

Speech by Mr. Brian Lenihan T.D.

Minister for Justice, Equality and Law Reform on the occasion of the Law Reform Commission's final public consultation on its Third Programme of Law Reform

**Dublin Castle
18 July 2007**

Ladies and Gentlemen,

May I say how honoured I am to have been asked to make the closing remarks at the final public consultation organised by the Law Reform Commission on its forthcoming Third Programme of work.

As we know, the Commission is by statute independent in the exercise of its functions. It is gratifying to note, however, that the Commission's own view of its independence does not involve any splendid isolation on its part. For almost 10 years now, the Commission has engaged in consultations on its work programme through a Consultative Committee that includes the Attorney General, representatives of a number of Government Departments - including my own - and the legal professions. The aims of the Committee include the maintenance and development of lines of communication between the Commission on the one hand and Departments whose Ministers are to be the promoters of implementing legislation through the Oireachtas. As the Honourable Justice Michael Kirby indicated in his contribution, it's all very fine coming up with well-thought-out proposals for reform of the law, but the practical business of getting from that stage through the legislative process cannot be lost sight of. Thus it is eminently sensible that the Commission and the Executive Branch of Government work closely together as it is the Executive which in our system most usually takes the lead role in piloting proposals through the Legislature.

There is a history of healthy co-operation between the Commission and my Department on a number of projects. A current case in point is the hand-in-glove working of the officials in the Civil Law Reform Division of my Department with the Law Reform Commission in the development of the Bill to reform the law on land and conveyancing. Anyone who has studied law will know just how Byzantine in nature this area of the law has been to date. Law students will also be familiar with at least the existence, if not every detail of the content, of the authoritative and exhaustive work on the subject by Professor John Wylie. What more sensible approach to this project, then, than to engage the services of the Professor as consultant with a view to developing reforming legislation. My Department's officials were involved from the very beginning of the project, and now that the Bill is half-way through its passage through Parliament, there continues to be close contact between the officials, the Commission and Professor Wylie. As I take up the cudgels on the Bill in my new position as Minister for Justice, Equality and Law Reform, to complete its passage through Dáil Éireann, it is a source of reassurance to me that these lines of communication and support continue to be available. The land law project as a whole is, to my mind, a shining example of

co-operation between the independent Law Reform Commission and the organs of State involved in carrying the Commission's proposals through to reality. The respective positions of the various players are respected, and there is no question of the Commission's independence being compromised.

A similar joint approach is being taken between my Department, the Commission and the Courts Service to the challenge of restating the maze of Courts Acts, of which over 60 have been passed since 1922 - not to mention those predating Independence. I look forward to the Commission's forthcoming consultation paper on this subject, due to be launched at the end of the month.

These projects are among the more obvious manifestations of the good working relations that exist between Government and the Commission. In other perhaps less spectacular or specific ways, though, we try to ensure that Commission recommendations get implemented. We have, for instance, before the Dáil at the moment the Civil Law (Miscellaneous Provisions) Bill, which is the vehicle for implementing a number of Commission recommendations, in for instance the areas of succession law and the law of trusts. That Bill also contains a number of significant changes to Courts legislation, mainly sought by the Courts Service that cannot await the comprehensive restatement that I have just referred to. We are of course making sure that the Commission is kept fully up to speed on these changes for incorporation in the comprehensive restatement proposals.

I can also say that work is in hand in my Department on the proposals in the Commission's important Report published last year on Vulnerable Adults and the Law, with a view to getting Government approval to draft the legislation necessary to give effect to those proposals.

Another Bill currently being worked on in my Department and which draws heavily on a Law Reform Report - the Report on the establishment of a DNA Database - is the Criminal Justice (Forensic Sampling and Evidence) Bill. The purpose of this Bill will be to provide a single comprehensive statutory regime in relation to DNA and other forensic sampling for purposes of criminal investigations and prosecutions. In particular the Bill will provide for the establishment of a DNA database which will be available as an "intelligence tool" to An Garda Síochána.

The General Scheme of a Bill has already been approved by Government and I expect to publish the Bill towards the end of this year.

I should also mention, in this necessarily rather selective outline of how Government and the Commission work well together, an important item from my previous responsibilities as Minister for Children. When a particularly sensitive and complex issue arose in the area of adoption law, the Attorney General, at my request, referred it to the Law Reform Commission for examination. I am grateful to them for the promptness and the quality of their report and recommendations. The recommendations made have already fed into the drafting of legislation in this area which my colleague Minister Brendan Smith expects will be published later this year.

Of course, as the Law Reform Commission acknowledges in its Seminar Paper, it does not have exclusive rights in the area of law reform. Perhaps the most obvious current example of a major project being undertaken other than under the aegis of the Commission is the codification of the criminal law. But even with that, there is close co-operation with the Commission, and it is no coincidence that that project is under the chairmanship of Professor Finbarr McAuley, himself one of the Law Reform Commissioners.

Incidentally, the Seminar Paper characterises, in my view, the practical and realistic approach that the Commission takes to its work. It underlines the Commission's own view that its work does not take place in an esoteric vacuum but must be related to what is achievable.

I was interested to hear the Honourable Justice Kirby's comments on the shared ancestry of Irish and Australian laws, deriving as they do from the common law of what is now the United Kingdom, and in some measure too from the statute law of the Westminster Parliament. It seems to me, however, that there is a historical divergence between Ireland and Australia in the manner in which our laws have developed during the last seven or eight decades. The difference lies, I think, in the nature of our two Constitutions. The Australian Constitution, as does ours, goes into considerable detail on the mechanisms and institutions of government, whether executive, legislative or judicial. Where we diverge, though, is in the significant provisions in the 1937 Irish Constitution that set out a framework of human rights - provisions that do not have an analogue in the Australian Constitution. These provisions have resulted in a vigorous jurisprudence around the concept of rights which, though unenumerated in the Constitution, have been held to attract the same degree of Constitutional protection. The effect of the Irish Constitutional provisions has been to provide, as it were, a filter through which pre-independence British laws (indeed, all statute and common law) can be screened and interpreted by the Courts in suitable cases. Thus, while decisions of the English courts continue to have value in Irish courts as precedents, that value is at a lower level in the hierarchy; the Constitution trumps everything else.

That is not to suggest that the Irish way results in perfection each time: there is still plenty of scope for the Irish Courts to arrive at conclusions as to the state of the law in a particular area that are unsatisfactory. Such decisions can arise from a variety of origins, not least among which is the possibility that the Court is faced with a legal lacuna that cannot satisfactorily be bridged by judicial creativity.

The Law Reform Commission comes into its own in such circumstances. It is equipped with the tools to seek out such lacunae whether in statute law, in the common law, or in any interstices that it may identify between the two; to research and, through its well-developed consultative processes, canvass possible solutions; and to make proposals to the legislature and the general public for change.

What happens from then on in relation to any proposal requiring legislation is necessarily in the political domain. The elected legislature is constitutionally the sole law-making body; and the elected Government is the principal conduit for bringing forward legislative proposals. Governments tend to come to office with an already fairly well specified programme of proposed achievements, some of which will be in the legislative sphere, and proposals for changes in the law are in competition for parliamentary time—even, on occasion, different proposals within the remit of the one Minister.

I am happy to say, however, that the concept of a portmanteau vehicle for a wide variety of relatively small-scale legislative changes has already been given reality in the form of the Civil Law (Miscellaneous Provisions) Bill. (I might say in passing that smallness of scale does not equate with unimportance, however.) I see that Bill as a potential model for future legislative change, and a means of bringing forward some at least of the proposals that emanate from the Law Reform Commission. The fact that such Bills might amend a disparate range of legislative corpora, something that has hitherto been considered less than desirable from the point of view of the accessibility of the statute book, can no doubt be addressed satisfactorily in the light of the Commission's forthcoming consultation paper on Statute Law Restatement, due to be launched tomorrow.

In conclusion, might I take this opportunity to wish the Law Reform Commission continued success as it draws its Second Programme of work to a largely successful close and embarks on its Third Programme. May I also thank its members, and particularly its Chair, Judge Catherine McGuinness, for their kind invitation to me today? I look forward to ongoing close and cordial co-operation with them in their work.