

## **LAW REFORM (MISCELLANEOUS PROVISIONS)**

### **(NORTHERN IRELAND) ORDER 2005**

**SI 2005 1452 (NI 7)**

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## **EXPLANATORY MEMORANDUM**

### **INTRODUCTION**

1. The above Order is being made under the Northern Ireland Act 2000 and is subject to affirmative resolution.
2. This Explanatory Memorandum has been prepared by the Department of Finance and Personnel (“the Department”) in order to assist the reader in understanding the Order. It does not form part of the draft Order.

### **BACKGROUND AND POLICY OBJECTIVES**

3. Over the course of the last 2 years, the Office of Law Reform has undertaken the task of identifying a number of discrete areas of law that could be included in one piece of legislation. This draft Law Reform (Miscellaneous Provisions) Order is the culmination of that work, with a number of areas considered to be in need of reform included in this draft Order. They originate from a range of sources. Recommendations relating to deeds and escrows produced to Government by the Law Reform Advisory Committee, changes to domestic violence legislation flowing from a review of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, changes in the law relating to the equal treatment of spouses that were originally part of the draft Divorce Bill, and some miscellaneous repeals and amendments are all included in this Order.
4. The Law Reform Advisory Committee for Northern Ireland (LRAC) issued a report entitled “Deeds and Escrows” in 2002. The law relating to this area is a fairly archaic subject yet one that remains in practice an important part of the law in the field of property and commercial transactions. Certain categories of document need to be in the form of deeds. Different rules apply to deeds as compared to transactions effected by documents which do not constitute deeds. Under the current common law it is a requirement that a deed must be sealed. The LRAC recommended in its report that the requirement for sealing a deed executed by an individual should be abolished, thus bringing the law in Northern Ireland into line with that which has existed in England and Wales since 1989.
5. The LRAC also recommended that new requirements should be brought forward dealing with the execution of instruments by a liquidator and by the donee of a power of attorney. It also noted that the rule of law known as the rule in *Pigot’s Case* be abolished and a statutory declaration made to the effect that a material alteration to a

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deed or other written document evidencing a contractual intention does not by itself invalidate the document or render it void. It further recommended the law relating to escrows be clarified. These particular recommendations have been accepted and are included in the draft Order.

6. The LRAC also reported in the same year on contracts for the sale of land and the rule in *Bain –v- Fothergill*. Some further work is necessary on the former aspect of this report but the draft Order does abolish the rule in *Bain –v Fothergill* which restricts the damages recoverable for breach of contract occasioned by defects in title to land and brings the law in Northern Ireland in line with that in England and Wales.
7. Part III of the Order deals with reforms to the Family Homes and Domestic Violence (Northern Ireland) Order 1998. This follows a review of the Order led by the Office of Law Reform relating to the operation of that legislation and a further consultation exercise carried out by an Inter-Departmental group which issued a consultation paper entitled “Tackling Violence at Home – the Government’s proposals on domestic violence in Northern Ireland”. Over 2800 copies were distributed amongst a wide range of relevant parties, 12 workshops were carried out and a number of face to face meetings were arranged. 70 responses were received and this Order deals with some of the civil law issues that were raised in the consultation including human rights issues, anomalies in relation to in-law relationships, same-sex relationships, exclusion zone and molestation order issues, and the penalty for the breach of an order.
8. The Order also deals with what have been described as the “three anomalies” of matrimonial property law. In order to ratify Protocol 7 to Article 5 of the European Convention on Human Rights they must be addressed. Article 5 of the Protocol requires the law to treat husband and wife equally and the Order’s provisions rectifies a previous imbalance in this regard. The areas in question are the presumption of advancement, the husband’s common law duty of maintenance and the common law rule in relation to housekeeping money. The presumption of advancement operates in relation to transfers of property by a husband or father to his wife or child and creates an equitable presumption that the transfer is intended as a gift, whereas when a similar transfer is made by a wife or a mother the court will assume that she retains an interest in the property by way of a resulting trust. This rule is outdated and discriminatory and requires repeal in order to satisfy the Protocol 7. The common law duty of maintenance is similarly outdated and has since been superseded by reciprocal statutory duties of maintenance by both spouses, but change is still necessary in order to ratify Protocol 7. Thirdly, in Northern Ireland, savings from a housekeeping allowance paid by a husband to a wife, and any proceeds thereof, belong to the husband. This rule does not apply where an allowance is paid by a wife to her husband and is thus discriminatory and also outdated. All three of these “anomalies” were considered in the Assembly as part of the debates on the draft Divorce Bill, although the Assembly was suspended before this Bill had completed its progress.
9. Several repeals and amendments are also dealt with in this Order. The Colonial Solicitors Act 1900 is an archaic piece of legislation that originally regulated the admission of overseas solicitors into the UK. It has long since ceased to have effect in England and Wales but is still on the Northern Ireland statute book. The Act provides the requirements for the admission of solicitors from various parts of the then British colonies, subject to certain conditions, and has been amended by a series of piecemeal

statutory instruments since then. It is considered to be an anomalous piece of legislation and hence this Order makes provision for its repeal.

10. The Order also deals with the repeal of Trading Stamps legislation. Existing legislation contains requirements in respect of the issue, use and redemption of trading stamps, and implies various warranties on their redemption for goods. Trading stamps were introduced following the abolition of retail price maintenance in the early 1960's and operated as incentives to purchase goods at certain retail outlets operating a Trading Stamp scheme. Such incentives in the modern retail climate generally work through the medium of electronic loyalty cards and it is doubtful that such schemes fall within the definition of a trading stamp. The effect of the current legislation is placing unnecessary legal and administrative burdens on business without providing any real protection to consumers that would not otherwise be available under other consumer protection measures. The Department of Trade and Industry consulted on this issue and a Regulatory Reform Order is currently being considered to repeal the relevant legislation. Northern Ireland mirrored this consultation and this Order provides the same substantive set of repeals.
11. An amendment to the Census Act (Northern Ireland) 1969 concerns the Northern Ireland Statistics and Research Agency's (NISRA) ability to conduct a longitudinal study in Northern Ireland. The drafting of the original Act raised some question marks relating to whether such a study could be undertaken and the Order provides for the transfer of power (which now becomes a duty) to the Registrar General for Northern Ireland. Similarly, following the passing of the Courts Act 2003 it was realised that there was uncertainty relating to the interpretation of a reference to the Damages Act 1996. The Order contains a technical amendment to the new section 2(8) of the Damages Act 1996 (as inserted by section 100(1) of the Courts Act 2003) in order that Northern Ireland Court Rules are included, as was intended, in the interpretation provision created by new section 2A(6) of the 1996 Act.

#### **CONSULTATION PROCESSES UNDERTAKEN**

12. The LRAC consulted on the law relating to Deeds and Escrows by way of a discussion paper and then by the issue of its report. Similarly, its recommendation in relation to the rule in *Bain –v Fothergill* has been consulted on with positive responses received. The domestic violence provisions, as noted above, have been the subject of a review by the Office of Law Reform with 1700 questionnaires sent out to relevant parties, and by the Inter-Departmental consultation that received 70 responses in 2003. A number of workshops and face to face meetings were also effected during the consultation process. The "three anomalies" have been consulted on as part of the Divorce Bill and had been debated and agreed in the Assembly prior to suspension. The Law Society for Northern Ireland has been consulted in relation to the repeal of the Colonial Solicitors Act 1900, NISRA has had input to the changes to the Census Act and there has been liaison with the Department for Constitutional Affairs and the Northern Ireland Court Service in relation to the amendment to the Damages Act 1996.

#### **FINANCIAL EFFECTS OF THE ORDER**

13. No exchequer, staffing implications or costs to the public have been identified.

## **HUMAN RIGHTS ISSUES**

The provisions of the Order are compatible with the Convention on Human Rights.

## **EQUALITY IMPACT**

14. The three anomalies have already been the subject of an equality impact assessment that accompanied the former draft Divorce Bill. In relation to the domestic violence provisions, the main section 75 group affected are same-sex cohabitants. Currently this group faces a disadvantage as they cannot apply for all the protections available under the 1998 Order. The proposed amendments will remedy this inequality. The other provisions in the Order have been screened as regards section 75 of the Northern Ireland Act 1998 and no differential impacts have been identified.

## **REGULATORY IMPACT**

15. A regulatory impact assessment has been carried out in relation to the repeal of the Trading Stamps legislation. None of the other aspects of the Order are considered to have any significant effect on businesses.

## **COMMENTARY ON ARTICLES**

16. Articles 1 and 2 provide for the title, commencement and interpretation of the Order. Certain aspects of the Order will be commenced soon after the passing of the Order, others will be brought into operation on such day or days as the Department of Finance and Personnel may by order appoint.
17. Articles 3-9 relate to the changes to the law relating to deeds and other instruments.
18. Article 3 sets out the law relating to the formalities that must be undertaken for deeds which are executed by individuals. This Article abolishes the requirement for a deed to be sealed by an individual and sets out the new requirements dealing with the designation of a document and the requirements for signing and witnessing the execution of a document.
19. Article 4 deals with the execution of instruments by a liquidator. This Article amends the relevant provision of the Insolvency (Northern Ireland) Order 1989 and provides that the powers of a liquidator should include a power to execute deeds on behalf of a company and gives a power for the liquidator to use the company's seal.
20. Article 5 amends section 7 of the Powers of Attorney (Northern Ireland) Act 1971 making it clear that a deed properly executed by a donee is as effective as if executed in a manner which would constitute due execution of the deed by the donor.
21. Article 6 clarifies the legal position in relation to the delivery of deeds by abolishing the requirement that the authority given by one party to deliver an instrument must itself be evidenced in a deed. Where a solicitor, or an agent or employee of a solicitor, purports to deliver an instrument on behalf of a party to the instrument, this Article states that it should be conclusively presumed in favour of a purchaser that he is authorised to deliver the document.
22. Article 7 deals with escrows and makes it clear that a party delivering a deed in escrow should be entitled to revoke that escrow at any time prior to the fulfilling of any conditions on which the escrow depends. It also clarifies the law to the effect that a

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corporation is and always has been capable of delivering a deed in escrow in the same way as an individual.

23. Article 8 abolishes the rule of law known as the rule in *Pigot's Case*. A statutory declaration is also provided to the effect that a material alteration to a deed or other written document evidencing a contractual intention does not by itself invalidate the document or render it void or otherwise affect any obligation under the deed.
24. Article 9 abolishes the rule of law known as the rule in *Bain –v- Fothergill*.
25. Articles 10-15 relate to changes to the Family Homes and Domestic Violence (Northern Ireland) Order 1998. That Order contains, amongst other provisions, civil protections for those people who are suffering from domestic violence and Articles 10-15 contain amendments to these civil protections.
26. Article 11 amends the definition of “relative” in the 1998 Order to allow relief to be obtained by a victim of domestic violence if the perpetrator of that violence is a first cousin. The previous definition allowed protections to be obtained against uncles and aunts and the inclusion of cousins will add greater protection. This Article also amends a difficulty with in-law relationships. The 1998 Order as it stands creates an ambiguity as, for example, it appears to allow a daughter-in-law to apply for a protection order against her mother-in-law, but not vice versa. This anomaly was never intended and Article 11 ensures that any ambiguity is removed.
27. Article 12 amends the meaning of “cohabitee” within Article 2(2) of the 1998 Order to allow people who are living together in same sex relationships to avail of the protections provided by occupation orders and orders for transfer of tenancies.
28. Article 13 amends Article 20 of the 1998 Order to allow exclusion zones to be attached to non-molestation orders.
29. Article 14 amends Article 23 of the 1998 Order to make it clear that protective orders made on an ex-parte basis can only be made for a short period of time, to allow the respondent to have access to a full hearing of the case as soon as practicable.
30. Article 15 amends Article 25 of the 1998 Order increasing the penalties for breach of a non-molestation order or a non-molestation order combined with an occupation order to up to six months imprisonment and/or a maximum of a level 5 fine.
31. Articles 16-18 deal with the abolition of the three rules of law relating to matrimonial property.
32. Article 16 abolishes the presumption of advancement in relation to transfers of property by a husband to his wife, therefore allowing the equitable presumption of a resulting trust to operate. Abolishing this rule will bring Northern Ireland into line with Protocol 7 of the European Convention on Human Rights, Article 5 of which requires the law to treat spouses equally. The effect will not be retrospective. For the sake of clarity, Article 16 also abolishes the presumption of advancement in relation to engaged couples.
33. Article 17 abolishes any rule of common law which states that a husband must maintain his wife. The rule has been superseded by reciprocal statutory duties of maintenance by both spouses but abolition is necessary in relation to the above Protocol.

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34. Article 18 abolishes a rule of great antiquity in Northern Ireland whereby savings from a housekeeping allowance paid by a husband to a wife, and any proceeds therefrom, belong to the husband. This rule of law dates from a time when women could not own property and is long outdated.
35. Articles 19-23 deal with various miscellaneous amendments and repeals.
36. Article 19 repeals the Colonial Solicitors Act 1900. It also sets out the requirements which must be followed relating to the admission of overseas solicitors formerly admitted using the 1900 Act. The admission of such solicitors will now be governed by the relevant provisions in the Solicitors (Northern Ireland) Order 1976.
37. Article 20 repeals the Trading Stamps Act (Northern Ireland) 1965. Article 21 amends certain provisions that are connected with the exchange of goods on the redemption of trading stamps.
38. Article 22 amends the Census Act (Northern Ireland) 1969 by placing a duty on the Registrar General for Northern Ireland to collect and publish any available statistical information concerning the population of Northern Ireland in the interval between one census and another.
39. Article 23 amends the Damages Act 1996 and is a technical amendment designed to ensure that Northern Ireland Court Rules are covered in the interpretation of the Courts Act 2003 as it applies to the Damages Act 1996.
40. Schedule 1 of the Order sets out the various amendments consequential on the policy of removing the need for an individual to seal a deed.
41. Schedule 2 of the Order sets out the various repeals that are required in relation to the various aspect of the Order.

#### **COMMENCEMENT**

42. Parts II and III of the Order, together with the provisions relating to repeals of the Trading Stamps Act (NI) 1965 and the Colonial Solicitors Act 1900 will come into force on an appointed day laid down by order of the Department of Finance and Personnel. The other substantive parts of the Order will come into force one month after the Order is made at Privy Council.



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