

## PART I

INTRODUCTION

1. This Report covers the period from 1 January 1982 to 31 December 1982 and deals with the activities of the Commission under section 4 of the Law Reform Commission Act 1975 and with other matters referred to in section 6 of that Act.

Members of the Commission

2. The Law Reform Commission is a statutory body corporate, established under section 3 of the Law Reform Commission Act 1975 and consists of a President and four other members. The members are appointed by the Government.

3. One change in the membership of the Commission took place during the year. Mr Francis D. Murphy, Senior Counsel, resigned his membership of the Commission with effect from 5 March 1982, the day on which he was appointed to be a judge of the High Court. The Commission wishes to record its appreciation of his valuable contribution to its work during the period of his membership. Mr Roger Hayes' term of office as a member of the Commission was renewed by the Government for a period of three years from 24 November 1982. Mr J.H.G. Lovatt-Dolan, Senior Counsel, was appointed by the Government as a member of the Commission for a term of five years from 8 December 1982.

4. The membership of the Commission on 31 December 1982 was therefore as follows: Mr Justice Brian Walsh, Senior Ordinary Judge of the Supreme Court, President; Professor James Casey,

Professor of Law, University College Dublin; Miss Mary Finlay, Barrister-at-Law; Mr Roger Hayes, Barrister-at-Law; and Mr J.H.G. Lovatt-Dolan, Senior Counsel. Professor Casey, Miss Finlay and Mr Lovatt-Dolan were appointed to serve in a part-time capacity.

#### Staff of the Commission

5. The staff of the Commission consists of the Secretary, three Research Counsellors, an Executive Officer and three Clerical Assistants.

#### Functions of the Commission

6. The Commission was set up to keep the law under review and, in accordance with the provisions of the Law Reform Commission Act 1975, to examine and conduct research with a view to reforming the law and to formulate proposals for law reform. The Commission has prepared a programme for the examination of administrative law, civil liability for animals, conflict of laws, criminal law, evidence, family law, privacy, sales, State Side orders and statute law. The Commission is devoting its attention to these branches of the law and has published ten Working Papers and four Reports.

7. Copies of the Commission's publications are sent to each member of the Houses of the Oireachtas and to all the law schools and law faculties in the country. Copies are also sent on a reciprocal basis to various law reform agencies outside the State. In performance of its obligations under section 6 of the Law Reform Commission Act 1975 the Commission presented its First Report (1977) (Pr1. 6961) to the Attorney General on 1 March 1978, its Second Report (1978-'79) (Pr1.

885) on 8 April 1980, its Third Report (1980) (Prl. 9733) on 31 March 1981 and its Fourth Report (1981) (Pl. 742) on 5 April 1982. These Reports were duly laid by the Taoiseach before both Houses of the Oireachtas and copies were sent to each member of the Houses of the Oireachtas.

## PART II

## WORK OF THE COMMISSION IN 1982

8. Since the submission of its Fourth Report to the Attorney General on 5 April 1982, the Commission has issued three Reports containing its final recommendations on certain matters. The Report on Defective Premises and the Report on Civil Liability for Animals were published in June 1982. These Reports contained the Commission's final recommendations on matters covered in its Working Papers Nos. 1 and 3 respectively and draft Bills embodying in legislative form the Commission's final proposals. The Report on Defective Premises also contained a comprehensive Explanatory Memorandum accompanying the Bill on that subject. The Commission's Report on Illegitimacy was issued in October 1982. On 5 May 1982 the President of the Commission forwarded a draft Age of Majority Bill to the Taoiseach and intimated that a Report on the subject was being prepared incorporating the text of the Bill and a detailed accompanying Explanatory Memorandum. The Bill provided that the age of majority should be reduced from 21 to 18 years, that 16 should be the absolute minimum age for marriage and that, for the marriage of a person between 16 and 18 years of age, the consent of his or her parents, should be mandatory. The subject matter of this Bill was treated in the Commission's Working Paper No.2.

Report on Civil Liability for Animals (LRC 2-1982)

9. The Report makes final recommendations on the subject-matter of the Commission's Working Paper No.3 (published in December 1977) and is accompanied by a draft Animals Bill 1982. The Bill proposes to reform the existing law as contained in the rules of the common law and statutes dating back to the Summary Jurisdiction (Ireland) Act 1851.

10. Under existing law the general rules as to liability in

tort also apply to injuries caused by animals. Thus the owner of a dog who brings the animal on to the public road may be liable in negligence if he fails to exercise reasonable care in controlling it. A person who keeps animals in such numbers that they unreasonably interfere with his neighbour's enjoyment of his property may incur liability in nuisance. The occupier of premises may be liable if, for example, injury is caused to a lawful entrant by the occupier's dog. In certain cases the owner of an animal that causes injury whether to person or to property is strictly liable. In other words, he is liable irrespective of any fault or negligence on his part. For instance, there is strict liability in the case of trespass by cattle (including horses, sheep, goats, pigs, donkeys, domestic fowl and, seemingly, domesticated deer). The liability for wild animals is also a strict liability. However, in the case of injuries caused by a domestic animal, the plaintiff must prove that the animal had a vicious or mischievous propensity known to the defendant. There is an exception to this rule in the Dogs Act 1906, which imposes strict liability on the owner of a dog that causes injury to certain types of animals. On the other hand the law is especially indulgent to the owners of animals which stray onto the highway - the general rule is that no liability whatsoever attaches in respect of any injuries such animals may cause.

11. The Commission's Report recommends:

- (1) that the immunity of the keeper of straying animals for damage caused on the highway should be abolished; and
- (2) that the keeper of an animal that causes injury should be strictly liable therefor, but that this rule should be qualified in three ways:
  - (a) it would be a defence for the keeper to show that the damage was attributable solely to an Act of God;

- (b) ordinary negligence principles would apply where the person injured by the animal was a trespasser; and
- (c) the negligence of the injured person would be a ground for reducing damages.

12. It should be noted that the Report of the Commission deals with certain matters not touched upon in the original Working Paper. The main such matter is the provision of a remedy where livestock stray on to property. The existing law is that the occupier of any land may detain trespassing animals until he has been compensated by their owner for the damage done. This is known as distress damage feasant (literally, 'doing damage'). The power arises only in the case of injury to land and has no application to cases of personal injury. Moreover, the occupier has no power of sale. The Law Reform Commission recommends that the remedy, "which is obsolescent, if not indeed obsolete", should be abolished. It also recommends that the existing statutory provisions (as contained in the Summary Jurisdiction (Ireland) Act 1851 and the Towns Improvement (Ireland) Act 1854) should be replaced by modernised and simplified provisions similar to those contained in the Animals (Northern Ireland) Order 1976. The recommendation of the Commission is that where livestock not under the control of any person stray on to land, the occupier of the land should be able to detain them for forty-eight hours. This period would be capable of extension where the Garda Síochána - and the keeper of the livestock if known - are notified of the detention. The keeper would be able to terminate the right to detain by tendering sufficient money to satisfy the detainer's claim for any damage caused. And a power of sale at a market or by public auction would arise after fourteen days' detention. Section 10 of the draft Bill appended to the Report implements these recommendations of the Commission.

13. Finally the Commission recommends that where animals are found wandering on the public road, and their owner is not known, any member of the Garda Síochána should be empowered to impound the animals; and that, if the animals are not claimed by their owner within 14 days, it should be lawful to have them sold at a market or by public auction. This recommendation is on similar lines to a provision contained in the 1976 Northern Ireland Order.

Report on Defective Premises (LRC 3 - 1982)

14. The Report makes final recommendations on the subject matter of the Commission's Working Paper No.1 (published in June 1977) and is accompanied by the Defective Premises Bill. The purpose of the Bill is to amend the law relating to the liability of builders, vendors and lessors for the quality and fitness of premises.

15. The recommendations made in the Commission's Report would have two main effects. In the first place there would be imposed on every builder of premises a statutory duty to build the premises properly. Builders, architects, sub-contractors and others who undertake or carry out building work would be under a duty to see that the work is carried out in a good and workmanlike or, as the case may be, professional manner so that, in the case of a dwelling, it will be reasonably fit for human habitation and, in the case of other premises, they will be reasonably fit for the purpose for which they were intended. The duty would be owed not only to the person who commissioned the work but also to every person who acquires an estate or interest in the premises, so that subsequent purchasers would be protected.

16. The statutory duty to build properly would extend to persons such as developers and local authorities who are involved (whether in discharge of a statutory duty or otherwise) in the provision of premises. (The liability of a local authority in respect of houses provided by it was established at common law in the decision of the Supreme Court in the case of Siney v Dublin Corporation [1980] I.R. 400, in which it was held that, where a flat was let by the Corporation pursuant to its powers and duties under the Housing Act 1966, there was implied in the tenancy agreement a warranty that the flat was fit for human habitation at the date of the letting. The Law Reform Commission's Working Paper No.1 on the subject of defective premises was referred to in the decision.) Furthermore, where a power, right or duty to inspect building work exists (e.g. on the part of a local authority) and there is a failure to inspect or negligence in the inspection of such work, this constitutes a breach of the statutory duty.

17. The second main effect of the Commission's proposals would be to impose on every vendor, lessor or other disponer of premises a statutory duty to take reasonable care to see to it that persons likely to be affected by defects in the state of the premises are reasonably safe from personal injuries and from damage to their property caused by any such defects. "Persons likely to be affected by defects in the state of the premises" would include not only the purchaser or lessee himself but would also cover, for instance, persons invited or allowed onto the premises by him. This rule would not apply unless the defects in the premises existed at the time of the sale or letting of the premises and were known or ought reasonably to have been known to the vendor or lessor. So, where the defects did not manifest themselves until after the premises had been sold, the vendor or lessor would not be liable unless he had knowledge (actual or constructive) of the

defects. Also, a vendor or lessor would be absolved from his duty where he had given a warning sufficient to enable the person to whom it was given to be safe from personal injury or from damage to his property.

18. The Commission also recommends that it should not be possible to "contract out" of the duties to be imposed on builders, vendors or lessors. Any term in a building contract or in a contract of sale or lease of premises that would seek to exclude liability under the Bill would be void.

19. The new statutory duties that the Law Reform Commission proposes should be imposed on builders of premises and on vendors and lessors of premises would be additional to any duties to which they are at present subject at common law.

Report on Illegitimacy (LRC 4 - 1982)

20. The report makes radical proposals for the reform of the law relating to illegitimacy. The basic proposal is that legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage. The effect of this would be that the legal consequences of the parent/child relationship would not be subject to any differentiation based on the marital status of the parents - a child would not be discriminated against because his parents are not married.

21. The Report contains a number of recommendations regarding proof of parenthood.

- (1) There would be a rebuttable presumption of the paternity of the husband of a child's mother in specified circumstances.

- (2) Birth certificates would constitute rebuttable evidence of paternity.
- (3) Registration of the name of a man as father of a child would establish a rebuttable presumption of paternity in certain specified circumstances. Appropriate safeguards in relation to the registration process are recommended.
- (4) Proceedings for a court declaration of parenthood would be provided for. Such proceedings would be capable of being brought at any time during the joint lives of the alleged parent and child, and, where either dies, within six years of the death where a share in the estate of the deceased is being claimed.

22. The Report takes the view that the principle of equality of treatment between children, irrespective of the marital status of their parents, requires that rights of maintenance of all children should be identical. Accordingly, it is proposed that all children, irrespective of the marital status of their parents, should be entitled to apply to the Court for an order for maintenance against either or both of their parents. In making an order for maintenance for or on behalf of a child, the Court should, it is proposed, be empowered to give a direction for a capital payment or payments. At present only periodical payments may be ordered.

23. The Commission does not favour compulsory blood tests to establish parenthood but considers that where a particular person refuses to undergo a test the Court should be empowered to draw such inferences as it considers proper.

24. The Report recommends that children born outside marriage should have the same succession rights in respect of their parents' estates as those born within marriage and that the same rule should be applied in respect of the estates of their

other relatives. It also recommends that the parents and other relatives of illegitimate children should be entitled to succeed to the estates of children born outside marriage in the same way as they would if the children had been born within marriage. Furthermore, it is proposed that the various rules as to the construction and validity of provisions in wills, deeds and other instruments that discriminate against children born outside marriage should be abolished. At present, a child born outside marriage has no succession rights in the estate of its intestate father and may succeed to the estate of its intestate mother only if she dies leaving no legitimate issue. The existing law in this regard is at present the subject of a constitutional challenge in the Supreme Court.

25. A number of amendments of the law in regard to the guardianship of infants as contained in the Guardianship of Infants Act 1964 are recommended. Two main amendments are proposed. The first is that both parents of a child should be the joint guardians, whether the child is born within or outside marriage. (Under existing law the mother of a child born outside marriage is its sole guardian.) The second amendment would enable the Court to make an order depriving a parent of the custody of a child and the power to exercise other guardianship rights where it was satisfied that the best interests of the child required this and that it would be proper to make such an order having regard to those interests and to the rights and interests of all other persons concerned.

26. The Report also recommends that section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 should be amended so as to permit not only a spouse but also a child of any person, whether that person is or is not married, to apply to the Court for a barring order. Section 22 of the 1976 Act provides that the Court may order a spouse to leave the family home if it is of opinion that there are reasonable grounds for

believing that the safety of the other spouse or of any dependent child of the family requires it.

27. Though the Report examines in the context of the abolition of the status of illegitimacy the question of artificial insemination and the law of adoption, the Commission makes no recommendations relating to these matters. They are, in the Commission's view, essentially matters of social policy, and as such, more properly matters for determination by the Oireachtas.

28. The Report was not preceded by the publication of a Working Paper because the Commission felt in the light of past experience that there would be little to be gained by the delay involved in consulting with the public between the publication of a Working Paper and the issue of a Report, when many of the submissions would be related to social issues rather than to strictly legal questions. In the Commission's view there is a very important place for this type of consultation; but on the present subject the Commission felt that it should be between the Government (rather than the Commission) and the general public.

## PART III

WORK IN PROGRESSSubjects from the Commission's First Law Reform Programme and Matters referred by the Attorney General(1) The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects

29. The Commission's Working Paper No.2 - 1977 dealt with the law relating to the age of majority, the age for marriage and some connected subjects. The Commission considered the submissions it received on the proposals contained in that Paper and, as has already been mentioned (para. 8 above), a draft Age of Majority Bill was forwarded to the Taoiseach on 5 May 1982 and it was intimated that a Report on the subject was being prepared incorporating the Bill and an accompanying Explanatory Memorandum.

30. The subjects of minors' contracts and the liability of minors in tort were touched upon in Working Paper No.2. A draft Working Paper on minors' contracts for submission to the Commission is nearing completion and a draft Working Paper on the liability of minors in tort is being prepared.

(2) Family Law

31. A revised document on the law of nullity of marriage has recently been completed and submitted to the Commission. The document is in the form of a draft Report, which, for reasons similar to those obtaining in relation to the subject of

illegitimacy (see para. 28 above), would not be preceded by the publication of a Working Paper. The revised draft takes account, inter alia, of some important recent developments in case-law.

32. The Commission's Working Paper No.10 on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws was published in September 1981. A draft of a final Report on this subject for submission to the Commission has been completed.

33. A draft Working Paper is before the Commission on the legislation necessary to become party to the Hague Convention on the Civil Aspects of International Child Abduction (1980). The draft Paper also examines the legal measures which might be adopted to prevent the kidnapping of children out of the jurisdiction.

34. Other areas of family law upon which work is in progress are divorce a mensa et thoro, restitution of conjugal rights, jactitation of marriage, the recognition of foreign divorces and legal separations, the recognition of foreign nullity and foreign annulment decrees, the recognition and enforcement of foreign decisions relating to maintenance obligations, the law applicable to maintenance obligations in the Conflict of Laws, and the law applicable to matrimonial property regimes in the Conflict of Laws.

(3) Evidence

35. The Law Reform Commission Working Paper No.9 on the Rule against Hearsay was published in May 1980 and the Commission requested that observations be submitted before 2 August 1980. This request was renewed in the last two years' Annual Reports

and specific requests were made to some interested parties but no observations whatsoever have been received as yet. Where this subject is concerned, observations from interested persons on the provisional proposals contained in the Working Paper would be particularly useful to the Commission in the preparation of its final Report.

36. A draft Working Paper is before the Commission containing a General Scheme of a Bill to implement the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970). The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) are also being examined.

37. A draft Working Paper dealing with the competence and compellability of spouses of parties as witnesses in civil and criminal cases has been completed for submission to the Commission.

(4) Review of the Vagrancy Acts and the Dublin Police Acts

38. Following consideration of this subject by the Commission a revised draft Working Paper on the Vagrancy Acts is before the Commission and a revised draft Working Paper on the Dublin Police Acts for submission to the Commission is nearing completion.

(5) Judicial Review of Administrative Action: The Problem of Remedies

39. The Law Reform Commission Working Paper No.8 published in

December 1979 dealt with this topic. Observations were invited before 1 April 1980, but none have been received so far. If no comments are received in the near future, the Commission will have to proceed to the preparation of its final Report without having had the benefit of observations from interested parties.

## PART IV

PARTICIPATION IN INTERNATIONAL MEETINGS

40. The Commission has continued to take an active interest in developments in the field of international law and especially in the activities of The Hague Conference on Private International Law. The Commission has with the agreement of the Minister for Justice participated in the various meetings of the Special Commissions of the Conference. Also, at the request of the Minister for Trade Commerce and Tourism, a research counsellor attended meetings of EEC Council Working Parties as a member of the Irish delegation.

Special Commission of Hague Conference on the Law Applicable to Trusts and their Recognition

41. It was decided at the Fourteenth Session of The Hague Conference in October 1980 "to include with priority in the Agenda of Work of the Fifteenth Session the question of the international validity and recognition of trusts". A Special Commission on Trusts met in The Hague from 21 to 29 June 1982 and the Minister for Justice agreed that a member of the Law Reform Commission should be the Irish delegate. The Commission considered that trusts created under the laws of Common Law jurisdictions for family, business, financial and other purposes increasingly present connecting factors with Civil Law countries, where the trust is generally not known. The existing international legal situation is not satisfactory and this gives rise to numerous legal and practical problems. The Special Commission concluded that an International Convention on Trusts should be prepared and that this Convention should deal, in particular, with the recognition of

trustees' powers, should contain a precise definition of the essential elements of a trust and should in so far as possible keep problems of private international law concerning the trust separate from those connected with other areas of the law, such as the law of succession and the law of matrimonial property. In effect, the trust would be viewed as sui generis even in those countries that do not have provision for trusts in their legal systems. The Convention could contain conflict rules relating to the validity of trusts, or more generally concerning the law applicable to trusts. It was agreed that the Special Commission would meet again from 28 February to 11 March 1983 and that in the meantime a special Working Group would meet to draw up a tentative draft Convention for examination at the second session of the Special Commission. The Working Group met from 3 to 5 November 1982 and prepared a set of Draft Articles on the Law Applicable to Trusts and their Recognition for consideration at a second meeting of the Special Commission from 28 February to 11 March 1983.

42. It is hoped that a final draft text of an International Convention will be settled by the Special Commission for circulation for comments to the Governments of the Member States of The Hague Conference so that a definitive text can be agreed at the Fifteenth Session (Plenary) of the Conference, which will take place at The Hague in October 1984.

Special Commission of Hague Conference on Law Applicable to  
Contracts for the International Sale of Goods

43. The first meeting of the Special Commission of the Hague Conference charged with undertaking the revision of the Convention of 15 June 1955 on the law applicable to the international sale of goods was held at The Hague from 5 to 14 December 1982. With the agreement of the Minister

for Justice, a member of the Law Reform Commission attended as the Irish delegate. In accordance with the decision made by the Conference at its Fourteenth Session to allow non-Member States to take part in the work of the Conference whenever this seemed necessary because of the subject-matter under discussion, the Secretary General invited to the Special Commission meeting those Member States of the United Nations Commission on International Trade Law (UNCITRAL) that are not Members of The Hague Conference. Eleven accepted the invitation and were represented.

44. Because of the unusual nature of the Special Commission and in view of the proposal to hold a Diplomatic Conference in the form of an Extraordinary Session in October 1985 it was decided to elect a Bureau of the Commission with a President and four Vice-Presidents. The Irish delegate was elected one of the Vice-Presidents. The Commission prepared a preliminary draft Convention on the law applicable to the international sale of goods. The Convention deals with such matters as freedom of the parties to choose the applicable law, applicable law in the absence of choice, essential and formal validity of a contract of sale and the scope of the applicable law. A second meeting of the Special Commission is due to be held in The Hague from 7 to 18 November 1983 when the draft Convention and a Commentary thereon prepared by the Permanent Bureau of The Hague Conference will be discussed. If there appears to be need for it, a third meeting may be held during 1984 in order to finalise the text of the draft Convention to be examined at the Extraordinary Session of the Conference to be held in October 1985.

EEC Council Working Party on Draft Second Non-Life Insurance Directive.

45. An EEC Council Working Party has for some time been considering a draft of a second Directive on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services. Among the provisions of the draft Directive are some concerned with the law applicable to contracts of insurance that would be concluded in pursuance of the Directive. This aspect of the draft Directive is very closely related to the EEC Convention on the Law Applicable to Contractual Obligations which was concluded at Rome in 1980 and to which Ireland is a signatory. One of the Commission's Research Counsellors who was a member of the Irish delegation during the negotiations that led to the conclusion of the Convention has, at the request of the Department of Trade, Commerce and Tourism, acted as a member of the Irish delegation to a few meetings of the Council Working Party at which the applicable law provisions of the draft Directive have been discussed.

## PART V

GENERAL(1) First Report on Family Law

40. In the Family Law Act 1981 legislative action was taken in relation to a number of the recommendations contained in the Commission's First Report on Family Law (LRC 1 - 1981). However, no action was taken on certain of the Commission's recommendations. These related to actions for loss of consortium, personal injury to a child, seduction of a child, enticement of a child and harbouring of a child, and to the determination of questions as to property between spouses. It is understood that the Minister for Justice has all these recommendations under consideration.

(2) Offices of the Commission

41. In previous annual reports reference has been made to the difficulties that the Commission has experienced resulting from the lack of suitable accommodation. Alternative accommodation has now been obtained in the Ardilaun Centre, St. Stephen's Green, Dublin 2 and it is hoped that the Commission will be in a position to transfer its offices there in the near future. The Commission received great assistance in its search for and its securing of new premises from the Department of Finance, the Office of Public Works, the Chief State Solicitor and the Assistant Chief State Solicitor, Mr James Lynch. The Commission wishes to record its gratitude to these bodies and persons for their help in the matter.

(3) Superannuation of Certain Officers of the Commission

42. The Superannuation Scheme prepared by the Commission in collaboration with the Department of the Public Service, pursuant to section 12 of the Law Reform Commission Act 1975, has been approved by the Attorney General with the concurrence of the Minister for the Public Service. It has been laid before both Houses of the Oireachtas.

(4) Examination of other legal systems

43. In preparing its publications the Commission examines the laws of other countries. The Commission is grateful for the continuing assistance in this research provided by foreign embassies and legal authorities in foreign countries.

(5) Assistance from Departments of State

44. The Commission wishes to record once again its appreciation of the assistance that it has received from a number of Departments of State in carrying out its functions. The Commission wishes to thank especially the Department of Justice.

(6) Observations on Working Papers

45. In previous annual reports attention has been drawn to the need for an interaction between the Commission and interested and informed persons as part of the process of formulating law reform proposals. The Commission has frequently

indicated and takes this occasion to reiterate that it welcomes oral or written representations from persons or bodies interested in reforms in those branches of the law dealt with in the Commission's First Programme (Prl.5984; 1977). The Commission has also on a number of occasions appealed for observations on its various published Working Papers. The response has been very disappointing, especially from law teachers and from bodies representing the various branches of the legal profession. The Commission takes this opportunity to renew its appeal once again. The whole idea of publishing Working Papers is so that comments can be obtained from interested parties on the provisional proposals they contain in order to assist the Commission in the formulation of its final proposals. If comments are not forthcoming, the whole object of the exercise of publishing a Working Paper is largely defeated.

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