

Setting an agenda for the next decade

The Law Reform Commission of Ireland

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The Law Reform Commission of Ireland was established in 1975, and so, like the ALRC, celebrated its 30th Anniversary in 2005.¹

Our general statutory mandate,² like most other law reform agencies, is to keep the law under review with a view to its reform: this includes the development of law, its codification (including simplification and modernisation) and the revision and consolidation of statute law. The Commission carries out this mandate primarily through Programmes of Law Reform, of which there have been two to date;³ and it also receives requests to examine specific areas from the Attorney General, the Government's principal law officer.⁴ Since its establishment, the Commission has published more than 130 documents reviewing different aspects of the law in Ireland (invariably, with a comparative edge to the analysis) and has made significant proposals for law reform.⁵ The Commission is coming to the end of its current Programme of Law Reform and is engaged in a public consultation process to develop a *Third Programme of Law Reform*, which will run for seven years from the beginning of 2008.⁶

In 2006, the Commission also agreed to take over responsibility for the development of a Programme of Statute Law Restatement.⁷ Statute Law Restatement involves administrative consolidation of legislation, and is similar to a 'Statutes Reprint' policy. This new role for the Commission is fully consistent with our original statutory mandate, and forms part of the Irish Government's commitment to tidy up the Irish Statute Book,⁸ which in turn is part of its wider *Better Regulation* policy.⁹

The remainder of this article provides a general overview of some of the Commission's recent and current work.

Reform of the legal system

Two examples from the Commission's current work reflect 'founding principles' of law reform agencies: consolidation of the law on the jurisdiction of the courts and the Commission's new statute law restatement mandate.

The Courts Acts

In October 2005, the Commission began a joint project with the Courts Service and the Department of Justice, Equality and Law Reform to consolidate, with reforms, the jurisdiction of the courts in a single *Courts Act*. Reflecting the wider project to tidy up the Irish Statute Book, this involves combining a large number of pre-1922 Acts in this area with more than 60 Courts Acts passed since the establishment of the state in 1922. Among the pre-1922 Acts that remain in place is the *Supreme Court of Judicature (Ireland) Act 1877*, which was modelled on the *Supreme Court of Judicature Act 1873*. Going a bit further back in history, the project is likely to set out in modern form the *Courts Act 1476*,¹⁰ which requires judges and barons to wear their habits and coifs in term time only! The Commission will publish a consultation paper on this topic in 2007, which will include a draft Consolidated Courts Bill.

Statute Law Restatement

As already mentioned, in 2006 the Commission agreed to take over responsibility for the development of a Programme of Statute Law Restatement. Restatements mirror the idea of reprints and do not, therefore, contain any substantive changes to the law. The Commission will publish a *Consultation Paper on Restatement* in the first half of 2007. This will include an assessment of the various styles and technologies that would enhance the

presentation and accessibility of Restatements. It will also include sample draft Restatements of the Irish *Freedom of Information Acts 1997* and *2003*, using different presentation styles.

Law of evidence

Reflecting a long-standing body of work on the law of evidence, the Commission has continued to review specific and general aspects of the law, both common law and statutory.

DNA database

In 2005, the Commission published a *Report on the Establishment of a DNA Database* (LRC 78, 2005). In making its recommendations, the Commission took account of the broad and complex constitutional and human rights issues that may arise; and secondly, the more specific question of what classes of DNA profiles would make up any database. The report recommended the establishment of a limited DNA database, in which profiles of those reasonably suspected of, and convicted of, serious crimes (including homicides, most offences against the person and burglary) would be retained on the DNA database. The report also recommended that the purposes of the DNA database should be stated in the primary legislation establishing it. The report also addresses the issue of who should regulate and maintain the DNA database, recommending that an independent Forensic Science Agency be established for this purpose. In February 2007, the Government published the General Scheme of a Criminal Justice (Forensic Sampling and Evidence) Bill 2007, which would broadly implement the Commission's recommendation for a limited DNA database.

Other aspects of evidence law

In October 2006, the Commission began a project on the law of evidence in civil and criminal matters. This project will explore options for reform of aspects of the law of evidence, including relevant common law and legislative rules. By the end of 2007, the Commission hopes to publish a consultation paper dealing with documentary evidence and expert evidence.

Criminal law

The overall aim of the Commission's work in this area is to lay the groundwork for eventual codification of criminal law.¹¹

Homicide

The Commission has published two consultation papers on homicide, which will form the basis for a final *Report on Murder and Manslaughter*. Most recently, in 2007 the Commission published a *Consultation Paper on Involuntary Manslaughter* (LRC CP 44, 2007). The Commission has provisionally concluded that, in general, the current law of involuntary manslaughter is satisfactory, but that a number of specific amendments should be considered and it invites submissions on these. For example, the Commission suggests that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter and be prosecuted as assaults instead. The Commission provisionally recommends that the current test for gross negligence manslaughter be amended so that a person would only be liable for gross negligence if he or she were mentally and physically capable of averting to, and avoiding the risk of substantial personal injury at the time of the fatality. The Commission also provisionally recommends that the specific offence of dangerous driving causing death should continue to exist alongside the more serious offence of manslaughter.

Defences

In 2006, the Commission published a *Consultation Paper on Legitimate Defence* (LRC CP 41, 2006), including self-defence. This was the third in a series of consultation papers on defences in criminal law, following the Commission's *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27, 2003) and the *Consultation Paper on Duress and Necessity* (LRC CP 39, 2006). The Commission intends to publish a report on the three defences in 2007 or 2008.

Land and conveyancing law

In 2003, the Commission launched its eConveyancing Project, which involves a comprehensive review of the substantive law and also embraces the relevant procedural and administrative elements with a view to the eventual introduction of eConveyancing.

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Substantive reform

In 2005, the Commission published its *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74, 2005). This included a draft Land and Conveyancing Bill which implemented more than 90 recommendations for reform and modernisation of land law and conveyancing and proposed the repeal, in whole or in part, of more than 130 statutes, commencing with *De Donis Conditionalibus* of 1285. This led to the publication of the Government's Land and Conveyancing Law Reform Bill 2006. The 2006 Bill was passed by Seanad Éireann (the Upper House of the Irish Parliament) in late 2006, where it received all-party approval, and is likely to be enacted later in 2007.

eConveyancing

In 2006, the Commission published its *Report on eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79, 2006). The report sets out the views and recommendations of the Commission on *Modelling of the Irish Conveyancing System*, a report prepared for the Commission by BearingPoint Management and Technology Consultants. The Modelling Report includes the first detailed 'end-to-end' process model of the entire conveyancing transaction. The next stage of the project involves conducting a detailed assessment of the most suitable model for eConveyancing in Ireland, including preparation of proposals for Government as to the design, establishment, operational governance and implementation of the actual model. The Commission intends to have a final report for Government by the end of 2008.

Vulnerable adults, capacity and guardianship

In 2006, the Commission published a *Report on Vulnerable Adults and the Law* (LRC 83, 2006), which brought together material dealt with in two papers, the *Consultation Paper on Law and the Elderly* (LRC CP 23, 2003) and the *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37, 2005). The report dealt with two topics in the Commission's current Programme of Law Reform: the law and older people; and the law concerning adults whose ability to make decisions may be limited, for example, through intellectual disability, dementia or an acquired brain injury. The report is divided into two parts. The first part recommends the

enactment of a new mental capacity law to create clear rules on when a person has the legal competence (capacity) to make a wide range of decisions, including commercial and healthcare decisions. The second part recommends that the current Wards of Court system (governed mainly by the *Lunacy Regulation (Ireland) Act 1871*) should be replaced by a new Guardianship system (on which the Commission drew from experience in Australia).

In the report, the Commission aims to promote the empowerment of vulnerable adults, while also recognising that some protections are still needed. In terms of empowerment, the Commission recommends that the proposed law should include a clear presumption that all people over 18 should be presumed to have mental capacity. The Commission also recommends that a modern 'functional' approach to legal capacity should be put in place. The functional approach means assessing a person's decision-making ability in relation to a particular decision at the time the decision is made. The Commission also recognises that vulnerable adults may still need protection against abuse. For example, the Commission has recommended that all types of home 'equity release' schemes—many of which are aimed at older people—should come under the ambit of the Irish Financial Regulator. Some equity release schemes have been designed so that they are not financial products, so that the Financial Regulator cannot currently regulate these types of schemes.

The report recommends that the proposed capacity legislation should contain specific guiding principles, which must always be taken into account. These are: no intervention can take place unless it is necessary for the person, including whether the person might regain their capacity; any intervention should be the least restrictive of the person's freedom; account must be taken of their wishes, past and present; account should be taken of the views of their relatives, carers and those who they live with; and due regard should be given to their rights to dignity, bodily integrity, privacy and autonomy. In February 2007, a Private Members Bill—the Mental Capacity and Guardianship Bill 2007—which sought to implement the Commission's report, was introduced in Seanad Éireann. In the debate that followed, the Government accepted the Bill in principle and it was deemed to have passed Second Stage.

Family law

Two projects in the family law area highlight the international dimension to adoption and the changing nature of family structures in Ireland.

Intercountry adoption

In 2007, the Commission published a *Consultation Paper on Aspects of Intercountry Adoption* (LRC CP 43, 2007). This arose from a request to the Commission by the Attorney General. The request came against the immediate background of *Attorney General v Dowse*,¹² which concerned the adoption of an Indonesian child, and which was recognised and registered in Ireland under the *Adoption Act 1991*, but which the adoptive parents later applied to have revoked. This was an unusual intercountry or foreign adoption because the adoptive parents did not live in Ireland and the child never set foot here. Such adoptions represent approximately 10% of all the intercountry or foreign adoptions recognised and registered by the Irish Adoption Board in its Register of Foreign Adoptions. About 75% of intercountry or foreign adoptions recognised and registered in Ireland involve adoptive parents who live in Ireland and have been assessed before they travel abroad and adopt a child. Once a foreign adoption is recognised and registered by the Adoption Board, the child is entitled to become an Irish citizen provided that at least one of the adoptive parents is an Irish citizen. This is what occurred in the *Dowse* case even though the adoptive parents and child were resident outside the state.

The Commission's research shows that this approach is accepted by a growing number of countries and its provisional recommendation is that this should remain the law on this point. The Commission highlighted the practical difficulties of ensuring the legal and constitutional rights of an Irish citizen child who is resident in another jurisdiction and notes that the Constitution of Ireland states that most rights are subject to a test of how 'practicable' it is to protect them. The Commission provisionally recommended that if a situation like the *Dowse* case arises in future, the Attorney General, in his role as guardian of the public interest, and in conjunction with the diplomatic and consular services of the Government, is the most appropriate officer of the state to protect the rights of the child subject to relevant principles of international law. The Commission also reiterated a previous recommendation made in 1998 that the 1993

Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption be ratified and incorporated in Irish law. The Commission welcomed the Irish Government's proposal to do so in 2007.

Rights and duties of cohabitants

In 2006, the Commission published a *Report on the Rights and Duties of Cohabitants* (LRC 82, 2006). The report makes substantial recommendations for reform of the law concerning cohabitants (de facto couples); defined as opposite sex or same-sex couples who live together in an intimate relationship and who are not related to each other. It covers cohabitants who do not marry or who have not registered their relationship through, for example, civil partnership. In light of the views of most elected public representatives in Ireland, the report assumes that a form of civil partnership for same-sex couples is likely to be introduced in the near future. The report emphasises that its recommendations are not an alternative to public registration systems—whether marriage or civil partnership—but deal with a different situation, which is the position of cohabitants who do not publicly register their relationship (for whatever reason). The Commission concluded that this group of cohabitants—whether same-sex or opposite-sex—should be considered separately in any reform of the law.

The report deals with the rights and duties of cohabitants under a wide range of topics. It makes recommendations aimed at encouraging cohabitants to make agreements on financial matters (cohabitant agreements), how transactions between 'qualified cohabitants' (discussed below) should be dealt with under tax laws, and what succession entitlements qualified cohabitants should be entitled to apply for. The report also recommends that there should be general recognition of same-sex and opposite-sex cohabitants under, for example, social welfare law, private tenancy law, in the health care and hospital setting, and under domestic violence law. The report also recommends the enactment of a 'safety net' redress system for 'qualified cohabitants', who could apply to court for financial relief at the end of a relationship but only if they can show that they had become 'economically dependent'. The Commission recommends that, in such an application, a court could make any of the following orders: a property adjustment order, a compensatory maintenance order, or (as

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a last resort) a pension splitting or pension adjustment order.

The report also states that, where cohabitants wish to claim some public benefit (such as tax benefits) or redress through the courts (such as succession rights or a property adjustment order) this will only be available to 'qualified cohabitants', which is defined as cohabitants who have been living together for at least three years (or, if they have had a child, two years). The report emphasises that, in many cases, a much longer period would be required before a cohabitant would obtain any entitlements, because the court would also have to take into account a wide range of factors, including contributions and sacrifices made to the relationship. The report recommends that, for couples who do not register their relationship (whether through marriage or civil partnership), most entitlements will not be automatic and will only apply where various 'qualifying criteria' have been met, and including the requirement that a cohabitant shows he or she is 'economically dependent'.

Contract and tort

Privity and third party rights

In 2006, the Commission published a *Consultation Paper on Privity of Contract: Third Party Rights* (LRC CP 40, 2006). In the paper, the Commission has provisionally recommended that, subject to certain limitations, the privity of contract rule should be changed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to sue if the agreement is not carried out properly. The Commission's analysis reflected on the changes which have been made in many common law states in this area, largely arising from the recommendations of law reform agencies. The Commission intends to publish its final report on this topic by the end of 2007.

Duty of care of volunteers and 'good Samaritans'

In January 2006 the Attorney General requested the Commission to consider whether:

- the law in relation to those who intervene to assist and help an injured person (good Samaritans) should be altered in relation to the existence of a duty of care by such persons to third parties and/or the standard

of care to be imposed on such persons towards third parties;

- the law in relation to the duty of care of voluntary rescuers should be altered, by statute, and if so the nature of such change in that duty and/or standard of care owed by voluntary rescuers to third parties;
- the duty of care and/or the standard of care of those providing voluntary services, for the benefit of society, should be altered by statute and, in particular, whether in what circumstances a duty of care should be owed by such persons to third parties and the standard of such care; and
- the law should be reformed, by statute, so as to impose a duty on citizens and members of the caring professions and members of an Garda Síochána or the Defence Forces (when not engaged in duties in the course of their employment) to intervene for the purposes of assisting an injured person or a person who is at risk of such an injury and the circumstances in which such a duty should arise and the standard of care imposed by virtue of such a duty.

The Commission has begun its examination of this request, which allows an opportunity to explore the foundations of liability in negligence. It also raises wide-ranging policy issues concerning how to ensure active volunteering and active citizenship in Ireland against the background of some concerns about potential civil liability. The Commission intends to publish a consultation paper later this year.

Conclusion

We hope that this overview will give readers a flavour of the Irish Commission's recent and current work. The Commission is conscious that many of these topics have been explored by other law reform agencies: for those who peruse the publications library on our website, it will be obvious that the Commission has benefited greatly from the analysis of other agencies. We are equally aware that any reform proposals that we make must pass the 'will it work' test, and that they will be suitable for Ireland. This is a particularly exciting time for the Commission as we look forward to the preparation of a programme of Statute Law Restatements, which will play a part in the modernisation of the Irish Statute Book, and

to the challenge of preparing our new *Third Programme of Law Reform*, which will set out our reform agenda for well into the next decade.

Endnotes

1. The Commission's 30th anniversary was marked by a lecture delivered in June 2005 by the former President of the Commission (and former Chief Justice of Ireland) Mr Justice Ronan Keane. *Thirty Years of Law Reform, 1975–2005*. <www.lawreform.ie> at 31 May 2007.
2. In accordance with the *Law Reform Commission Act 1975*. The 1975 Act mirrors the provisions of the British *Law Commissions Act 1965*, subject to some important variations in detail. It is worth noting that a Northern Ireland Law Commission was formally established in April 2007 when section 50 of the *Justice (Northern Ireland) Act 2002* (which arose from the 1998 Belfast/Good Friday Agreements setting out the arrangements for devolved government in Northern Ireland) was brought into force. It is expected that the Commission will begin work in late 2007.
3. The Commission has worked under two Programmes to date. The *First Programme of Law Reform* ran from 1977 to 1999. The *Second Programme of Law Reform 2000–2007*, as its title suggests, was time-limited.
4. In recent years, these have been running at a rate of about one annually.
5. All our publications are available at <www.lawreform.ie>. The current implementation rate is about 70%.
6. See *Seminar Paper: Third Programme of Law Reform* (LRC SP3, 2007).
7. See the *Statute Law (Restatement) Act 2002*, available at the website of the Houses of the Oireachtas (the Parliament of Ireland). <www.oireachtas.ie>. Until 2006, responsibility for the preparation of Statute Law Restatements rested with the Office of the Attorney General. The Attorney General will continue to be responsible for the formal certification of the Restatements to be prepared by the Commission.
8. Another significant development in this area is the publication—in the *Statute Law Revision Act 2007*—of the first definitive list of the statutes carried over by the state on independence in 1922, and in particular a 'white list' of 1,364 pre-1922 Acts being retained on the Statute Book. This 'Pre-1922 Project' was carried out over a four-year period by a dedicated team in the Office of the Attorney General.
9. See <www.betterregulation.ie>.
10. 16 & 17 Edw 4. c 22.
11. The Irish Government and Oireachtas have legislated for the preparation of a criminal code under the auspices of a statutory Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*. For background to the Committee, see the Report of the Expert Group on the Codification of the Criminal Law. *Codifying the Criminal Law* (2004). The report noted that the 'mini-codes', which had been enacted by the Oireachtas in recent years and which derived from, for example, previous work of the Commission, would form essential building blocks for the Code, which might take the form of a Crimes Act.
12. [2006] IEHC 64; [2007] 1 ILRM 81.