be a loss to sue for – the value of the property received. This is not necessarily the case for dishonest assistance.

3 Justifying allowances

3.a Fiduciaries

Once disgorgement is justified, the question is: how much? There is a countervailing principle to disgorgement against fiduciaries: non-forfeiture. While disgorgement clearly has a punitive element,[35] it is not forfeiture *sensu stricto*. It is said that 'equity never forfeits'.[36] In fiduciary cases, liability is limited either to the fiduciary's actual net profits (if any),[37] to what the principal ought to have received,[38] or to actual losses.[39] In *Vyse v Foster* the Court of Appeal said that '[t]his Court is not a Court of penal jurisdiction'.[40]

While these two principles are clearly in tension, the one uncontroversial point is that disgorgement is of net profits. Legitimate expenditure is always deducted, hence the phrase 'account of profits'. It is a short stretch to make an allowance for work and skill expended by the wrongdoer, as this is little different to expenditure on a consultant to do the same. It is where this principle is carried forward that the controversy builds. It is clear that permitting the wrongdoer to share in the profits reduces the deterrent effect. And this leads to the well-known *dictum* of Lord Goff insisting that:

> [T]he exercise of the jurisdiction [to award allowances must be] restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.[41]

Nonetheless, as Harding points out, Lord Goff did not go so far as saying that allowances were never justified. Therefore, even on his strict view, some level of allowance is appropriate,[42] even if it tends towards over-protection. Moreover, restricting allowances too severely would amount to forfeiture. In the recent case of *Murad v Al-Saraj*,[43] Arden LJ quoted concerns from the old case of *Docker v Somes*.[44] A hypothetical example was of a pharmacist who bought drugs with £100 of trust money and earned £1000 selling them to patients. Lord Brougham suggested these were cases primarily of skilful labour that would not be subject to disgorgement.[45] 'Full' disgorgement absent an allowance certainly appears to trespass into the realm of forfeiture in such cases.

That is as far as it goes. There are statements to the effect that:

35 *Re Western of Canada Oil, Lands and Works Co (No 1), Carling's Case* (1875) 1 Ch D 115 (CA), 123; David Stevens, 'Restitution, Property and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things (Part 1)' (1989) 39 University of Toronto Law Journal 258, 279.

36 Gary Watt, 'Property Rights and Wrongs: The Frontiers of Forfeiture' in Elizabeth Cooke (ed), *Modern Studies in Property Law Volume 1: Property 2000* (Hart 2001) 116. See also *A-G v Alford* (1854) 4 De GM & G 843, 853; 43 ER 737, 742; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), 692.

37 *Vyse v Foster* (1872) LR 9 Ch App 309 (CA Ch), 333.

38 Ibid; *A-G v Alford* (1854) 4 De GM & G 843, 851; 43 ER 737, 741.

39 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC); *Swindle v Harrison* [1997] 4 All ER 705 (CA).

40 *Vyse v Foster* (n 37) 333.

41 *Guinness plc v Saunders* [1990] 2 AC 663 (HL) 701. This must apply to all types of fiduciaries, not just trustees.

42 Matthew Harding, 'Justifying Fiduciary Allowances' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart 2009) 344.

43 *Murad v Al-Saraj* (n 22) [85].

44 (1834) 2 My & K 655, 39 ER 1095.

45 (1834) 2 My & K 655, 667; 39 ER 1095, 1099.

> [Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties. The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched.[46]

However, the limit of robbing the fiduciary appears to be set at the level of what would cause forfeiture. The *dicta* quoted above show that a windfall is not considered unwarranted enrichment provided it is given in the name of prophylaxis.[47]

3.b Accessories

Allowances for accessories – or indeed reasons for excusing the accessory from disgorgement altogether – would therefore be justified for at least the same reasons as for fiduciaries. The further reason is to reflect any lesser culpability on the part of the accessory. There are some justifications for treating accessories differently and they are examined here.

The distance of the accessory from the fiduciary relation was an important factor for the Court of Appeal in *Novoship*.[48] It relied heavily on the Supreme Court case of *Williams v Central Bank of Nigeria* where it was confirmed that accessories are not fiduciaries and the rules are less strict: 'No trust has been reposed in [the accessory].'[49] A limitation period is applied to accessories where one is not to a trustee, at least in respect to the stewardship of trust property.[50]

However, that is just one factor. The difference in limitation period is justified by the fact that the trustee is entrusted with the long-term stewardship of property. The trustee's involvement in the trust's affairs is entirely to be expected and gives no grounds for suspicion without more. The accessory is typically not involved so closely and for such a long period of time and, as such, there is no excuse for excessive delay on the part of the beneficiary in taking action.[51] But what justifies a shorter limitation period does not necessarily justify reduced liability in other areas.

Indeed, as the Court of Appeal said in *Novoship*, there is an imperative to deter fiduciary wrongdoing and its assistance, hence the accessory is also made liable.[52] This suggests that the underlying norms are the same or similar even if the concrete rules have to be made different to reflect the accessory's different place in the scheme of things. Old *dicta* such as 'clothing [the] stranger . . . with the fiduciary character, for the purposes of making him accountable'[53] can further be taken to reflect the courts' attitude that the norms are the same and the rules adopted must remain within the range of possibilities consistent with those underlying norms.[54] If one is to take Lord Goff's *dictum* concerning deterring fiduciary breach[55] seriously – or as seriously as is possible while still accepting a need for allowances – these matters need to form part of the discussion. They did not, however, in *Novoship*.

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46 *Maguire v Makaronis* (1997) 188 CLR 449 (HCA), 496, quoted in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453 [47].

47 Section 2.a.

48 *Novoship* (n 2) [68]ff.

49 *Williams v Central Bank of Nigeria* (n 25) [31].

50 Ibid.

51 Ibid [13].

52 *Novoship* (n 2) [76] quoting *Consul Development v DPC* (n 10) 397.

53 *Docker v Somes* (1834) 2 My & K 655, 665; 39 ER 1095, 1098.

54 A point also made by Virgo (n 7) 328ff.

55 See text to n 42 above.

4 Approaches to formulating liability and allowances

4.a Nomenclature and balance

The issue is then how to express in concrete rules the principles governing allowances and, indeed, whether there is liability – the two overlap, as will be seen when discussing restitutionary measures. Accordingly, this section is concerned with the terminology used and precisely what it means in order to address the questions of basis of disgorgement and allowance. There are two broad choices as to the principles governing measure of allowance, as Mason J states:

> One approach, more favourable to the fiduciary, is that he should be held liable to account [only] of the particular benefits which flowed to him in breach of his duty. Another approach, less favourable to the fiduciary, is that he should be held accountable for the entire business and its profits, due allowance being made for the time, energy, skill, and financial contribution that he has expended or made.[56]

Theories of restitution do not preclude the possibility of adopting Mason J's latter approach. It is a crude caricature to say that restitutionary theories are an attempt to homogenise the rules for vastly different causes of action into a set of fixed rules. Indeed, Birks went so far as to argue that restitution for wrongs ought to be studied within the law of wrongs, not the law of unjust enrichment.[57] He identified three broad classes of restitution for wrongs: (a) the deliberate exploitation of wrongdoing; (b) anti-enrichment, as opposed to anti-harm, wrongs; and (c) prophylaxis.[58] While he did not consider quantum and allowances in respect of each class, his schema comfortably accommodates the possibility of different norms supporting disgorgement claims, putting fiduciary actions in category (c) and leaving space for more generous allowances in other actions. Furthermore, Virgo has argued that rules of causation and remoteness will have to be adapted with respect to 'the different policies underpinning particular wrongs'.[59]

This leads to the names proposed for each approach identified by Mason J. Since the prophylactic approach demands no profit is left with the wrongdoer, the first approach can conveniently be called 'non-prophylactic' and the second 'prophylactic'. Clearly, they are ends of a continuum and, in practice, giving an allowance may be a difficult and uncertain exercise in finding the balance.

4.b Equitable just allowances

Conventionally, equity has adopted the latter approach. Fiduciary allowances are discretionary[60] and it is for the wrongdoer to establish that he should be granted an allowance.[61] Perhaps the most significant factor is the blameworthiness of the wrongdoer. In *Boardman v Phipps* the worst of the fiduciary's behaviour towards the trust was perhaps insufficient disclosure and a liberal allowance was therefore permitted.[62]

56 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (HCA), 110.

57 Peter Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005); Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998).

58 Birks (n 7) 326–33.

59 Virgo (n 7) 303. Virgo did not tackle accessories to a breach of fiduciary duty, most likely because that work predates *Novoship* and the matter would then have seemed relatively unimportant.

60 *Lord Provost v Lord Advocate* (n 8) 839.

61 *Warman v Dwyer* (n 22) 561.

62 *Boardman v Phipps* (n 1).

Conversely, the defendant's dishonesty was said to be a reason to deny him an allowance in *Murad v Al-Saraj*.[63]

Even in the least culpable of all breaches of fiduciary duty – where the fiduciary has actually made a profit for the trust that could not always have been made otherwise – a profit share was not permitted: *Boardman v Phipps*.[64] The texts list only *O'Sullivan v Management Agency and Music Ltd* as an example where profit-sharing was permitted.[65] There, the Court of Appeal held that in exceptional circumstances there might be a small profit element in the allowance given to the fiduciary.[66] However, this was consistent with a pre-breach agreement to share profits, which was knowingly agreed to by the claimant. Moreover, the court expressly stated that the allowance had been reduced because of the wrongdoing.[67]

There are other factors,[68] but these are the most significant. They lean heavily towards keeping the allowance parsimonious, towards remuneration for skill rather than a share of the profits. Certainly, in *Warman International Ltd v Dwyer*, it was noted that the fiduciary's unauthorised profit had been 'carved out of the business' of the principal and profit-sharing was therefore inappropriate.[69] In that case it was also said to be inappropriate to allow profit-sharing if the fiduciary had exposed the principal's property to risk.[70]

4.c Restitutionary language: causation and remoteness

Fiduciary cases have eschewed the language of causation and remoteness of gain in favour of framing the issue as one of granting an allowance. While the editors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* dismiss recourse to these concepts as having 'no support in either the doctrines by or the practices of the courts [and dependent on] restitutionary theories of an a priori kind',[71] the restitutionary theories are, at the very least, a useful comparator. Moreover, that passage was apparently written before the judgment in *Novoship* was handed down and certainly without reference to it.

Causation encompasses more than a simple connection to the wrongdoing. How causation is drawn defines the kind of link required. It may be thought that, at a minimum, 'but for' causation is required: that the wrongdoer would not have made the same profit in a way other than via breach of duty. This is certainly what is apparently required in theories of restitution for wrongs derived from non-fiduciary cases.[72] In the

63 *Murad v Al-Saraj* (n 22).

64 *Boardman v Phipps* (n 1).

65 [1985] QB 428 (CA): Heydon et al (n 8) para 5–280; Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 20–049; McGhee (n 19) para 7–027; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 436; Robert Pearce and Warren Barr, *Pearce and Stevens' Trusts and Equitable Obligations* (6th edn, Oxford University Press 2015) 884–5.

66 *O'Sullivan* (n 65) 462, 469. In Australia, profit-sharing is more likely to be granted: e.g. *Warman v Dwyer* (n 22).

67 *O'Sullivan* (n 65) 468.

68 See Heydon et al (n 8) para 5–280.

69 *Warman v Dwyer* (n 22) 568.

70 Ibid 561.

71 Heydon et al (n 8) para 5–280, but see *Warman v Dwyer* (n 22) 561 for a tentative move towards the language of causation, which the authors begrudgingly note. There are two possible explanations for this. First, it could simply be that equity has been slow to adopt these principles, but recent cases are challenging this reticence. For causation: breach of fiduciary duty: *Brickenden* (n 39), cf *Swindle v Harrison* (n 39). Breach of trust: *Re Dawson* [1966] 2 NSWR 211 (New South Wales Supreme Court), cf *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL). Second and related, it could be, as Edelman says, that these principles are in there infancy and have not yet been fully explored: Edelman (n 3) 103.

72 E.g. Virgo (n 7) 304.

patent infringement case of *Celanese International Corporation v BP Chemicals Ltd*, the award was for the additional profits resulting from the infringement, rather than a complete account because '[t]he question to be answered is "what profits were *in fact* made by the defendant by the wrongful activity?"'.[73] Implicit in this is that the defendant would have been able to make and market the product in any event, and should be credited for those hypothetical profits.

Celanese International also suggests that causation goes to quantum as well as liability. It also suggests that, for this cause of action, the measure of disgorgement looks to the part of the gain caused by the wrongdoing and omits the part not so caused. Fiduciary cases have rejected causation as a requirement. In *Murad v Al-Saraj*, the fiduciary breached his fiduciary duty by failing to disclose that his contribution to a joint venture was by way of set-off rather than directly.[74] Nonetheless, it was found that his co-venturers would have continued in any event and would merely have demanded a greater share of the profits. The Court of Appeal, by a majority, rejected the submission that the fiduciary should be granted an allowance accordingly, meaning a 'but for' link to the profit was not required.[75] Instead, as Harding points out, the causal enquiry in fiduciary cases has been to seek a 'basic factual connection between . . . breach and . . . profit'.[76]

Nonetheless, fiduciary disgorgement cases have tended to insist on a degree of sufficiency of connection. This is captured in language such as 'Did [the defendants] . . . acquire[] these very profitable shares . . . in course of their office of directors?'[77] But most often it is proximity. This can be seen as a bar to cases where the wrongdoing was of minimal effect but not cases where the wrongdoing is one of several causes of the profit. Moreover, there seems no reason why this kind of apportionment ought not to flow from both the 'but for' and sufficiency aspects of causation.

Remoteness of gain is also concerned with cutting off recovery, but with reference to different factors, often the time since the wrongdoing and where the profit arises from different facts.[78] If I make an unlawful gain from my involvement in a car-maker and invest that gain in another completely independent business making bicycles, there is an argument that that second gain is due to my own efforts, even if I did not have the money otherwise (so the 'but for' causal link is made out). As Virgo points out, remoteness is concerned to prevent the over-protection of the principal.[79]

Although there is only limited support for them in the authorities,[80] the tests postulated for remoteness serve well to illustrate the point. Birks' proposal was to limit recoverable gains to the 'first non-subtractive receipts'[81] (or, as Virgo puts it, gains arising 'directly from the commission of [the] wrong').[82] The profits from subsequent reinvestment of the gains would not be subject to disgorgement. An alternative proposal

73 [1999] RPC 203 (Ch) [39] (emphasis added).

74 *Murad v Al-Saraj* (n 22).

75 Similarly *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 (Birmingham Assize) 453.

76 Harding (n 42) 345.

77 *Regal (Hastings)* (n 20) 145. See also *Maguire v Makaronis* (n 46) 468: 'sufficient connection' (or 'causation'); *Warman v Dwyer* (n 22) 557: 'necessary connection'; *Visnic v Sywak* [2009] NSWCA 173, [1]–[2].

78 See e.g. Birks (n 7) 351ff; Mysty S Clapton, 'Gain-based Remedies for Knowing Assistance: Ensuring Assistants Do Not Profit from their Wrongs' (2008) 45 Alberta Law Review 989, 1002; *Murad v Al-Saraj* (n 22) [79] commenting on *Warman v Dwyer* (n 22).

79 Virgo (n 7) 305.

80 Ibid 306ff.

81 Birks (n 7) 351ff.

82 Virgo (n 65) 436.

is Edelman's, which is that an innocent wrongdoer be stripped of gains if there was a 'reasonable foreseeability of that kind of profit'.[83] Deliberate or cynical wrongdoing should not attract such a limit, in accordance with the law's focus on culpability.

What these tests show is that, while there is a normative element in sufficiency of causation, it becomes much more explicit in questions of remoteness, as these tests show. The profit from the bicycle business was still caused factually by the wrongdoing, even if one considers the most effective cause to be my own efforts. If I am excused from disgorgement, it is for a normative reason such as preventing over-protection. Such norms can form part of either a causation test or a remoteness test, although they may be better suited to one over the other.

4.d The conceptual view: similarities

Ultimately, reconciling the principles governing liability and allowances comes down to the same fundamental issue: disgorging what is deemed to be due to the wrongdoing and permitting the wrongdoer to keep what is deemed due to the wrongdoer's own efforts. The word 'deemed' disguises two factors. The first is the normative justification for what is taken and what may be retained. The second is the set of specific rules adopted to determine the same.

In the context of compensation for loss, the overlap between causation and remoteness has long been acknowledged.[84] Indeed, in recent times such doctrines governing loss have been conceptualised as mere expressions of the scope of duty or responsibility, most notably in the jurisprudence of Lord Hoffmann concerning causation, remoteness of loss and the implication of terms.[85] Getzler highlights Lord Hoffmann's reflective point in *South Australia Asset Management Corporation v York Montague Ltd* that causation 'is deeply affected by the court's normative judgment of the purpose and the context of the duty whose breach is said to have caused the harm'.[86] Similarly, Stapleton notes that:

> [T]he reasoning in these decisions is obscured because it is couched in such causal formulations . . . The issue for the courts . . . is a normative one and as such it is more conveniently posed in completely non-causal terms.[87]

Mitchell points out that the same applies 'with equal force to claims for unauthorised fiduciary gains'.[88] It is a short reach to further generalise Stapleton's proposition to orther gains claims. The importance and centrality of the normative foundation of the matter underpins Barker's observations about why one must use caution in adopting the language and principles from the doctrines limiting loss in tort and contract. He points out that the foreseeability test for remoteness of loss is justified by two reasons: (i) a moral objection to making a defendant liable for all losses caused because of the limits of human foresight; and (ii) the economic argument that the defendant is the cheapest loss-avoider

83 Edelman (n 3) 108–9.

84 E.g. *Roe v Minister of Health* [1954] 2 QB 66 (CA), 85.

85 Remoteness of loss: *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61; causation: *South Australia Asset Management Corporation v York Montague Ltd (SAAMCO)* [1997] AC 191 (HL); implication: *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

86 Joshua Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships' in Peter Birks and Francis Rose (eds), *Restitution and Equity: Resulting Trusts and Equitable Compensation* (Mansfield Press 2000) 245. See *SAAMCO* (n 85) 212–22.

87 Jane Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 Law Quarterly Review 388, 422.

88 Charles Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17 King's College Law Journal 325, 337.

and thus the claimant is incentivised to protect him or herself from harms that might flow from the loss. As he says, these matters are not relevant to gains claims.[89] Consequently, the rules are likely to be different and must be attuned to their (different) justifications.

The characterisation of the enquiry as determining the scope of the duty is too nebulous to yield concrete rules of law and the courts have drawn back from such generalities in favour of specific tests in recent leading cases concerning remoteness of loss, construction and the implication of terms in fact.[90] Even so, the 'scope of duty' analysis yields one vital point: the underlying principles governing liability and quantum are normative in character.

The specific rules may well describe the precise responsibility of the wrongdoer accurately. They then give the law's norms 'concrete legal embodiment'.[91] But those rules do not always fully describe the operation of the law. Sometimes one must rely on the 'justificatory *and explanatory*' function, as MacCormick puts it,[92] of the underlying norm to inform the rule. So we have tests of 'effective causation' and 'proportionality' but they are only one part of the picture. They can only be understood and interpreted properly given the underlying norm. An underlying norm of prophylaxis suggests a broad construction of what was effectively caused by the wrongdoing and that there is no need for the principal to have suffered loss nor to have lost an opportunity. Conversely, an underlying non-prophylactic norm suggests a narrower construction and that loss, or a lost opportunity, is a requirement.

It therefore follows that both the particular formulations of the rules and their justifications must be carefully formulated in accordance with whatever standards the law declares its desire to uphold. It further follows that there is a requirement of coherence – the rules and their justifications must be consistent in aim.[93] If they are not, the law will become impossible to apply with any certainty or to understand or develop consistently.

4.e Differences in point

For many cases there will not be much of a difference in outcome between approaches. Both can accommodate remuneration and profit-sharing; indeed, neither appears inherently limited to one or the other. We may quibble about the balance, but a significant and apposite point of departure is where one of the concurrent causes of the profit is attributable neither to the wrongdoer, the wrongdoing, nor the party to whom the duty is owed. Working through such circumstances demonstrates not only this, but also how the construction of 'effective causation' is determined by its underlying norms.

Such external causes may be due to a third party's intervention. This will usually be an intervention at the behest of the primary wrongdoer, in which case the cause can be attributed to the wrongdoer. Thus, the case of a third party is unlikely to be difficult. In practice another perennial problem is likely to yield a truly external cause: market movements.

89 Kit Barker, 'Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54 Current Legal Problems 255, 291ff.

90 The restriction on *The Achilleas* (n 85) in *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7, [2010] 2 All ER (Comm) 1185; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 drawing back from *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; and *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 drawing back from *Belize Telecom* (n 85) respectively.

91 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon 1994) 154–5.

92 Ibid 152 (emphasis added).

93 Ibid 152ff.

This was an issue in *Novoship*. It was the extraordinary rise in the shipping market that had generated the bulk of Nikitin's vast profit, at least numerically. The Court of Appeal was clear about what it considered the dominant cause of the gain: 'The real or effective cause of the profits was the unexpected change in the market.'[94] The vivid colloquialism 'real' makes it clear that this was a normative judgment.

It is here where the distinction between the two approaches to allowances is at its sharpest. The prophylactic approach, looking to the wrongdoer's legitimate work and skill put in, would not take market movements as part of this and allow disgorgement accordingly. It would disregard the fact that the claimant lost nothing or was uninterested in the opportunity. In effect it says that this part of the profit was not caused by the wrongdoer because it was part of the opportunity and, since the wrongdoer may only retain the profits he caused, he cannot retain these profits.

The non-prophylactic approach would, however, do the opposite. It would look to what was taken from the claimant – in this case nothing. Consequently, it would attribute gains arising from the market movements to the wrongdoer's legitimate work and skill. In effect it says that this part of the profit was caused by the wrongdoer and, since the wrongdoer may retain the profits he caused, he may retain these.

If the gains are extraordinary – as they were in *Novoship* – the difference in approaches will be enormous. The underlying norms matter.

5 Analysis of *Novoship*

With all this in mind, it is possible to take a close look at *Novoship v Mikhaylyuk* and particularly the meaning and ramifications of the adoption of the tests of effective causation and proportionality. The analysis is technical. However, it follows a relatively simple path at a high level of generality. Having established that:

1. the low-level rules adopted are an expression of the norms and general principles governing liability;
2. this particularly applies to causation and remoteness; and
3. accessories ought to be subject to disgorgement where appropriate;

The analysis continues:

4. the Court of Appeal paid insufficient attention to those norms *per se*;
5. the court did not engage in sufficient consequential reasoning to identify the difficulties the tests adopted would cause more generally; and
6. the court did not consider apportionment, with the result that:
7. the tests adopted were generous by any standards;
8. particularly, they take into account what the principal lost rather than considering only what the wrongdoer gained;
9. this is in tension with the justification given – prophylaxis – which looks not to what the principal lost but to what the wrongdoer gained; and
10. quantum appears limited to the *Wrotham Park* 'hypothetical bargain' measure, something closer to compensation than disgorgement.

Finally, a solution to the problem of dividing Nikitin's gain, necessary if one believes that partial disgorgement was appropriate, is advanced.

94 *Novoship* (n 2) [114].

5.a Remoteness and (effective) causation

'Effective causation' was not said to be a remoteness of gain test in *Novoship*, but it has some elements of remoteness in it. Saying that the profits from the Henriot transaction were effectively caused by other matters is in effect saying that they were too improximate from the wrongdoing. The risks of not adverting to the normative matters more explicit in remoteness are noted by Mitchell, building on Stapleton. Framing the question in terms of remoteness 'explicitly require[s] the court to assess whether or not imposing liability is fair and in accordance with the principles underlying the rules that give the claimant his cause of action'.[95] But:

> In contrast, the causation question asks the court whether the facts of a case possess some apparently freestanding analytical characteristic – 'Was the causal chain broken by an intervening event?' – a question which it is tempting for the court to answer without explicitly discussing the reasons why the answer matters.[96]

While the Court of Appeal did engage with normative matters, it did so mostly while applying the proportionality test. However, since both tests have to be met in order for there to be disgorgement, the normative matters ought to have been part of the discussion of what amounts to effective causation too. Yet the Court of Appeal applied the test as though it was a simple formula looking to the most effective cause.

5.b Uncertainty as to the requirement for 'but for' causation

The test of 'effective causation' was taken from *Galoo Ltd v Bright Grahame Murray*.[97] It can be traced back from that case to *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)*.[98] These are common law contract cases. For an award of compensation, the courts require not just a 'but for' connection between breach of contract and loss, but a degree of sufficiency too, that the breach was an 'effective cause' of the loss. In *Monarch Steamship*, much was made of the 'dominant' cause of the delay in delivery being the vessel's unseaworthiness rather than ship's requisition by the government for war purposes. According to the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors*, there is no objection to borrowing principles from the common law and applying them to equitable actions, provided one is alive to the differences and is not blinded by the similarities.[99]

Before considering the norms behind 'effective causation', consider the requirement for 'but for' causation. While the Court of Appeal acknowledged that the trial judge had disavowed the need for a 'but for' link,[100] it expressed disagreement with him at a rather more general level, namely that 'the same considerations that apply to a fiduciary [do not] apply to a dishonest assistant who has no fiduciary duties'.[101] But rather than expressly admit or reject (i) a 'but for' test and (ii) a sufficiency test ('effective causation') distinctly, the Court of Appeal only went so far as to admit the latter and did not decide the former.[102] Saying 'in our judgment the simple "but for" test is not the appropriate test'[103]

95 Mitchell (n 88) 337.

96 Ibid 337.

97 *Novoship* (n 2) [108]; *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA).

98 [1949] AC 196 (HL).

99 [2014] UKSC 58, [2015] AC 1503, [133], [136], [137].

100 *Novoship* (n 2) [112]–[113].

101 Ibid [114].

102 Ibid.

does not distinguish between whether it is one of a set of two tests (it alone is not the appropriate test), or it forms no part of the set of tests (it is inappropriate to consider it at all). The court's conclusion is equally unilluminating: the claim should be denied because 'there was an insufficient direct causal connection between entry into the Henriot charters [or transaction] and the resulting profits'.[104]

It is submitted that 'but for' causation should not be required. Generally, prophylactic remedies do not require this because deterrence demands a remedy for even a slight connection to the wrong. Even in a loss claim, dishonest assistance requires only a very weak causal connection, namely that some assistance was provided.[105] 'But for' causation is not required in fiduciary disgorgement claims. It should therefore not be required either for non-fiduciary disgorgement claims where the justification is also prophylaxis.

5.c Construing 'effective causation'

The next issue is how widely 'effective causation' should be construed. In the common law compensation for breach of contract case of *County Ltd v Girozentrale Securities*, it was decided that the offending act only needs to be 'an' effective cause.[106] It was held that the court is not required to choose the most effective cause and is not constrained to decide there is liability only if that was the defendant's act or omission. Conversely, in *Novoship* the effectiveness requirement was construed narrowly; the market movements were more effective and that was the end of it.

Owing to the factual peculiarities of claims for disgorgement for dishonest assistance, this issue will come up generally. To see this, consider how a dishonest assistant's acts would be evaluated by an effective causation test. If a dishonest assistant receives a fee in return for assisting a fiduciary in a breach of fiduciary duty, it would be tolerably clear, on any principle of causation, that such 'profit' will have been caused by the dishonest assistance. But many dishonest assistants – such as a bribe-*giver* who pays in order to secure some advantage – will never make any profit unless he or she engages in an enterprise separate from the primary wrongdoing.[107] Such a dishonest assistant must, however, receive some kind of collateral advantage otherwise there would be no incentive to act. This is illustrated by the facts of *Novoship*. Without participating in Mikhaylyuk's dishonest scheme, Nikitin would not have been able to charter Novoship's vessels in the first place.

This issue was touched on in *OJSC Oil Company Yugraneft v Abramovich*, where it was intimated that the proceeds of the reinvestment of an initial gain might be subject to disgorgement from a dishonest assistant.[108] That principle surely applies, *mutatis mutandis*, to the exploitation of a non-pecuniary gain. *Abramovich* was cited in *Novoship*, but not in relation to this issue.[109] Yet *Abramovich* suggests that the law must be tailored such that some remoter gains are subject to disgorgement.

Indeed, given that the Court of Appeal said the action was available in principle, there must be some circumstances where it is in fact. It is unlikely that the court would have declared this remedy available only to make it otiose. It must therefore be necessary to

103 Ibid.

104 Ibid [115].

105 *Grupo Torras SA v Al-Sabah (No 5)* [2001] CLC 221 (CA) [119].

106 [1996] 3 All ER 834 (CA), 849, 857.

107 A point made in the court below: *Novoship* (HC) (n 13) [494].

108 [2008] EWHC 2613 (Comm) [392].

109 *Novoship* (n 2) [71].

construe 'effective causation' widely in order for it to have any meaning at all in dishonest assistance cases and, certainly, it should encompass gains caused by such collateral advantages.

Yet the Court of Appeal construed it very narrowly. Accordingly, it would have been better if the test had been called 'dominant causation'.[110] And in dishonest assistance cases, where it is not necessary for the accessory to receive property, such profits will inevitably be predominantly caused by the wrongdoer rather than the wrongdoing. Therefore, as construed, 'effective causation' is very much a principle of the non-prophylactic approach, since it attributes such causes to the wrongdoer's own efforts. Conversely, if 'effective causation' were backed by prophylactic norms, it would attribute all but the ineffective causes to the wrongdoing.

5.d The proportionality test and lack of apportionment

Consider now the proportionality test. It was introduced and applied under the broad consideration that the court has a discretion over whether to award an account of profits or not in claims against accessories.[111] The Court of Appeal's reasoning was limited to noting that the remedy is discretionary in the non-fiduciary actions of breach of confidence[112] and breach of contract[113] and approving the proposition in *Fyffes Group Ltd v Templeman* that an account of profits is not automatically awarded upon making out liability against an accessory to a breach of fiduciary duty.[114]

The judgment in *Fyffes* considered only breach of confidence cases in respect of this point.[115] Toulson J refused a full account of profits because he had found that Fyffes would have entered into the relevant agreement even if the agent had not been dishonest.[116] It was not that full disgorgement was said to be disproportionate, but full disgorgement was inappropriate because of consent to the profit element demonstrated by the antecedent profit-sharing arrangement. Hence, the reasoning takes in similar factors to those falling under the proportionality test in *Novoship*. However, Toulson J considered that they were relevant to quantum.

The possibility of apportionment was noted above, when discussing *Celanese International*.[117] There are other cases too. In *Seager v Copydex (No 2)*, only a 'springboard' or 'headstart' measure was awarded for the inadvertent use of confidential information, meaning a measure of the advantage gained, namely a reduction in the development work owing to the infringement.[118] Conversely, a full account of profits, due to intentional appropriation, was awarded in *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd*.[119]

It is therefore surprising that in *Novoship* this was not raised in the judgment and the proportionality principle was treated only as relevant to liability: 'One ground on which the court may *withhold* the remedy is that an account of profits would be disproportionate

110 One of the terms used in *Monarch Steamship* (n 98) 227.

111 *Novoship* (n 2) [119].

112 *Walsh v Shanahan* [2013] EWCA Civ 411, [2013] 2 P&CR DG7; *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 (CA).

113 *A-G v Blake* (n 3).

114 *Novoship* (n 2) [119]; see also [98]ff.

115 *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 (QB), 668ff.

116 Ibid 672.

117 Section 4.c.

118 [1969] 1 WLR 809 (CA), 810.

119 [1964] 1 WLR 96 (Ch).

in relation to the particular form and extent of wrongdoing.'[120] The consequence of this is so clear it needs no further argument: it is more likely to be disproportionate to disgorge if it is impossible to apportion.

This, it is submitted, is a significant cause of the difficulties in *Novoship*. Thinking it inappropriate or impossible to apportion the gain, the Court of Appeal, having starting out wanting at most a weaker prophylactic approach, decided that full disgorgement was disproportionate. This was a reasonable conclusion given this (incorrect, it is submitted), premise. But the result is that the tests were construed so generously that they have steered the law far away from the justification the court posited, namely that liability exists to deter breach of fiduciary duty and its assistance.

5.e Novoship's disinterest in the opportunity

That deals with the general aspect of the proportionality test. That test, however, was also given a specific aspect: it would be disproportionate to disgorge because the opportunity was one Novoship had actively foregone. Since Novoship was content to lay off the risk, in effect it had disavowed any interest in any consequent profits, and hence the company had lost nothing. Although Novoship would not have let vessels to Nikitin had the company known of the wrongdoing, it would certainly have let to someone else.[121]

This point was only explored by the Court of Appeal summarily and, once again, a closer look reveals factors that were overlooked. The court said that:

> In our judgment [this gain] cannot be described as profits which ought to have been made for the beneficiary, and therefore they fall outside the rationale for the ordering of an account.[122]

This is one rationale for disgorgement against fiduciaries, indeed, the one Lionel Smith advances. That is fine as far as it goes. But that does not mean that it is the *only* rationale for disgorgement, otherwise there could be no disgorgement in the intellectual property and confidential information cases. Furthermore, a suitable rationale was given by the Court of Appeal in the instant case: the deterrence of the assistance of fiduciary infidelity.

This abrupt change in justification further suggests that the deterrence of wrongdoing was not a weighty factor in the tests adopted, despite what was said about it. What appeared to matter instead is whether the principal lost an opportunity. This, again, indicates a non-prophylactic approach – looking to the principal's loss, where a prophylactic approach would ignore this and instead look only to the wrongdoer's gain.

Nonetheless, there simply must be something in the Court of Appeal's claim that the purpose of the jurisdiction is to deter fiduciary wrongdoing and also its assistance. If so, there may be a difference where the dishonest assistant procures, rather than merely assists, the underlying breach of fiduciary duty, as Ridge suggests.[123] It might further be thought that the dishonest assistant should be excused if the fiduciary would have found a way to execute his or her scheme without the need for this particular dishonest assistant's help. The overall justification is that disgorging from the mere assistant would have no deterrent effect in these circumstances and the remedy is therefore not warranted.

It therefore pays to look in more detail at what Nikitin did in the course of the two transactions and how they were linked. The trial judge was unable to determine the

120 *Novoship* (n 2) [119] (emphasis added).

121 Ibid [9], [117].

122 Ibid [117].

123 See text to n 31 above.

precise connection between the two transactions. Speaking from the vantage point of the PDVSA transaction, he was, however, 'satisfied' that it must have been one of three things and probably the first or the last of them:

(i) Mr Nikitin provided or held out the prospect of some other benefit to Mr Mikhaylyuk; or

(ii) made, or constituted, some threat to him, or put him under some pressure, which, in either case, resulted in Mr Mikhaylyuk getting Mr Ruperti to make these payments; or whether, on the other hand

(iii) Mr Mikhaylyuk was seeking to benefit Mr Nikitin because of some advantage that he thought to gain thereby, either in the form of a deal or otherwise.[124]

In all three eventualities, there is a degree of active participation as opposed to merely providing professional services for a fee. These eventualities also suggest that there is a continuum of participation and it is not simply a binary choice between procurement and mere assistance. While not all of them go so far as to say that Nikitin masterminded both transactions, the culpability they disclose is far stronger than the familiar cases where dishonest assistants have not been fully cognisant of the underlying wrongdoing.[125] What is clear is that Nikitin was not merely assisting. Furthermore, even if there was no imperative to deter the particular fiduciary breach (and its assistance) in the Henriot transaction directly – where Novoship was not interested in the opportunity – there was an imperative to deter the other fiduciary breach. To do so, one must deter the Henriot transaction because of the link. One must ignore the objection that Nikitin did not intercept a wanted opportunity.

While the Court of Appeal reproduced the judge's finding of fact quoted above,[126] it went no further into the distinction between mere assistance and what is tantamount to procurement, nor what would be necessary to amount to effective deterrence.[127] Again, this shows the Court of Appeal's approach was non-prophylactic.

5.f Restriction to the hypothetical bargain measure

One corollary of all this was also unexplored in the judgment in *Novoship*. It has been made so difficult – if not impossible – on the 'effective causation' test to disgorge profits arising from independent enterprises that the action is *de facto* limited to the *Wrotham Park* hypothetical bargain measure. This is what was awarded in the only accessories case so far that has come near to awarding something close to an account of profits: *Fyffes Group Ltd v Templeman*.[128]

In this case, one Templeman, an employee of Fyffes and a fiduciary, was being bribed by a client, Seatrade. Seatrade was therefore a dishonest assistant of Templeman's breach of fiduciary duty. However, it was found that Fyffes would have contracted with Seatrade in any event – even if the fiduciary had not been dishonest – albeit on better terms. Toulson J therefore refused a full account of profits, restricting the claimant to compensation because '[i]nsofar as Seatrade made an "ordinary" profit element, it was not

124 *Novoship* (HC) (n 13) [389].

125 E.g. *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

126 *Novoship* (n 2) [7](v).

127 Cf the Australian courts' emphasis on the distinction: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, [161]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296, [243]ff.

128 *Fyffes* (n 115) .

caused by the bribery of Mr Templeman, but was profit for the provision of services for which there would have been a contract in any event'.[129] The measure of compensation awarded was (as regards that particular head of claim) on the hypothetical basis of how a prudent and honest negotiator, rather than Templeman, would have contracted. Toulson J held that full account of profits was available in principle, but not on these facts (particularly owing to the existence of a pre-existing profit-sharing agreement.)

What was awarded was in essence the *Wrotham Park* hypothetical bargain measure, named after the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.[130] It is a partial account of profits representing what would have been agreed. In that case, a property developer had built more homes than it ought to in breach of a restrictive covenant. The beneficiary of the covenant would not have entered into a bargain releasing the developer from this restriction. Nonetheless, the beneficiary was given an award of what that bargain would have been had it been possible; a small percentage of the anticipated profits such a release would have yielded.[131] The 'gain' disgorged was equivalent to the loss caused by the breach, meaning the failure to honour a hypothetical contract of release. Once it is accepted that one may look to such hypothetical circumstances, the measure is less controversial – being for lost profits from that hypothetical contract, which is a perfectly ordinary head of claim in contract. So, the argument goes, the award is not really account of profits at all. It is just compensation.

Then, just as compensation is the usual measure for breach of contract, it is the usual measure for dishonest assistance. In *Fyffes v Templeman* the hypothetical bargain would have been a variation improving the rate in Fyffes' favour. The difference between the better rate and the rate actually obtained was the same numerically as Seatrade's additional profit and thus was equal to the full disgorgement measure. On the facts, Fyffes' loss was Templeman's gain.

Nonetheless, the two measures are conceptually distinct.[132] Only the full disgorgement measure gives access to profits such as those Nikitin made, because they do not relate to the immediate wrongdoing but consequent activity, unlike in *Fyffes* or *Wrotham Park*. That consequent activity is always predominantly caused by the wrongdoer or at least attributable predominantly to external causes and not the wrongdoing. This will be the case whether the opportunity was one the principal desired or not. It is therefore always beyond the reach of the test adopted, 'effective causation', as currently construed. Consequently, on the current law, the measure for account of profits for dishonest assistance is limited to the hypothetical bargain measure in practice.

6 Solving the market movements problem

It is submitted that, given the foregoing, a true disgorgement remedy should have been imposed, at least on the grounds that Nikitin had procured the scheme and perhaps on the grounds that even the mere assistance of a breach of fiduciary duty should be deterred by such a remedy. This is what the prophylactic approach requires. Any proportionality requirement should extend to quantum for the reasons set out above. On the strictest prophylactic approach, full disgorgement should have been imposed, but on

129 Ibid 672.

130 *Wrotham Park* (n 5).

131 Ibid 815.

132 The argument that the loss and gain measures are the same in these circumstances is also made in Ralph Cunnington, 'The Assessment of Gain-based Damages for Breach of Contract' (2008) 71 Modern Law Review 559. See generally Edelman (n 3) 2–3 and ch 3 as to the distinction.

a less strict prophylactic approach – perhaps justified by the distance of the accessory from the fiduciary relationship – apportionment may be appropriate.

This demands an answer to the question of how the courts should apportion such that disgorgement is not disproportionate or to take what was not effectively caused by the wrongdoer. To recapitulate: the bulk of Nikitin's gain was, at least numerically, caused by the rise in the market. If disgorgement of his profits is not to be disproportionate, a way to split this cause in two must be found. The difficulty is, however, that there is no obviously applicable principle upon which to apportion.

Birks' and Virgo's proposals for remoteness of gains tests offer no assistance here. Edelman's proposal has more potential.[133] However, even if Nikitin was taken not to have acted deliberately or cynically, the test would still not have apportioned his gain. The difficulty is that market movements are eminently foreseeable – move, put bluntly, is what markets do.[134] Therefore a foreseeability of kind rule would do nothing to divide the market movements into recoverable and non-recoverable portions.

However, foreseeability of kind is not the only foreseeability test. For contractual remoteness of loss, there is a superadded requirement that the kind of loss be 'not unlikely' to occur.[135] This is a way of raising the bar to recovery. This requirement is of no assistance to the issue of market movements because it is most likely that they will occur.[136] It does show, however, that the foreseeability test has been modified where necessary, in this case to narrow it. There is no reason why the test could not be widened in different circumstances.

While in remoteness of loss cases there is no need for the extent of the loss to be foreseeable in England[137] (in Australia there is authority suggesting the opposite),[138] there is no reason why foreseeability of extent ought not to be part of the test for cut-off in gain cases. As Barker notes, the underlying justifications are different.[139] Conversely, there are good reasons why it ought to be. If there is to be an allowance on the prophylactic approach – allowing a defendant like Nikitin to be rewarded only for his efforts and not for gains not attributable to those efforts – it is logical to allow only the value of what could have been foreseen. The gains attributable to the extraordinary and unforeseeable market movements would then have gone to the claimant. Nikitin's allowance would indeed have been in the lower reaches and consistent with the principle of prophylaxis.

There is some judicial support for this proposition. In the US case of *Primeau v Granfield*, Learned Hand J considered the matter of account of profits for the misappropriation of a claimant's money into a mining venture.[140] One concern was the correct apportionment. The minerals could be traced into and were therefore clearly subject to the claim. The difficulty was the value created by their discovery and how much that was due to the defendant's own efforts. Some was due to the investment and skill put in to discover them. But clearly not all was – there was some value in the minerals' very

133 See section 4.c.

134 E.g. *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL); *The Achilleas* (n 85).

135 The most popular formulation of the nebulous probability requirement from *The Heron II* (n 134) 388, 406.

136 Ibid 388, 406, 410.

137 *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 WLR 377.

138 *Burns v MAN Automotive Pty Ltd* [1986] HCA 81, (1986) 161 CLR 653, 668, according to Wilson, Deane and Dawson JJ; Gibbs CJ and Brennan J treated the issue as one of mitigation.

139 See text to n 89.

140 184 F 480 (1911) (SDNY). See the discussion of it in *Grimaldi* (n 127) [541]ff.

existence too, because such endeavours involve elements of risk and chance. Learned Hand J eschewed 'such metaphysics to ascertain how much such expenses contributed to the ore'.[141] Other figures – the payments to obtain the lease, to open the mine, to work it and, crucially, the royalties paid – amounted to a proxy for that impossible question. Considering the deal that would have been made by reasonable parties would lead to the answer.

Transferred to the facts of *Novoship*, these principles from *Primeau v Granfield* can be restated *mutatis mutandis*. Nikitin took a risk and was rewarded when it paid off. But some of that reward can be put down to his skill and effort and expected gain, and the rest down to a windfall caused by the luck and chance element within 'Nikitin's accurate *or fortunate* forecast',[142] to quote the trial judge, of the unforeseeably large market movements. On a practical basis this might be calculated with reference to long-term risk forecasts and historic average profits. This would allow such defendants to keep the average or expected gain while disgorging exceptional gains, yielding a parsimonious and just allowance.

Such apportionment would not, as a matter of definition, be disproportionate. Quite the opposite: one would apply the proportionality requirement to quantification rather than look at quantum and ask whether it was proportionate to disgorge the full amount. Moreover, the disgorged gain would also not be effectively caused by the defendant's own efforts, whereas the retained gain would. The difference is that in this proposal 'effective causation' is also construed as an apportioning principle rather than merely a test for liability. Moreover, it is supported by norms directly linked to the underlying and espoused policy of the law, which makes it possible to apply accurately. Clearly, there is a difficulty with precision – the outcome will be fairly uncertain – but the courts accept that it is impossible to be perfectly precise in such cases and what is required is 'not . . . mathematical exactness but only a reasonable approximation'.[143]

Finally, it is important to emphasise that this proposal requires that the principal actively foregoes the opportunity, as in *Novoship*. Had the dishonest assistant misappropriated an opportunity the principal desired, the answer is simpler. Interception should always justify a full account of profits.

7 Conclusion

In the first case to consider at length full disgorgement against a dishonest assistant, *Novoship (UK) Ltd v Mikhaylyuk*, the Court of Appeal adopted a considerably more generous approach than the traditional equitable one. Turning the equitable principle on its head, it sought to leave the wrongdoer with what was not due to the wrongdoing rather than to take all but that not due to the wrongdoing. It gave precedence to the fact that the principal lost nothing. As for the former, the difference may appear slight, even semantic, but it is not. The court considered that gains caused by neutral factors such as market movements were not due to the wrongdoing and thus left them with the wrongdoer. The deterrent effect is therefore much reduced and the approach cannot be called prophylactic. As for the latter, this is also a non-prophylactic approach because prophylactic remedies do not require loss to be suffered.

141 Quoted in *Grimaldi* (n 127) [543].

142 *Novoship* (HC) (n 13) [501] (emphasis added).

143 *Warman v Dwyer* (n 22) 558, quoted in *Murad v Al-Saraj* (n 22) [149] and *My Kinda Town Ltd v Soll* [1982] FSR 147 (Ch), 159.

While worryingly generous to those who assist breaches of fiduciary duty, this would at least be coherent when one considers that dishonest assistants and knowing recipients are not fiduciaries and this may justify treating them more leniently. But it conflicts with the court's claim that the jurisdiction to disgorge exists to deter fiduciary wrongdoing and its assistance. The generosity of the allowance and the way the tests were construed are not consistent with this justification. This inconsistency endangers the coherent application and development of the law. If in precedents the decisions point one way but the justifications another, it will be impossible to predict the outcomes of claims where the facts are novel. The courts should take one position or the other and stick to it. Either the justification is not prophylaxis and deterrence and the outcome of *Novoship* is right, or the justification is prophylaxis and the outcome is wrong.

The root cause of this, it is suggested, was a lack of consideration of the normative underpinnings of the terms 'causation' and 'proportionality'. Treating them as formulae to be applied in isolation from their underpinnings has led to this incoherence. Accordingly, it is suggested that criticism of the adoption of the terms of causation and remoteness as alien to equity is beside the point. These terms do carry some helpful directions as to what the courts are looking to – provided they are defined adequately and not detached from their norms. Unfortunately, this was not the case in *Novoship*.

Perhaps most troubling of all, the primary test adopted for disgorgement, 'effective causation', has been construed so narrowly as to seemingly make it impossible to disgorge anything beyond the *Wrotham Park* hypothetical bargain measure in all but the rarest of cases, if indeed at all. This cannot have been intended. It is therefore hoped that, in time, the courts will revisit these issues and resolve them.

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Exclusive possession or the intention of the parties? The relation of landlord and tenant in Northern Ireland

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Abstract

The seminal House of Lords judgment in Street v Mountford *established that the test for distinguishing between a lease and a licence is whether the occupant has been granted exclusive possession of the premises. The test is objective: the relation of landlord and tenant exists where exclusive possession has been granted, regardless of the intention of the parties. However, this stands at odds with the law in both parts of Ireland, where s 3 of Deasy's Act states that the relation of landlord and tenant 'shall be deemed to be founded on the . . . contract of the parties'. This article analyses the historical background that led to Deasy's Act, surveys contemporary case law in both parts of Ireland on leases vs licences and argues that the law in this area in Northern Ireland differs from that in England and Wales.*

Keywords: exclusive possession; landlord and tenant; leases; licences; Deasy's Act.

Until 1860 the law of landlord and tenant was the same in Ireland as in England. The doctrinal basis of the relationship has always been difficult: at its heart lies the notion that two people can enjoy the same property for two differing purposes, despite one of the foundational principles of land law being the ability of the owner to exclude the world. Thus, the ability to rent land was, at its earliest stage, an essentially heretical idea, arising as a practical response to the population decrease occasioned by the Black Death.[2] Shaped by both contract and land law, the common law gradually came to recognise a hybrid basis for the relation of landlord and tenant: initially viewed as a contractual relationship, the relation became governed by classic land law principles (anchored in tenure and the doctrine of estates),[3] so that the rights and obligations inherent in the relation would run with the land rather than be confined to the privity of the contracting parties.

However, the application of strict land law principles to the relation created problems in Ireland. One such principle was the need for the landlord to retain a reversion.[4] Most Irish landlords were absentee and employed middlemen to manage their properties, often

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2 *R Megarry and W Wade: The Law of Real Property*, C Harpum, S Bridge and M Dixon (eds) (8th edn, Sweet & Maxwell 2012) para 2–007; H Lesar, 'The Landlord–Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?' (1960–61) 9 University of Kansas Law Review 369.

3 P Bordwell, 'The Common Law Scheme of Estates' (1933) 18 Iowa Law Review 425.

4 *Pluck v Digges* (1832) 5 Bli NS 31, 5 ER 219 (HL), followed in *Porter v French* (1846–47) 9 ILR 514 (Exch).

failing to retain a reversion and thereby losing the remedies open to landlords. Statutory intervention was felt to be necessary, resulting in Deasy's Act.[5] Specifically, s 3 of that Act purports to found the relation of landlord and tenant in contract rather than tenure and removes the requirement for a reversion.

Yet, rather than clarifying the law, s 3 has resulted in permanent confusion over the nature and incidence of the relation of landlord and tenant. This confusion has once again recently been recognised in *Northern Ireland Renewables Ltd v Carey*, where the Court of Appeal called for legislative reform.[6] One particularly problematic question created by s 3, an area where there is most scope for divergence in Northern Ireland law from that of England and Wales, is the importance to be placed on the intention of the parties in determining whether the relation of landlord and tenant has arisen.

If, as seems to be the purpose behind s 3 of Deasy's Act, the relation arises out of the contract of the parties, then, in order to decide whether the relation has arisen, the contractual agreement will need to be construed and, in so doing, particular importance is placed on the intention of the parties as evidenced in the agreement. However, this approach to deciding whether the relation has arisen would appear to be incompatible with the House of Lords' decision in *Street v Mountford*, which held that the only relevant consideration is whether the tenant had exclusive possession of the premises, the parties' intentions being irrelevant.

This article will argue that the exclusive occupation test, though of primary relevance in construing the intention of the parties, cannot be the sole factor in determining the incidence of the relation of landlord and tenant in the sense expounded in *Street v Mountford*, and that the law in Northern Ireland must of necessity differ from that in England and Wales. Through the lens of the 'lease vs licence' debate, English case law will be contrasted with that in the Republic of Ireland and Northern Ireland, grounded in an analysis of s 3 of Deasy's Act.

Street v Mountford and the exclusive possession test

Street v Mountford has now been accepted as embodying the law on differentiating between a lease and a licence.[7] However, before analysing the ratio of the case and its later application, it is useful to outline the state of the law prior to that decision, as this enables a full understanding of the decision in *Street v Mountford*. Traditionally, if an occupant had exclusive possession, this was viewed as a conclusive indication that the agreement under which he held was a tenancy rather than a licence. In *Lynes v Snaith* (the leading case on the matter) a father gave permission to his daughter-in-law to live in a house which he owned; the Divisional Court held that by virtue of her exclusive possession the daughter-in-law was a tenant-at-will.[8]

However, in a line of cases whose common attribute seems to have been Lord Denning, a different test gradually evolved. This was initially apparent in *Errington v Errington*, where Denning LJ stated that '[t]he test of exclusive possession is by no means decisive' and that while 'a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention

5 For a history of land in Ireland, see J A Dowling, 'The Landlord and Tenant Law Amendment Act (Ireland) 1860' (PhD thesis, Queen's University Belfast 1985) ch 1. See also A Dowling, 'The Genesis of Deasy's Act' (1989) 40 Northern Ireland Legal Quarterly 53.

6 [2016] NICA 30, [23].

7 [1985] AC 809 (HL).

8 [1899] 1 QB 486 (QB), 489.

to create a tenancy'.[9] The nature of the relation is to be determined according to the intention of the parties: 'if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only'.[10] The importance of intention was emphasised in *Cobb v Lane*, where Denning LJ stated that 'the old cases can no longer be relied upon'.[11] Instead, '[t]he question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?'[12]

Yet, the acknowledgment that parties might attempt to contract out of the Rent Acts by purporting to have an intention to create a licence only, where in fact a tenancy had actually been in view, meant that some objective test was needed in order to decide what the true intentions were: 'the parties cannot by the mere words of their contract turn it into something else'.[13] Applying the above cases, Jenkins LJ stated in *Addiscombe Garden Estates Ltd v Crabbe* that:

> . . . the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.[14]

As exclusive possession was no longer accepted as the correct test,[15] another test had to be devised. In *Shell-Mex and BP Ltd v Manchester Garages Ltd*, Lord Denning MR considered whether an agreement was a licence or a tenancy:

> This does not depend on the label which is put on it. It depends on the nature of the transaction itself . . . Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy.[16]

The new test, therefore, was whether an agreement granted an interest in land, or whether it only represented a personal privilege.[17] Yet, this was hardly satisfactory, for, as has been pointed out, the result was that '[w]hat was once a consequence of a finding that a licence existed had been transformed into a determining factor in establishing the existence itself'.[18]

Street v Mountford presented the House of Lords with the opportunity to review the law. The parties had entered into an agreement for accommodation, with the agreement being expressly described as a licence. At the bottom of the document Mountford had written

9 [1952] 1 KB 290 (CA), 297 and 298.

10 Ibid 298.

11 [1952] 1 All ER 1199 (CA), 1202.

12 Ibid.

13 *Facchini v Bryson* [1952] 1 TLR 1386 (CA), 1389–90 (Denning LJ).

14 [1958] 1 QB 513 (CA), 528.

15 'The modern cases show that a man may be a licensee even though he has exclusive possession, even though the word "rent" is used, and even though the word "tenancy" is used. The court must look at the agreement as a whole and see whether a tenancy really was intended.': *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374 (CA), 376G (Lord Denning MR).

16 [1971] 1 WLR 612 (CA), 615E.

17 'What is the test to see whether the occupier of one room in a house is a tenant or a licensee? . . . All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only a permission for himself to occupy the room, whether under a contract or not? In which case he is a licensee.': *Marchant v Chambers* [1977] 1 WLR 1181 (CA), 1185F (Lord Denning MR).

18 K Lewison, *Lease or Licence: The Law after* Street v Mountford (Longman Professional 1985) 5.

and signed a statement explaining that she understood the agreement to be only a licence and that it did not give rise to a tenancy under the Rent Acts. Nevertheless, she later sought to benefit from the Rent Acts' protections and Street sought an order for possession. The House was asked to decide whether the agreement gave rise to a tenancy despite both parties having clearly indicated their understanding that it was a licence.

Counsel for the occupier argued that the entering into a legal relationship is determined by the parties' intentions and that the content of a contract so entered into is entirely a matter for the parties. However, the intention of the parties is irrelevant in construing the legal effects of rights and obligations contained in the contract, which are entirely matters of law. This includes whether or not an agreement gives rise to a tenancy. Where a landlord, having an estate in the land, grants exclusive possession of that land to a rent-paying tenant then, at law, a tenancy has arisen and the parties cannot avoid its creation by the description which they give to their agreement. Counsel for the landlord, on the other hand, argued that while 'exclusive possession' may describe the legal right of an occupier to exclude the world, it may also describe the right of a contractual occupier to obtain an injunction to prevent the owner from entering the land in what would be a breach of the contract – which right would be held alike by a licensee and by a tenant. There being two possible types of exclusive possession, it is for the parties, by their contract, to agree which possession is being granted. Whether exclusive possession of a sort that creates a tenancy was granted must therefore be determined according to the intention of the parties.

Lord Templeman, delivering the only speech, reaffirmed the traditional view. He attributed the outcome of the more recent cases as being explicable by either the lack of intention to create legal relations, or the existence of 'special circumstances which prevent exclusive possession from creating a tenancy'.[19] Lord Templeman agreed with Denning LJ's assertion in *Errington v Errington* that exclusive possession was not decisive,[20] but only because '[s]ometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy',[21] such as that of 'vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy'.[22] Similarly, the absence of intention to create legal relations would negative the existence of a tenancy, even if there had been exclusive possession.[23]

Thus, while parties were at liberty to contract and negotiate regarding the decision to contract,[24] the 'only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent'.[25] This is because 'the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement'.[26] If the parties intended to enter into legal relations, and provided that no special circumstances existed, then the only relevant question is whether there is exclusive possession for a term at a rent, as '[n]o other test for distinguishing between a contractual tenancy and a contractual licence appears to be

19 *Street v Mountford* (n 7) 822E.
20 Ibid 823E.
21 Ibid 826H.
22 Ibid 821B.
23 Ibid.
24 Ibid 819E.
25 Ibid 826G.
26 Ibid.

workable'.[27] If the test is met, then at law the relationship of landlord and tenant has been created: 'The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.'[28]

A noteworthy aspect of Lord Templeman's speech is that no reliance was placed on any doctrine of land law. Other than the adoption of the High Court of Australia's ratio in *Radaich v Smith*,[29] no reference was made to the principle that the creation of the relation of landlord and tenant passes to the tenant a proprietary interest in the subject lands. The consequence of the absence of land law doctrine in *Street v Mountford* became clear in the case of *Bruton v London & Quadrant Housing Trust*.[30] Lambeth Borough Council had entered into an agreement to allow the Trust to use property belonging to the council to house homeless persons, in keeping with the Trust's charitable purposes. The Trust in turn allowed Bruton to occupy one of the flats in the property under a licence agreement. It was found that both parties intended to enter into a licence agreement only. The council was statutorily prohibited from disposing of any interest in property which it owned without the consent of the Secretary of State.[31] It could therefore not have granted any proprietary interest in the property to the Trust, and the Trust in turn would not have had any estate out of which to grant a further proprietary interest to Bruton.

Nevertheless, the plaintiff sought to enforce repairing obligations which were statutorily implied into certain tenancies, and the question thus arose as to whether he occupied the flat by virtue of a tenancy rather than a licence. In deciding the question, the House held that the relationship of landlord and tenant was divorced from the doctrine of estates: while a lease generally does create a leasehold estate, this is dependent on whether there is a proprietary interest to pass on. If there is no such interest, then the lease does not cease to be a lease, it simply fails to create an estate.[32] Having established the possibility of creating a tenancy devoid of proprietary interests, the House then simply adopted a straightforward analysis by applying the exclusive possession test: as Bruton enjoyed exclusive possession of his flat, then the relation of landlord and tenant existed between him and the Trust; the intention of the parties was irrelevant.[33]

The *Bruton* judgment, and its creation of 'non-proprietary tenancies', has been the subject of some academic controversy.[34] In the Republic of Ireland, the Law Reform Commission has expressly doubted the decision.[35] Nevertheless, as far as the jurisdiction of England and Wales is concerned, the relation of landlord and tenant now arises as a

27 Ibid 824E.

28 Ibid 819F.

29 'What then is the fundamental right that a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right to exclusive possession is a tenancy and the creation of such a right is a demise.': *Radaich v Smith* (1959) 101 CLR 209, 222 (Windeyer J), cited at 827C of *Street v Mountford* (n 1).

30 [2000] 1 AC 406 (HL).

31 Other than to create a secured tenancy with a residential occupier: Housing Act 1985, s 32.

32 *Bruton* (n 30) 415B.

33 Ibid 413G.

34 See e.g. M Dixon, 'The Non-Proprietary Lease: The Rise of the Feudal Phoenix' (2000) 59 Cambridge Law Journal 25, cf J P Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting *Bruton v London Quadrant Housing Trust*' [2005] Conveyancing 114.

35 Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28–2003) para 1.18.

matter of law where exclusive possession has been granted for a term. The intentions of the parties are only relevant in deciding, first, whether the parties intended to create legal relations and, second, whether their agreement granted exclusive possession.[36] No other intention is relevant.

Section 3 of Deasy's Act

Any discussion of the law in either jurisdiction in Ireland must begin with the Landlord and Tenant Law Amendment (Ireland) Act (universally known as Deasy's Act after the law officer responsible for its introduction),[37] specifically s 3. The provision reads as follows:

> The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.

As first blush, this provision appears to constitute a radical shift in the law of landlord and tenant, seemingly removing from it any land law considerations and inscribing it wholescale within the scope of contract law. However, even from other provisions within the statute itself, it would appear that such a radical change was not the intention of the legislature.[38] Part of the difficulty in reconciling subsequent Irish case law on the nature of tenancies (especially when contrasted with licences) is due to the fact that the true significance of the section has eluded most attempts at a satisfactory explanation.

This becomes apparent from the early controversy over the interpretation of the section in the decades following its enactment. One line of authorities seems to espouse the radical view. An early example of this can be seen in an *obiter dictum* by Pigot CB, who was of the view that s 3 'creates a new relation, perfectly distinct from that which existed before.'[39] In a later case, Christian J stated that a written agreement (made after the passing of the Act) that one person would hold land from or under another should be understood by the courts as signifying 'that the new statuable relation of landlord and tenant should exist, – a relation discharged of the element of tenure and reversion, and resting exclusively in contract'.[40] In a case concerning an ejectment for non-payment of rent, where a question arose as to whether the landlord had sufficient title, Fitzgerald J stated that since Deasy's Act 'the party entitled to the rent need not have any legal estate in the premises to maintain an ejectment' because '[t]he relation of landlord and tenant is regarded as springing from contract and not from tenure'.[41] In a later case, Fitzgerald J said that '[t]he relation of landlord and tenant in this country rests not, as in England, on tenure as at common law, but on contract alone'.[42] Similarly, in a forceful statement,

36 See e.g. *Esso Petroleum Co Ltd v Fumegrange Ltd* [1994] 2 EGLR 90 (CA).

37 J C W Wylie, *Landlord and Tenant Law* (3rd edn, Bloomsbury 2014) para [1.08]; but Palles CB refers to 'what we are told not to call Deasy's Act' in *Irish Land Commission v Holmes* (1898) 32 Ir LTR 85 (QB), 86.

38 E.g. s 4 refers to the 'relation of landlord and tenant' in the context of an 'estate or interest', clearly a foundational land law concept.

39 *McAreavy v Hannan* (1862) 13 ICLR 70 (Exch), 81. It is interesting to note that, having been elevated to the Bench, Deasy B expresses no opinion on whether the Act which he introduced to Parliament was retrospective (86).

40 *Chute v Bustweed* (1866) 16 ICLR 222 (Exch Cham), 247.

41 *Hanson v Burke* (1876–77) 10 IRCL 322 (QB), 325.

42 *Russell v Moore* (1881–82) 8 LRI 318 (QB), 330. The decision was reversed on appeal, (1881–82) 8 LRI 332 (CA), but Fitzgerald J's *dictum* seems to have been approved by Palles CB (339).

Madden J explained that s 3 of Deasy's Act 'effected a radical change in the principles on which the relation of landlord and tenant was founded'.[43]

The radical approach, however, was never unanimously endorsed by the courts. As early as 1865, Christian J rejected a submission by counsel that the entirety of the law of landlord and tenant was now to be found within Deasy's Act.[44] In *Gordon v Phelan*,[45] a tenancy agreement provided that if the rent was in arrears the landlord could only distrain after 21 days, rather than the day after rent was due, which was the rule at common law.[46] The landlord attempted to distrain after only nine days, following the common law rule, and the tenant sued for trespass, arguing that the common law rules that had governed the incidents of landlord–tenant relation had been abolished by Deasy's Act and that the right of distress could only survive by contractual agreement. Deciding against the tenant on that point, Fitzgerald B held that the common law rules survived Deasy's Act:

> Section 3 of the Landlord and Tenant (Ir.) Act, 1860, shows an intention that something there called the relation of landlord and tenant should continue to exist, but that from that time it was to continue, not as founded on tenure, but as founded on the contract of the parties. This being so, I am of the opinion that the relation must continue with the incidents it had before.[47]

Thus, Deasy's Act was not a revolutionary reworking of the law governing landlord and tenant, since the common law rules applying to tenancies continued in full force (except where expressly modified by the Act). Rather, that which changed was the manner in which the relation arose: no longer as a result of the operation of the rules concerning tenure, but instead out of the intentions of the parties.

Very few cases have considered the interpretation of s 3 of Deasy's Act in the twentieth century. In *Lewiston v Somers*,[48] in which a landlord sought to recover rent arrears, a tenant no longer in possession disputed the validity of the landlord's title. In a dissenting judgment, Meredith J (Geoghegan J concurring) was of the opinion that since s 3 deemed the relation of landlord and tenant to be founded on the contract of the parties, the question of the validity of a landlord's title did not arise.[49] It is worth noting that Meredith J considered the meaning of 'deemed' within the section: 'the relation is "deemed" – that is to say, whatever be the position at common law – to be founded on the contract of the parties'.[50] In *Todd v Unwin*,[51] the Court of Appeal in Northern Ireland was asked to decide whether a deed constituted a sublease or an assignment. Counsel for the lessors argued that the second clause of s 3 operated independently from the first (so as to read 'the relation of landlord and tenant . . . shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent') and that therefore, as long as there is an agreement to hold land at a rent, a tenancy inevitably arises and the intentions of the parties are irrelevant. The Court of Appeal rejected this argument and adopted the Lands Tribunal's analysis of

43 *O'Sullivan v Ambrose* (1893) 32 LRI 102 (QB), 107.

44 *Bayley v Marquis Conyngham* (1865) 15 ICLR 406 (Comm Pl), 415–17.

45 (1881) 15 Ir LTR 70 (Exch Div).

46 On the remedy of distress, see Wylie (n 37) [12.15]–[12.24].

47 *Gordon v Phelan* (n 45) 72.

48 [1941] IR 183 (SC).

49 Ibid 203. The majority judges did not refer to Deasy's Act. The effect of Meredith J's opinion would have been to abolish tenancies by estoppel; there does not appear to be any support for this proposition from other Irish cases: Wylie (n 37) [4.48] fn 365.

50 *Lewiston v Somers* (n 48) 203.

51 [1994] NIJB 230 (CA).

s 3 as constituting 'a statutory intervention to allow the parties to reflect their intention'.[52] Thus, the starting point under s 3 is to decide whether the parties intended to create the relation of landlord and tenant and only if this is established is the second clause of the section operationalised. Other modern cases in which s 3 has been at issue have concerned the distinction between a lease and a licence and will be considered later.

Though judicial debate over the significance of s 3 receded after the end of the nineteenth century, the academic debate has continued uninterrupted. Some commentators have expressed regret that the full implications of basing the relation of landlord and tenant have never been realised.[53] Nevertheless, it is now too late to reconsider 150 years of case law on the matter, and it is unlikely that the section can ever be interpreted more expansively than it has been. Others, in contrast, would further restrict the interpretation of the provision. Two such interpretations have been advanced: (a) that Deasy's Act simply represents an alternative means of creating the relation of landlord and tenant, and that it operates in parallel to and has not abolished the common law rules, or (b) that the sole purpose and effect of s 3 of the Act was to reverse the decision in *Pluck v Digges*.

Proponents of the first view effectively argue that the definition of a tenancy given in s 3 of Deasy's Act applies only to tenancies created under that Act, and that it is still possible, in parallel, to create common law tenancies outwith Deasy's Act. Thus, Pearce and Mee argue that, in view of the requirement for rent under the Act, the better understanding of the section is that 'it is inclusive rather than exclusive, clarifying one case in which a lease or tenancy may exist, so that a rent-free holding may create a leasehold interest'.[54] The proposition is advanced most forcefully by Montrose, who points out that because the section contains two grammatically independent clauses, there may be situations in which the relation of landlord and tenant might be compatible with one of the clauses and not with the other; in such cases he argues that the courts would likely recognise the existence of the relation, and that the way in which such recognition can be reconciled with existing (contradictory) case law is to hold that the relation arose by the operation of the common law.[55]

The first scenario that he suggests is one where two parties enter into an agreement to form the relation of landlord and tenant, but do not reserve a rent: under the first clause of the section the relation would be recognised, but the second clause requires the payment of rent. Montrose recognises that the creation of the relation of landlord and tenant in this case would be difficult to reconcile with *McAreavy v Hannan* (where the absence of rent led to the absence of the relation under s 3),[56] but argues that '[f]or some practical purposes' the courts would still hold that it existed.[57] This proposition has been displaced by *Northern Ireland Renewables Ltd v Carey*, where the Court of Appeal expressed

52 Ibid 234B (Carswell LJ citing HHJ Gibson).

53 See Dowling (n 5) paras 3.26–7; see also Land Law Working Group, *The Law of Property* (vol 1, Final Report, HMSO 1990) para 4.2.4.

54 R A Pearce and J Mee, *Land Law* (3rd edn, Round Hall 2011) 161. See also T B Hadden and W Trimble, *Northern Ireland Housing Law* (SLS Legal Publications 1986) 27 and A Lyall (with A Power), L*and Law in Ireland* (3rd edn, Round Hall 2010) 594.

55 J L Montrose, 'The Relation of Landlord and Tenant' (1939) 3 Northern Ireland Legal Quarterly 81, 89–90.

56 A demised property to B (the mortgagee), and A and B granted a lease to C, with the rent being payable to A. Fitzgerald B (Hughes and Deasy BB concurring) held that the relation of landlord and tenant did not exist between A and C because C did not hold the land under A, and that the relation did not exist between B and C because no rent was payable to B: *McAreavy* (n 39) 85.

57 Montrose (n 55) 89.

the view that Deasy's Act created a statutory requirement for rent whether a tenancy was created under the Act or under the common law.[58]

The second scenario is one where the parties do not propose to create the relation, but the agreement provides for the holding of land and the payment of rent: Montrose argues that under the second clause the relation of landlord and tenant would arise irrespective of the intentions of the parties, and that such a relation would be recognised by the courts. However, this scenario has since been decided by the courts in *Todd v Unwin*, which held that the relation of landlord and tenant does not arise automatically from the payment of rent in respect of land; indeed, *Todd v Unwin* is authority that the two clauses of s 3, though grammatically independent, cannot be read in isolation one from the other.[59]

Yet, it is noteworthy that in both *Todd v Unwin* and *Northern Ireland Renewables Ltd v Carey* the Court of Appeal remained agnostic as to the possibility of creating the relation under either the common law or Deasy's Act. In *Todd v Unwin* the court agreed with the Lands Tribunal finding that s 3 is 'a permissive or enabling provision, which extends the situations in which the relationship of landlord and tenant is created and does not purport to define them'.[60] Although in *Northern Ireland Renewables Ltd v Carey*, the court expressed its view that the possibility of creating the relation both within and without the Act was 'hardly a satisfactory position', it felt bound by *Todd v Unwin* and held that correction of the position was a matter for the legislature rather than the courts.[61]

Whilst doctrinally unsatisfactory, the problem created by the existence of two routes to a tenancy is largely academic. The only practical difficulty was whether a rent was necessary,[62] and this has now been resolved. There are no reported cases in either Irish jurisdiction where a tenancy has arisen as a result of common law since Deasy's Act, and we have seen that the effect of *Street v Mountford* when read with *Bruton v London Quadrant Housing Trust* has been to create a new basis for the relation that is not founded in the common law principles relating to land law.

The second view – that s 3 of Deasy's Act is limited to effecting a reversion of *Pluck v Digges* – is perhaps best articulated by Wallace, in an article in which he also analyses the first five years of post-*Street v Mountford* case law.[63] Wallace argues that the second part of the section, which deems the relation of landlord and tenant to exist where there is an agreement to hold land for a rent, 'appears to negative the paramountcy of subjective intention', and that therefore the principal purpose was only to 'legislatively overrule' the House of Lords and enable the creation of reversionless leases.[64] We have seen that it has since been decided that the second part of the section is dependent on the first and is only engaged if the intentions of the parties were to create the relation of landlord and tenant. However, the section also clearly states that 'a reversion shall not be necessary', and it is plain that one of the principal immediate effects of the enactment was to overturn *Pluck v Digges*. Wallace's thesis must therefore be accurate, yet it is submitted that it is incomplete.

58 *Northern Ireland Renewables Ltd v Carey* (n 6) [50]–[54].

59 *Todd v Unwin* (n 51) 234D.

60 Ibid 233E.

61 *Northern Ireland Renewables Ltd v Carey* (n 6) [23] (Weatherup LJ). In the Republic of Ireland the Irish Law Reform Commission is strongly critical of the ambiguity (n 35) para 1.17. The draft Landlord and Tenant Law Reform Bill 2011 (published by the Department of Justice but not yet introduced in the Dáil) re-enacts a version of s 3 with universal application (head 10).

62 Wylie (n 37) para 2.19.

63 H Wallace, 'The Legacy of *Street v Mountford*' (1990) 41 Northern Ireland Legal Quarterly 143, 146–8.

64 Ibid 148.

Effectively, Wallace's view is that the mischief that the Act sought to remedy was the House of Lord's decision in *Pluck v Digges*; while this is accurate, it does not represent a complete picture: the outcome in *Pluck v Digges* was a result of a wider confusion that then existed about the conceptual basis for the relation of landlord and tenant and it is this confusion that Deasy's Act sought to remedy. In other words, while the 'mischief' of *Pluck v Digges* was indeed one of the targets of the legislation, it was subsumed within the wider mischief of conceptual confusion and it was this wider mischief that the Act sought to cure. In fact, this is hinted at within the section itself: were its chief aim to abolish the need for a reversion, a much more circumspect phrasing could have been adopted.[65] Thus, in order to understand the purpose of s 3 it is necessary to understand the confusion that led to *Pluck v Digges*, and in order to understand that confusion it is necessary to understand some of the history of the concept of landlord and tenant in Ireland.

The two foundational concepts of the law of real property in common law countries are the doctrine of estates and the doctrine of tenure.[66] The doctrine of estates governed the object of what was 'owned' and the doctrine of tenure governed the manner of the ownership. Thus, land itself could not be owned, but only an estate in the land: the largest of which (the fee simple), for example, extended from below the ground to the air above, extended in time indefinitely, and could be subdivided, both physically and temporally.[67] The doctrine of tenure governed the manner in which an estate was held: in principle, the king was the paramount lord of all land in the kingdom, and in theory the occupant of any given estate could trace his ownership, or tenure, of that estate up through a complex pyramid back to the king.[68] Generally, the type of tenure under which one owned land reflected the estate that was held.[69] The closest equivalent to the landlord and tenant relation that existed within this feudal scheme of tenure and estates was that of copyhold,[70] but this gradually died out in England and probably never extended to Ireland.[71] The expansion of the pyramid was halted by Quia Emptores (18 Edw 1, c 1), which prohibited further subinfeudation,[72] and eventually all types of tenure other than freeholdings were abolished by the Tenures Abolition Act (Ireland) 1662 (14 & 15 Chas 2, sess 4, c 19).

The importance of the above concepts lies in the fact that the relation of landlord and tenant arose entirely outside the feudal system,[73] and initially constituted a mere contractual relationship.[74] However, to base the occupation of land entirely within the contractual sphere was manifestly unsatisfactory: as the tenant had no security in the land there was no incentive to care for it, which could lead to overexploitation, and as there was no privity of estate neither the landlord nor the tenant could pass their interests along to their inheritors. Most problematic, though, was the extremely unequal nature of the relationship: the landlord could end the tenancy at any time and, as the tenant only had

65 Cf Dowling (n 5) para 3.26. In fact such a Bill was introduced in the House of Lords but ultimately failed: see HL Bill (1850) 551, cl 4.

66 On the distinction, see J C W Wylie, *Irish Land Law* (5th edn, Bloomsbury 2013) paras [2.04]–[2.05]. On the doctrine of tenure generally, see ibid, ch 1; on the doctrine of estates, ch 4.

67 P Bordwell, 'The Common Law Scheme of Estates' (1933) 18 Iowa Law Review 425, 428.

68 Wylie (n 66) para 2.07.

69 Ibid para 4.03.

70 W S Holdsworth, *A History of English Law* (vol 7, Methuen 1925) 296–312.

71 Wylie (n 66) para 2.34.

72 Though in Ireland a measure of subinfeudation continued under '*non obstant* Quia Emptores' grants that led to the evolution of the fee-farm: Wylie (n 66) para 4.60.

73 C Sweet (ed), *Challis: Law of Real Property* (3rd edn, Butterworth 1911) 63.

74 Wylie (n 37) para 1.02.

personal rights against the landlord, he could not hope to recover the land.[75] The common law intervened gradually, and over time established a set of rules that governed the relation. The turning point came with the action of ejectment. Until then, if the nature of an interest in land was in dispute, the parties' only recourse was to one of the real actions, which settled the question.[76] As the law did not recognise a tenant as having any interest in the land, the real actions were not open to him.[77] Ejectment arose out of an action for trespass, which was personal, rather than real (i.e. relating to property) in nature; it eventually evolved so as to enable a tenant to recover the term of his tenancy and re-enter the land.[78] The availability to a tenant of an action which enabled him to recover the land thus signified that the tenant had acquired an interest in the land: the creation of the relation of landlord and tenant therefore also now created an estate, which came to be known as the leasehold estate.[79]

Thus the leasehold estate was grafted into the doctrine of estates and it is from here that the confusion can be traced. Indeed, the leasehold estate was never fully integrated into realty but remained personalty, though with proprietary interests: it therefore acquired the label 'chattel real',[80] which might be seen as a contradiction in terms. Nevertheless, an interest in land that was recoverable by action must be an estate, which presented a conceptual problem: by what tenure, if any, was a leasehold estate held? Generally, tenure reflected the estate that was held, but as a leasehold estate had been grafted into the scheme of estates it was unclear to which tenure it corresponded. This was further complicated by the recognition that Quia Emptores had prohibited the creation of inferior tenures, but that a leasehold was created by granting an inferior estate out of a superior one: how was it possible to create an inferior estate if it was impossible to create an inferior tenure?[81] It seems, therefore, that the evolution of the landlord and tenant relation sat on an unstable conceptual foundation: having acquired proprietary interests, it was no longer purely contractual, but neither did it fit into the well-defined scheme of tenure and estates. As is readily apparent, this conceptual difficulty was principally an academic one: it did not prevent the operation of the law, nor did it inhibit the creation of leaseholds. However, the potential remained for situations to arise where the solution to a legal conflict was only to be found by resorting to first principles, which in the case of the relation of landlord and tenant would prove to be a difficult task.

It was against this conceptual background that *Pluck v Digges* was considered. Pluck was in arrears on his rent, and Digges distrained under the Distress for Rent Act (Ireland) 1751 (25 Geo 2 Ir c 13). Pluck then sued in replevin[82] for the recovery of the cattle that had been seized. Digges himself had leased the property from the head landlord, and had then leased his entire interest to Pluck, who argued that as Digges had not retained a reversion in the land the agreement in law constituted an assignment, rather than a lease. Digges was thus an exemplar of the Irish phenomenon of the middleman: a practice had

75 W S Holdsworth, *An Historical Introduction to the Land Law* (Clarendon Press 1927) 49.

76 Holdsworth (n 70) 4–19, especially 16.

77 Holdsworth (n 75) 19–20.

78 Ibid 71–3.

79 *Megarry and Wade* (n 2) para 4–019.

80 Wylie (n 37) para 1.04.

81 Wylie points out that the question of tenure in relation to leaseholds has never been fully resolved: ibid, para 1.02, fn 6.

82 The 'process to obtain a redelivery to the owner of chattels which have been wrongfully distrained or taken from him', *Halsbury's Laws* (vol 6, 5th edn, LexisNexis 2012), para 409. Note that the remedy of distress was abolished by the Judgments (Enforcement) Act (NI) 1969, s 122 (re-enacted by Judgments Enforcement (NI) Order 1981, art 143).

arisen in Ireland where the landed classes let out their estates to middlemen, who in turn parcelled out and sublet the land, generally letting out their entire interest (not retaining a reversion).[83] As vast swathes of land were held under middlemen leases, the outcome of the case would therefore have wide consequences on the validity of leases throughout Ireland. The decision that a reversion was necessary to the relation of landlord and tenant was ultimately made by the House of Lords,[84] but the defendants apparently having presented no arguments the judgment of the House is minimal, and the *ratio* must therefore be found in the judgments given in the Exchequer Chamber.[85]

Ten judgments were given in the Exchequer Chamber, with a majority of seven judges holding that a reversion was not necessary. Two strands of argument are evident from these judgments: that an instrument should be construed according to the intentions of the parties even if a rule of law would lead to a different conclusion, and that the legislation should be interpreted purposively. Thus, Torrens J said that the legislation expressed 'an intention to extend the provisions to other persons than those who stand in the precise, strict, legal relation of landlord and tenant',[86] and that therefore the tenant should not be allowed to go against his contractual agreement.[87] Moore J was of the view that the legislature had used the terms 'tenant' and 'demise' generally and did not contemplate 'tenure in its strict sense' and that therefore, 'under this statute it is the nature of the contract, and not of the estate that we are to look to'.[88] Smith B stated that 'to refuse to the party the benefits which the statute has conferred, would be to place him in a worse state than the party with whom he contracted intended, and to hold that the statute meant to place him in that worse state'.[89] Lord Plunket CJ, who gave the most developed judgment, argued that a party should not be allowed to contradict an instrument that he has executed:[90] the purpose of the Act was to remove impediments to the remedy of distress where there was enjoyment of the land under an instrument that provided for a right to distrain, no matter what the nature of the instrument was.[91] Therefore, 'it still is competent to a court of law to look into the instrument for the intention of the parties, and, if they find that construing it to be an assignment would defeat their manifest intention, to refuse to give it such an effect',[92] especially given the potential impact this would have in Ireland.[93]

The three dissenting judges, whose judgments must be taken to represent the view of the House of Lords, focused on the objective effect of the instrument according to common law rules. Vandeleur J stated that the difference between a sublease and an assignment is the existence of lack of a reversion, that the granting of an entire interest being less than a fee simple cannot create tenure, and that the intentions of the parties cannot displace the law.[94] Jebb J held that if a grant did not include a reversion, then at law the instrument constituted an assignment and not a lease, even if it was in the form of the lease, and that deeds should be construed based on their legal effects and not on

83 See Montrose (n 55) 83, see also Wylie (n 66) para 1.35.

84 *Pluck v Digges* (1831) 5 Bli NS 31, 5 ER 219 (HL).

85 *Pluck v Digges* (1829) 2 Hud & B 1 (Exch Cham).

86 Ibid 20.

87 Ibid 23.

88 Ibid 61–2.

89 Ibid 64.

90 Ibid 71.

91 Ibid 77.

92 Ibid 82.

93 Ibid 87.

the intention of the parties.[95] Johnson J was of the view that a lease for lives that grants an entire estate creates an assignment even if the instrument shows a different intention, because intentions 'cannot prevail against a rule of law'.[96] He therefore concluded: 'I cannot call that person landlord who has no estate in the land.'[97]

While *Pluck v Digges* settled the legal question of whether a reversion was necessary to the relation of landlord and tenant, it did not silence the controversy: the issue arose again in *Porter v French*.[98] There, Brady CB stated that 'the course of opinion and decision ever since [Quia Emptores] has been, to hold, that to constitute tenure – in other words, to create the relation of landlord and tenant – a reversion is necessary in all cases'.[99] He rejected the submission that the relation could arise by contract, as did Pennefather and Richards BB.[100] This conclusion, however, was questioned by Lefroy B who noted that the legislation referred both to landlord and 'minutes or contracts in writing' as well as to lessor and lessee, and that it would appear that the legislature intended that the remedy therein should apply not only to the relation of lessor and lessee, which could only arise at common law, but also to the relation of landlord and tenant, which could be created by contract.[101]

It is therefore apparent that the debate over the necessity of a reversion was but a symptom of a wider judicial controversy over whether the relation could arise only by operation of the common law, or whether it might also arise from the agreement of the parties. That this controversy over its conceptual foundations remained current after the above two cases is shown by an 1851 report into the law of landlord and tenant, which began with an analysis of the degree to which the relation was founded in contract as opposed to feudal law.[102] The authors note that '[t]here is ground to fear, that, by confusing those different aspects of the subject, not only has error been propagated, but the wild theories that are afloat as to the rights of property have been countenanced'.[103] This report led directly to a Bill the following year to amend the Irish law of landlord and tenant which, though ultimately unsuccessful,[104] in turn served as the basis for Deasy's Act, including a virtually identical third section.[105]

Clearly, then, s 3 of Deasy's Act was intended not simply as a legislative reversal of a controversial House of Lords decision (though it also served that purpose), but primarily as a clarifying measure that served to settle, once and for all, the conceptual foundations of the landlord–tenant relation. In that context, the words 'shall be deemed' evidence of a recognition that, according to the rules of the common law scheme of tenure and estates, the relation of landlord and tenant could not arise solely out of a contractual agreement, but that such a relation would henceforth be recognised on contractual terms notwithstanding the fact that, objectively speaking, the relation did not exist and could

94 Ibid 29–34.

95 Ibid 40.

96 Ibid 57.

97 Ibid 63.

98 (1846–47) 9 ILR 514 (Exch).

99 Ibid 539.

100 Ibid 540 (Brady CB), 541 (Pennefather B), 544 & 547 (Richards B).

101 Ibid 555; nevertheless Lefroy B felt bound by *Pluck v Digges* and concurred in the result.

102 W D Ferguson and A Vance, *The Tenure and Improvement of Land in Ireland, Considered with Reference to the Relation of Landlord and Tenant, and Tenant-Right* (E J Milliken 1851).

103 Ibid 2.

104 The Landlord and Tenant Law Amendment (Ireland) HC Bill (1852–53) [796]. See Dowling (n 5) 54.

105 Ibid 58.

not have existed.[106] Combined with the effect of the nineteenth-century cases (which determined that the overall law of landlord and tenant had not been affected by the section), it becomes apparent that the import of s 3 of Deasy's Act was mainly theoretical. This theoretical nature would explain the scarcity of case law relying on the section; however, this does not indicate that its merit was merely academic: on the contrary, it has been shown that only by clarifying the conceptual basis for the relation was the question of reversion resolved and, it is submitted that, occasionally, other questions will arise that go to the heart of the definition of the landlord–tenant relation, and which therefore require a conceptual answer. The 'lease vs licence' debate is just such a question and it is striking to note the degree to which the arguments that were recurrent in the reversion cases (objective law vs contractual agreement) have been replicated in the more recent lease vs licence cases.

Lease vs licence: Republic of Ireland

The starting point for a discussion of the Irish cases that concern the distinction between a lease and a licence must be *Allen & Sons v King*, in which a question arose as to whether a licence to affix bills to a cinema wall was in fact a lease.[107] The defendant, who was the cinema owner, had granted the licence to the plaintiffs, but had subsequently leased the cinema to a company which then revoked the licence. As there was no privity of contract between the plaintiffs and the company, they sued the owner for breach of contract. The owner argued that the licence was in fact a lease of an incorporeal hereditament,[108] which was then assigned to the company and that therefore the company was liable. At first instance, Gibson J resolved the question by construing the intention of the parties, and found that it was unlikely that they had intended to create the relation of landlord and tenant,[109] a conclusion that was endorsed by the Divisional Court.[110] Similarly, the Court of Appeal found that as the parties had no intention of creating a lease: 'I am sure that the parties . . . would have been very much surprised if they thought that the contract which they were entering into was anything more than a licence.'[111] When the case came to the House of Lords, Lord Buckmaster LC stated that the references in the agreement to the parties as licensor and licensee had no bearing on the construction of the document, but that 'it is the description in the body of the document of what the parties intended that the document should be' that was determinative.[112] *Allen & Sons v King*, therefore, is a marker for the weight given to parties' intentions in determining whether an agreement is a lease or a licence. However, as there was no question of exclusive occupation, the decision is of little usefulness in analysing the comparative weight given to the parties' intentions or exclusive occupation.

The first case in the Republic of Ireland where the importance of exclusive possession was considered is *Gatien Motor Co Ltd v Continental Oil Company of Ireland Ltd*.[113] Gatien Motor Co held the lease for a petrol station that was due to expire. Continental refused to renew the lease unless Gatien vacated the premises for a week; this was to prevent Gatien

106 See Meredith J in *Lewiston v Somers* (n 48).

107 [1915] 2 IR 213 (KB).

108 As permitted by Deasy's Act, s 1.

109 *Allen & Sons v King* (n 107) 220.

110 Ibid 244.

111 *Allen & Sons v King* [1915] 2 IR 448 (CA), 478 (Molony LJ), see also 450 (O'Brien LC), 458 (Ronan LJ).

112 *King v Allen & Sons* [1916] 2 AC 54 (HL), 59. Note that in a brief concurring speech Earl Loreburn held that the agreement could not be a lease because it did not create any interest in land (62).

113 [1979] IR 406 (SC).

from acquiring a statutory right to a tenancy under the Landlord and Tenant Act 1931. Gatien was concerned that a week's closure would impact the goodwill of the business and a compromise was reached whereby Gatien was allowed to remain in possession of the petrol station under a caretaker's agreement during the intermediary period. Both parties understood and acknowledged that the caretaker's agreement did not constitute a contract of tenancy. At the expiration of the second tenancy period, Gatien gave notice of its intention to claim a statutory tenancy. Whether an entitlement to such a tenancy existed turned on whether the caretaker's agreement legally constituted a tenancy.

Gatien argued that as it had had exclusive possession of the premises during the caretaker period the caretaker's agreement must be viewed as having created an implied tenancy. This was firmly rejected by Griffin J, who said:

> Whilst exclusive possession is one of the factors to be taken into account in determining whether an implied tenancy exists, it is not a decisive factor. To find whether it was intended to create the relationship of landlord and tenant, one must look at the transaction as a whole and at any indications that are to be found in the terms of the contract between the two parties.[114]

While Griffin J relied on the English case law,[115] he also cited s 3 of Deasy's Act as stating that 'the relationship of landlord is deemed to be founded "on the express or implied contract of the parties"', and that 'it would be doing violence to language to hold that an implied contract could exist on the facts of this case', especially as the agreement had been at arm's length.[116] Kenny J agreed, stating that 'exclusive possession . . . is undoubtedly a most important consideration but it is not decisive.'[117] While the existence of the relationship could not be determined by the labels the parties put on their agreement, '[a]ll the terms of the document and the circumstances in which it was entered into have to be considered'.[118] Thus, *Gatien* showed that, while the Supreme Court would consider the existence of exclusive possession as a potential factor indicating a tenancy, it was not prepared to allow exclusive possession to displace the intention of the parties.

The distinction between a lease and a licence was again considered by the Supreme Court in *Irish Shell and BP Ltd v John Costello Ltd (No 1)*.[119] The defendants operated a petrol station under an agreement from the plaintiffs, termed a licence. A number of successive agreements had been signed and a key consideration for the majority was the inclusion in earlier agreements of a clause expressly precluding the granting of exclusive possession or the creation of the relation of landlord and tenant; this clause was omitted from the last two agreements. Relations between the parties soured and the plaintiffs demanded possession of the premises which the defendants denied, claiming that the agreement amounted to a tenancy. Griffin J said that '[o]ne must look at the transaction as a whole and at any indications that one finds in the terms of the contract between the two parties to find whether in fact it is intended to create the relation of landlord and tenant or that of licenser and licensee'.[120] While Griffin J recognised that 'the right to exclusive possession is no longer conclusive that a tenancy exists', the absence of the clause precluding exclusive possession, coupled with his finding of actual exclusive possession,

114 Ibid 414.

115 *Shell-Mex and BP Ltd v Manchester Garages* [1971] 1 WLR 612 (CA).

116 *Gatien Motor Co v Continental* (n 113) 415.

117 Ibid 420.

118 Ibid.

119 [1981] ILRM 66 (SC).

120 Ibid 70, citing *Shell-Mex v Manchester Garages* (n 115) and *Gatien Motor Co v Continental Oil* (n 113).

appears to have played a key role in his decision.[121] However, it should also be noted that Griffin J did not treat exclusive possession as determinative, but merely as 'one of the important indicators',[122] alongside four other factual circumstances which he said also indicated the existence of a tenancy.[123] Griffin J also implicitly recognised Deasy's Act as the legislative basis governing the creation of the relation of landlord and tenant, recognising the periodic payments made by the defendants as constituting rent for the purposes of the Act.[124] *Irish Shell (No 1)* thus treats exclusive possession as an important, but not conclusive, factor in determining the intention of the parties. As Henchy J observed in follow-up litigation involving the same parties: 'In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had.'[125]

The Supreme Court cases have been considered in a number of Irish High Court cases. In *Governors of the National Maternity Hospital Dublin v McGouran*,[126] there was a dispute as to whether a coffee shop operated by McGouran in the hospital was to be regarded as a lease or a licence. An analysis of the agreement and of the facts led the court to find that the defendant had never had exclusive possession of the premises, and that the acceptance by McGouran of clauses in the agreement that precluded exclusive possession 'must be taken as an acknowledgment that the hospital had the right to use the premises irrespective of whether they sought to exercise that right or not'.[127] Thus, the absence of exclusive possession showed that the parties had never intended to enter into a tenancy agreement: 'there are clauses in the agreements which make it clear beyond doubt that what is being granted by the hospital and taken by Mrs McGouran is no more than a licence'.[128]

In *Texaco v Murphy*, the court was confronted with a discrepancy between the substance of written agreements and the defendant's understanding of what he had been offered.[129] The defendant was successful in his application to become the operator of a petrol station and was told he would be granted a tenancy. When he was presented with the written agreement, this was only in the form of a three-month licence. The defendant asked for the lease and was told that the licence was a temporary document until the lease was prepared. The defendant signed a series of licence agreements every three months, on each occasion requesting a lease and on each occasion being told that the lease was being prepared. During this time the company's policy was to grant licences only, and it was fully aware that no lease was being prepared and that no lease would be offered to the defendant. Barron J held that the defendant had entered into possession of the premises as a tenant, as there had been an unconcluded agreement until the entry into possession. The existence of exclusive possession was a key factor in arriving at this decision, Barron J holding that it was 'one of the important indicators that a tenancy and

121 Ibid.

122 Ibid.

123 Ibid 71.

124 Ibid, Kenny J dissenting on the existence of rent.

125 *Irish Shell and BP Ltd v John Costello Ltd (No 2)* [1984] IR 511 (SC), 517. The question was under what capacity had the defendants continued in occupation after the expiration of the lease, the court deciding that the defendants were either under tenants at will (O'Higgins CJ) or licensees (Henchy J) and that the plaintiffs were entitled to possession (McCarthy J dissenting).

126 [1994] 1 ILRM 521 (HC).

127 Ibid 528 (Morris J).

128 Ibid 527.

129 *Texaco (Ireland) Ltd v Murphy t/a Shannonway Service Station* (HC, 17 July 1991).

not a licence has been given'.[130] Barron J noted that '[t]he Plaintiff had admitted to the Defendant that he was entering as a tenant under a lease which was being prepared'.[131] Thus, Barron J held for the defendant on the basis that his entry into exclusive possession of the premises was conclusive of the parties' intentions to create a tenancy rather than a licence, even though the plaintiff's intention was only purported and not actual.

In *Kenny Homes & Co Ltd v Leonard*,[132] the plaintiff had bought land previously occupied by the defendant as a filling station and car park under a hiring and licensing agreement with Irish Shell Ltd. When the plaintiff sought to terminate that relationship the defendant argued that the agreement was in fact a tenancy. Applying the principles in *Irish Shell (No 1)*, the court examined the terms of the contract in order to decide whether the parties 'in fact intended to create the relationship of landlord and tenant rather than that of licensor and licensee'.[133] By reference to the terms of the agreement the court found that '[q]uite explicitly . . . the relationship of landlord and tenant was not to be created', and that this was confirmed by the court's finding that the parties never intended to grant exclusive possession. The court followed the approach adopted in *Irish Shell (No 1)* of considering whether exclusive possession was granted as being 'one of the important factors' in determining the intentions of the parties.[134]

The case of *Smith v CIÉ*[135] stands in contrast to the previous cases, largely because, as one commentator put it, the 'Irish courts discovered *Street v Mountford*'.[136] Smith was the operator of a newsagents in a train station owned by CIÉ, under an agreement described as a licence. It was accepted that when the agreement was executed all parties intended to create the relation of licensor and licensee only. However, relying on *Street v Mountford*, the applicant submitted that the existence of exclusive possession indicated that what had been granted amounted to more than a personal privilege, and therefore constituted a tenancy. This was accepted by Peart J, who held that the legal consequence of an agreement 'is not simply a question of the intention of the parties. It is in essence a matter of law.'[137] The court found that what had been granted amounted in fact to exclusive possession,[138] and that the agreement therefore constituted a tenancy.[139] The court accepted the respondent's argument that in certain instances exclusive possession could exist within a licence arrangement, but limited these to the exceptional situations outlined in *Street v Mountford*.[140] The court reconciled the Irish Supreme Court cases with *Street v Mountford* by holding that the test in those cases was whether what had been granted amounted to an interest in land or a mere personal privilege.[141] This view of the case law is problematic, as Peart J does not acknowledge that in the cases referred to the Supreme Court had construed the relevant agreements expressly by reference to the

130 Ibid (applying *Irish Shell (No 1)* (n 119)).

131 Ibid.

132 HC (11 December 1997).

133 Ibid (Costello P).

134 Ibid.

135 *Sub nom Smith v Irish Rail* [2002] IEHC 103.

136 A Power, 'Licence versus Lease: *ClearChannel UK Ltd v Manchester City Council and the Implications for Ireland*' (2006) 2 Conveyancing and Property Law Journal 41, fn 38.

137 *Smith v CIÉ* (n 135) [39].

138 Ibid [40].

139 Ibid [39].

140 Ibid [53].

141 Ibid [44]–[47].

intention of the parties, nor does he refer to s 3 of Deasy's Act, which also played a key role in those judgments.[142] The Irish Law Reform Commission has noted that the decision stands at odds with the Supreme Court's endorsement of the parties' intentions in *Kenny Homes*[143] and has expressed considerable doubt over the judgment,[144] concerns which have been echoed by Wylie.[145]

Lease vs licence: Northern Ireland

In Northern Ireland, the courts have generally emphasised the parties' intentions as the primary consideration. In *NIHE v McCann*,[146] the Northern Ireland Housing Executive sought to evict a squatter from one of its properties. Mr McCann, who had entered the house illegally, claimed to have been granted a tenancy. The Executive's policy at the time was to charge squatters a charge for 'use and occupation' while it reviewed the circumstances around the occupation with a view to deciding whether or not to evict. The Executive had sent Mr McCann a letter explaining these charges, and also explicitly stating that the charges did not constitute rent and that he was not being offered a tenancy, but that he was illegally occupying the premises. He was sent a rent book with the words 'Rent Book' crossed out and 'mesne profits' stamped over them. He was later sent a second letter explaining that the weekly charges were to be increased, but again explicitly stating that he did not hold a tenancy and that he was in illegal occupation. Finally, apparently due to an oversight, he was sent another standard rent book, this time with no amendments but including references to a tenancy and associated rights and responsibilities. The defendant submitted that the actions by the Executive constituted a tacit recognition of a tenancy even though the terms used were generally to the opposite effect. This was rejected by the court, which based its decision on s 3 of Deasy's Act in finding that the relationship of landlord and tenant was to be founded on the express or implied intentions of the parties. Therefore, on the facts of the case 'it seems . . . to be flying in the face of reality to say that there was an express or implied contract between the respondent and the appellant that the relation of landlord and tenant should exist between them'.[147]

The decision in *NIHE v McCann* was followed in *NIHE v Duffin*,[148] even though the facts of the latter case were slightly less straightforward. Mr Duffin entered into illegal occupation of an Executive house and was sent a letter by the Executive explaining that his occupation was illegal and that he would be charged a weekly amount for use and occupation. The letter explicitly stated that he was not being granted a tenancy. He was given a payment book where each page was stamped 'use and occupation'. Later, however, he was sent a larger payment book; while each payment slip was again stamped 'use and occupation' the book also contained a number of information pages relating to various matters strictly related to a tenancy, with Mr Duffin's name and address printed on each

142 It should also be noted that *Irish Shell (No 2)* (n 125) does not appear to have been cited to him.

143 *Kenny Homes & Co Ltd v Leonard* (SC, 18 June 1998).

144 Law Reform Commission (n 35) paras 1.28–1.31.

145 Wylie 2014 (n 37) paras 2.34–2.35. The resulting uncertainty in the law is in evidence in *Esso Ireland Ltd v Nine One One Retail Ltd* [2013] IEHC 514, where McGovern J appears to rely equally on the absence of exclusive possession (demonstrating that no tenancy existed as a matter of law) and on the party's intention to create a licence only, without stating whether he was following the objective or subjective test ([42]–[46]). He does, however, warn that a 'court should be slow to look behind the clear terms negotiated by the parties at arm's length and in circumstances where each was legally represented' ([44]).

146 *Northern Ireland Housing Executive v McCann* [1979] NI 39 (HC).

147 Ibid 43D (Murray J).

148 [1985] NI 210 (HC).

one, as well as a table on the back cover entitled 'rent payment record'. Mr Duffin fell into arrears and, after having arranged a repayment schedule, was sent a document that referred to rent and the occupier as tenant. The defendant argued that these documents were consistent with a tenancy rather than a licence and that therefore a tenancy had been created. This proposition was rejected by the court, which applied *NIHE v McCann* in stating that s 3 of Deasy's Act required an express or implied contract that a tenancy was to be created, which could not be said to be the case in the circumstances. Carswell J explained that his view was that it was 'necessary to look at all the facts, and to seek the true intentions of the parties'.[149]

In neither of those cases (decided before *Street v Mountford*) was the relevance of exclusive possession directly explored. The only relevant Northern Ireland case reported since *Street v Mountford*, *Hayes v Shell (UK) Ltd*,[150] is of little assistance. Shell sought to end its relationship with the operator of one of its filling stations and the operator attempted to argue that the agreement was a tenancy despite being termed a licence. The court quickly ruled out the possibility of the agreement constituting a lease, relying on *Esso Petroleum Co Ltd v Fumegrange Ltd*[151] in holding that various terms of the licence agreement were incompatible with the existence of exclusive possession.[152] However, Pringle J also stated that he would have arrived at the same conclusion without reference to *Fumegrange*, as the terms of the agreement made it clear that it could not be a lease, therefore seeming to indicate that the case could have been decided by sole reference to the parties' intentions. It appears that Deasy's Act was not cited to the court.

A small number of Lands Tribunal judgments have considered the question of whether an agreement is a lease or a licence. In *Tubman v Department of the Environment*,[153] the tribunal was asked to decide whether compensation for land compulsorily acquired should take into account the value of that land with or without a tenancy. The question was whether the person living in the property at the date of acquisition was a tenant, or whether she was merely a caretaker. The agreement governing the residence was titled 'caretaker's agreement' and a rent book had been provided where entries were made under 'cash received' rather than 'rent due'. It had been the owners' intention to have a caretaker live in the property until it was sold. The claimant argued that the existence of exclusive possessive and the weekly payment of rents indicated that a tenancy had arisen by implication. This was rejected by the tribunal, which adopted the respondent's argument that common intention was necessary to create the relationship of landlord and tenant and that, on the facts, the intention had been to create a licence only.

Beattie v NIHE was another case where a house had been compulsorily acquired and the amount of compensation payable depended on whether the occupants were tenants or licensees.[154] Both parties agreed that they were bound by *Street v Mountford*. The claimant conceded that the occupants had exclusive possession, but argued that the ensuing presumption that a tenancy existed was negatived by their entry under a caretaker's agreement. The claimant also argued that special circumstances also surrounded the agreement: the landlord and occupants were friends and the landlord had purchased the house from the occupants' daughter and let it out to the occupants as a result of their friendship. However, the tribunal held that, on the facts of the case (no written agreement

149 Ibid 214E.

150 [1995] NIJB 82 (Ch).

151 [1994] 2 EGLR 90 (CA), itself applying *Street v Mountford*.

152 *Hayes v Shell* (n 155) 87J–88A.

153 [1982] RVR 235 (Lands Trib).

154 R/6/1985 (Lands Trib, 2 May 1986).

could be produced), there was no caretaker's agreement, that though friendship existed there had been no act of generosity, and that therefore no special circumstances arose that negatived the presumption of a tenancy arising from the occupants' exclusive possession. Deasy's Act does not appear to have been cited to the tribunal.

In *SD Bell & Co Ltd v Department of the Environment*,[155] the tribunal was asked to decide whether the claimant held a tenancy over land that was compulsorily acquired. The land in question had been held under a tenancy that expired in 1951, yet the claimant continued to regularly pay rent after this. The claimant argued that, following *Street v Mountford*, where an occupier had exclusive possession of the land, then a tenancy would be presumed. The respondent argued that the existence of a family relationship (as existed in this case) negatived a presumption of tenancy,[156] that the House of Lords in *Street v Mountford* did not have to consider s 3 of Deasy's Act and that, while in Great Britain exclusive possession as a sole consideration might be sufficient to find a tenancy, in Northern Ireland the creation of a tenancy can be avoided by agreement. Unfortunately, the tribunal did not fully address the argument advanced by the respondent. It found that a tenancy had been created, and stated: 'The recent House of Lords decision in *Street v Mountford* supports the conclusion that the Company was a tenant and not merely a licensee; the Company had exclusive possession and control and there was not anything in the circumstances to negative an intention to create a tenancy.'[157] The tribunal thus expressed no view on the relevance of s 3 of Deasy's Act; its decision clearly rests on the claimant's exclusive possession but does not decide whether this existence of exclusive possession creates a tenancy by operation of law or whether it merely constitutes a convincing indication of the parties' intentions.

In *Eccles v NIHE*,[158] the tribunal was again asked to decide whether compensation for compulsorily acquired land should be calculated on the basis of the properties being subject to tenancies. The properties in question had been occupied under documents entitled 'Caretaker's Agreement'. Both the claimant and the respondent agreed that the relationship of landlord and tenant was created by contract as a result of Deasy's Act, but disagreed on the nature of the contract. The respondent argued that the substance of the agreement was that of a tenancy and the conduct of the parties indicated this understanding. The respondent also argued that the existence of exclusive possession had given rise to a tenancy. The tribunal held that the caretaker's agreement was in the nature of a personal right only and (following *Street v Mountford*) that its terms did not indicate an intention to grant exclusive possession and that therefore a licence only existed. The tribunal did not address the respondent's argument that the actions of the parties indicated an intention to grant a tenancy and that such an intention should be enforced under Deasy's Act.

Conclusion

In *Street v Mountford*, the House of Lords created an inflexible test whereby, whenever exclusive possession of land was granted at a term, then a tenancy was created. *Bruton v London Quadrant Housing Trust* applied the test expansively, so that in England and Wales tenancies can be created even when the grantor has no estate out of which to pass a proprietary interest. As a result of this test, the intention of the parties is largely

155 R/1/1987 (Lands Trib, 11 March 1988).

156 Relying on a *dictum* by Denning LJ in *Cobb v Lane* [1952] 1 All ER 1199 (CA) quoted by Lord Templeman in *Street v Mountford* (n 7) 821H.

157 *SD Bell v DoE* (n 155).

158 R/38/1988 (Lands Trib, 8 March 1990).

irrelevant. It serves only a preliminary purpose: to determine whether the parties agreed to enter into legal relations. If the answer is positive, then the second stage is to decide whether, as a matter of fact and law, what has been granted amounts to exclusive possession. If it does, then a tenancy has been created, even if the result is contrary to what the parties understood to have been agreeing.

This sits uneasily with the statutory landscape in both parts of Ireland, where a tenancy is deemed to be founded on contract. If *Street v Mountford* were to be applied in Ireland, then there would be no place for contractual construction (other than to determine whether a contract existed). Such an application appears to be incompatible with s 3 of Deasy's Act and the *Street v Mountford* version of the exclusive occupation test has not been applied in reported cases in either jurisdiction.

It would be wrong, however, to let the pendulum swing too far and state that exclusive occupation is irrelevant in Ireland. The Republic of Ireland case law, in particular, does place an emphasis on whether an occupant enjoys exclusive occupation of premises, but the emphasis does not serve, without more, to decide whether the relation of landlord and tenant has been created. Rather, the test of exclusive occupation is applied as a useful, often determinative tool to ascertain whether the parties intended to create a tenancy. The difference is more than simply one of form: if exclusive occupation is merely a factor to be considered in deciding whether the parties intended to create the relation of landlord and tenant then, no matter the weight attached to that factor, it is always open to being displaced by other factors pointing to a contrary intention. Such an outcome would be unthinkable in England and Wales.

In Northern Ireland, the legal landscape is woefully murky. There is a dearth of cases concerning the difference between a lease and a licence that postdate *Street v Mountford* and its compatibility with the law of Northern Ireland has not yet been tested. This may perhaps be explained by the likelihood of practitioners being more familiar with the English case than the nineteenth-century Irish statute, but, if that is so, then there is a danger that agreements are being entered into on a mistaken legal basis. It is submitted that, as long as Deasy's Act remains in force in Northern Ireland, the Republic of Ireland Supreme Court cases should be considered to be more persuasive than the judgments in *Street v Mountford* and *Bruton v London Quadrant Housing Trust*. The test of exclusive occupation should therefore not be viewed, in this jurisdiction, as being determinative of the existence of the relation of landlord and tenant; instead, the test should be viewed as a factor in construing the parties' intentions, so that the relation can only arise when the parties so intended.