

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

NINTH REPORT (1986-1987)

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2.

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<i>CONTENTS</i>	<i>PAGES</i>
Letter to the Attorney General	(iii)
1986	1
New Commissioners	1
Staff and Finances	1
Functions of the Commission	2
The Attorney General's Request	2
New Procedure	3
The Year's Work, 1987	4
(a) Receiving Stolen Property	4
(b) The Statute of Limitations	4
Claims in Respect of Latent Personal Injuries	4
(c) Rape	5
(d) Child Sexual Abuse	5
(e) Debt Collection	6
(f) Conveyancing and Land Law	6
Other Activities	7
Action Taken on Reports of the Commission	7
(1) Illegitimacy	7
(2) Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters	8
(3) Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws	8
(4) Divorce a Mensa et Thoro and Related Matters	9
(5) Recognition of Foreign Divorces and Legal Separations	9
(6) Judicial Review of Administrative Action: The Problem of Remedies	9
Appendix: Publications to date	10

NINTH REPORT OF THE LAW REFORM COMMISSION

1. This Report which covers the period from 1st January, 1986 to 31st December, 1987 is addressed to the Attorney General pursuant to section 6 of the Law Reform Commission Act, 1975.

2. 1986

There being no Commissioners in 1986 no Reports or other papers were produced.

3. New Commissioners

On the 2nd January, 1987 the following took up office as Commissioners:-

The Hon Mr Justice Ronan Keane, Judge of the High Court, President;

John F. Buckley, Esq., B.A., LL.B., Solicitor;

William Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Senior Lecturer in Law, University of Dublin;

Ms Maureen Gaffney, B.A., M.A., (University of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;

Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

4. Staff and Finances of the Commission

The staff of the commission currently consists of the Secretary, two Research Counsellors and three Clerical Assistants. The Commission's approved establishment allows for a Secretary, a Director of Research, three Research Counsellors and four Clerical Assistants. The Commission is accordingly obliged to carry on its work with a seriously reduced staff level because of the present financial constraints. The limited resources available to the

Commission have also obliged it to effect economies in the purchase of books and periodicals, which are, of course, essential tools for a body engaged in research, and the organisation of seminars etc. which it also regards as an important feature of its work.

5. Functions of the Commission

The functions of the Commission are to keep the law under review, to undertake examinations and to conduct research with a view to reforming the law and to formulate proposals for law reform. In consultation with the Attorney General the Commission prepared a programme for the examination of different branches of the law which was approved by the Government. Copies of it were laid before both Houses of the Oireachtas on 4th January, 1977. By 1st January, 1986 the Commission had formulated and submitted to the Taoiseach 20 Reports containing proposals for reform of the law pursuant to recommendations contained in its programme.

In addition to reporting on matters in the programme it is also the function of the Commission at the request of the Attorney General to undertake an examination of and to conduct research in relation to any particular branch or matter of law whether or not it is included in its programme and, if so requested, to formulate and submit to the Attorney General proposals for its reform.

6. The Attorney General's Request

On 6th March, 1987, the Attorney General, Mr John Rogers SC, requested the new Commissioners to undertake an examination of, and conduct research and formulate and submit to him proposals for reform in relation to, the following matters:-

- (1) Conveyancing law and practice in areas where this could lead to savings for house purchasers;
- (2) Sexual offences generally, including in particular the law relating to rape and the sexual abuse of children;
- (3) The law relating to sheriffs, the collection of taxes and debt collection;
- (4) The law relating to compensation in personal injuries cases, including in particular (a) provision for periodic payments and the making of provisional awards and (b) the Statute of Limitations in cases of latent personal injuries and
- (5) The following aspects of criminal law:
 - (a) Sentencing policy
 - (b) Indexation of fines
 - (c) Confiscating the proceeds of crime, and
 - (d) Whether there is a need to revise or up-date the law relating to the various offences which are still mainly governed by pre-1922 legislation, including in particular the laws relating to dishonesty, malicious damage and offences against the person.

The Commission decided at an early stage that attention should be concentrated on the aspects of these subjects which seemed most relevant and urgent. So, for example, in the wide range of topics in the criminal law referred to the Commission by the Attorney General for examination, it was felt that the law on receiving of stolen property was the most fruitful area for research and recommendations. In the case of the law relating to compensation for personal injuries, the effect of the Statute of Limitations in cases of latent personal injury was a relatively straightforward instance of where the law had arrived at a state of palpable injustice and where reform would be welcome and uncontroversial. It was also felt that in the conveyancing area, aspects of the law could be isolated where change would be both beneficial and easily effected. Child sexual abuse is a more complex area but its selection by the Commission reflected their belief that their work should be as relevant as possible to matters of public concern. Similarly, the law relating to debt collection generally (including the collection of taxes) is a large and difficult area, but again, since it vitally affects a wide range of people, it was considered to be an area especially appropriate for examination and recommendations. The Commission accordingly undertook the investigation of the aspects mentioned in the preceding paragraph with the assistance of their two Research Counsellors. Later in the year, it also began an examination of the law of rape. In addition, the Commission decided to investigate an aspect of private international law in which reform had become a matter of urgency, i.e. the service of documents abroad in civil proceedings. By the end of the year, the Commission had completed its reports on three of these topics, i.e.

- (1) **The Statute of Limitations in cases of latent personal injuries.**
- (2) **Receiving stolen property.**
- (3) **Service of documents abroad in civil proceedings.**

In the case of the first two, the reports were presented to the Attorney General who had requested them and in the case of the third to the Taoiseach. All three reports have now been published.

7. New Procedure

At the outset, the Commission decided on one particular change of policy. It had been the earlier policy of the Commission to precede every report with a "working paper" published to the world at large with a view to obtaining responses and suggestions before a final report was published. Since few if any responses were received to these working papers, the expense incurred and the time expended in publishing them seemed hardly justified. Accordingly, the Commission then published a number of reports without first publishing any working or discussion paper at all.

The new Commissioners had reservations about the latter approach as they considered it wiser that first thoughts on a matter

should be exposed to some outside comment before final conclusions were drawn. It was decided, therefore, that, while certain topics might merit the publication of a working paper, in general it was better to distribute a discussion paper to a limited group of experts specifically seeking written observations and, in addition, asking such experts to meetings at the Commission's Offices thus ensuring at least verbal comments. Working Groups have also been established to assist in the preparation of certain reports ab initio.

8. The Year's Work: 1987

(a) Receiving Stolen Property

The Commission appreciated that ideally any modernisation of the law of receiving should take place in the context of a comprehensive modernisation of the law of dishonesty in general, such as was embodied in the Theft Act 1968 in the United Kingdom. However, the extremely limited resources available to the Commission made it more desirable, in their view, to confine their attention initially to this aspect of the subject. In selecting receiving for attention, they were conscious of the fact that to the extent that the existing law permitted receivers of stolen property to escape conviction for unjustifiable reasons it also facilitated crimes of dishonesty over a larger area.

The Commission began by preparing a discussion paper which set out the existing law and its shortcomings, examined the law in other jurisdictions, discussed the policy considerations which arose and made provisional recommendations. This paper was circulated among a number of people with particular expertise in this area, including judges, lawyers, academics, the Attorney General's Office, the Director of Public Prosecutions Office, the Department of Justice and the Gardai. As a result, the Commission received a number of detailed and helpful commentaries in writing on the discussion paper and, in addition, a meeting was held at the Commission's offices in July 1987 at which there was a large attendance of those interested. When the results of this exercise had been carefully assimilated and collated by the Commission, a core group was established to take the examination to a further stage. The Commission is extremely grateful to all those who assisted them in arriving at their final conclusions which were embodied in a report presented to the Attorney General on the 18th December, 1987.

(b) The Statute of Limitations: Claims in Respect of Latent Personal Injuries

The Commission had already addressed the complex question of latent defects in buildings in its *Report on Defective Premises*, published over six years ago. They now considered the difficulty facing those who suffered personal injuries in circumstances where they could not reasonably be aware that they had a possible cause of action and subsequently found that their claim was liable to be

defeated by the passage of time under the provisions of the Statute of Limitations 1957. The Commission set up a Working Group composed of the President, Secretary, Mr P Connolly SC (who was nominated by the General Council of the Bar of Ireland), Mr N Smith, Solicitor (who was nominated by the Law Society), Mr B Fitzsimon BL, ACII, Head of Underwriting and Claims, Hibernian Insurance plc (who was nominated by the National Council of the Insurance Institute of Ireland), Mr A Kerr Lecturer in Law, University College Dublin and Mr William Binchy Research Counsellor with the Commission. The Commission's Report, which was submitted on 19th August, 1987 to the Attorney General, contains detailed proposals for reform of the law in this area. The Commission are especially grateful to the members of the Working Group from outside the Commission who contributed most helpfully to its work.

(c) Rape

Of the subjects dealt with by the Commission during the year under review, that of rape was undoubtedly the one which evoked the greatest public interest. As a first step in the process of formulating proposals to the Attorney General for reform of the law, the Commission published a consultation paper in November 1987. The paper outlined the areas in which concern had been expressed that the law required alterations, examined the manner in which the problem areas had been dealt with in other jurisdictions and indicated tentative proposals for reform. Continuing the Commission's policy of securing the maximum public debate on its proposals, the consultation paper was introduced at a Press Conference on the 30th November, 1987 and was extensively reported and commented on in the media. The Commission announced its intention to hold a seminar in January, 1988 at which various persons and groups with special interests and expertise in this area would be invited to attend. The response to the publication of the consultation paper and the announcement of the seminar was extremely encouraging, a wide range of written submissions being received. The Commission will shortly commence formulating its final proposals for reform which will be presented in the form of a report to the Attorney General early in 1988.

(d) Child Sexual Abuse

The Commission began a study of the law relating to this subject at the beginning of the year. Submissions have been invited and received from several organisations and individuals. Visits have taken place to the Rotunda Sexual Assault Treatment Unit, the Rape Crisis Centre and the Temple Street Children's Hospital. Members of the Commission have had discussions with the officials in the Department of Health and with a number of other persons, including parents of abused children. With the near completion of the work on rape which is itself relevant to child sexual abuse, more of the Commission's limited resources can now be devoted to the preparation of a discussion document which we hope to have

available by the early summer of 1988. The discussion document will address, among other issues, the definition and classification of sexual offences relating to children, evidential and procedural matters relevant to the child's testimony, reporting and investigation of alleged abuse and the civil procedures relevant to child protection.

(e) Debt Collection

The Commission set up a Working Group in 1987 in order to ascertain the legal, administrative and practical problems which were hampering the efficient collection of debts. The group consisted of the President, Mr Charles Lysaght, Research Counsellor to the Commission, Mr Liam de Fue, representing the Irish Trade Protection Association, Mr John Fitzpatrick, Dublin County Sheriff, Mr Tom Maher, representing the Collector General's Office of the Revenue Commissioners, Mr Desmond Moran, Solicitor, former Dublin County Sheriff, Mr Frank Nowlan, Solicitor, Mr John O'Malley, of Messrs Dun & Bradstreet Limited, and Mr Thomas P Owens, County Registrar for Cavan and Hon Secretary of the County Registrars' Association. (Mr Maher, whom the Commission would wish to thank for his assistance, was succeeded on his transfer to other responsibilities by Mr JV Rogers.) This group has held a number of meetings and is at present considering a discussion paper prepared by Mr Lysaght dealing with the methods of enforcing judgment debts and the difficulties to which they give rise. Further meetings of the Working Group are planned and it is hoped in the near future to publish a preliminary paper indicating provisional conclusions as to reforms that might be achieved in this area. The Commission are happy to take the opportunity of thanking the members of the Working Group who are contributing so greatly to their work.

(f) Conveyancing and Land Law

The Commission established a Working Group on Conveyancing and Land Law under the chairmanship of Mr John F Buckley. The members of the Working Group are Miss Justice Carroll, Mary Laffoy, SC, George Brady, SC, Professor James C Brady, Ernest B Farrell and Rory McEntee, Solicitors.

The Working Group, while recognising the need for a comprehensive review and reform of land law and conveyancing law in the State where there has been no comprehensive reform for over a hundred years, also appreciated that with the present resources available to the Commission such a comprehensive review could not be carried out. Accordingly the Group adopted as a primary target the identification of anomalies in the law that caused difficulties or delays in normal house purchase and other conveyancing transactions. The Group met on twelve occasions during the year and has made preliminary recommendations to the Commission for changes in the law along the following lines:

- (i) The reduction of the period which must be shown under open contracts from forty to twenty years;

- (ii) The establishment of a doctrine of partial merger;
- (iii) The amendment of Section 23 of the *Registration of Title Act 1964* in respect of properties formerly affected by title changes;
- (iv) The evidencing of consents to assignment of leasehold property;
- (v) The establishment of a statutory power to partition properties held in joint ownership;
- (vi) the imposition of a time limit for proceedings under Section 27 of the *Local Government (Planning and Development) Act 1976* in respect of changes of use of property;
- (vii) Abolition of the fee-tail estate;
- (viii) Amendment of the rules relating to encroachment by lessees on adjoining properties;
- (ix) The conferring of power on all limited companies
 - (a) to deal in land
 - (b) to pledge the company's property as security for borrowings.

Consultation is now taking place with various Government Departments and other interests involved in these areas and the Working Group hopes to present a Report to the Commission before the middle of 1988. The Working Group has moved on to consider other areas of interest including a proposal to introduce provisions whereby enduring Powers of Attorney may be created. The Commission is most grateful to the outside members of the Working Group who are devoting their time and expertise to this highly specialised topic.

9. Other Activities

On a broader level, the Commission sought to keep the public informed as to the nature of its work with a view to stimulating the widest possible debate on proposals for reform emanating from the Commission. It began this process with a reception on April 23rd which was addressed by the Taoiseach and was extensively covered in the media. It was hoped to follow this by arranging a seminar in Dublin on a wide range of law reform issues. Unhappily, financial constraints prevented the Commission from proceeding further with this in the year under review, but it is hoped to revive the project in the near future and arrangements are now being considered to have the projected seminar in Summer 1988.

10. Action taken on Reports of the Commission

(1) Report on Illegitimacy (LRC 4-1982)

The Status of Children Act, 1987 gives partial effect to this Report. The Commission recommended that legislation should remove the

concept of illegitimacy from the law and equalise the rights of children born outside marriage with those born inside marriage. The Act does not go so far. It retains, in some areas of the law, a distinction based on whether or not the parents of a child have married each other. The Act introduces changes in certain areas of the law - maintenance, succession and property - so that a general principle of equality applies. With regard to succession, however, the onus of establishing relationship is, in effect, placed on the applicant. These changes are, by and large, in line with the Commission's recommendations. So far as guardianship is concerned, the Act provides that the mother is to be the sole guardian but that the court may, on the application of the father, appoint him to be a guardian. Rules of court are to provide a special procedure for determining such an application where:

- (a) the mother consents in writing to the appointment of the father as guardian, and
- (b) the father is registered as the father in a register maintained under the Births and Deaths Registration Acts 1863 to 1987.

This procedure is to be "as informal as is practicable and consistent with the administration of justice." The Act contains provision relating to declarations of parentage, blood tests, presumptions of paternity and non-paternity and the registration and re-registration of birth broadly in line with the Commission's recommendations on these matters. It should be noted that the European Court of Human Rights in *Johnson v Ireland* (18 December, 1986) held that the Irish law then applying amounted to a failure to respect the family life of a child born outside marriage and of her parents.

(2) Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983)

The Family Law Bill, 1987, which was introduced in the Seanad on 15 July, 1987 abolishes the action for restitution of conjugal rights in accordance with the recommendation in this Report. No action has yet been taken in relation to the recommendation that proceedings for jactitation of marriage should be abolished and a new remedy created in its place under which an injunction may be obtained against a person falsely claiming to be married to a person. Nor has any action been taken on the recommendation in this Report that the present law regarding declarations as to status should be restated in legislation. The Minister for Justice told the Seanad on 15 July, 1987 that these latter recommendations were being examined in his Department along with other proposals in the area of family law.

(3) Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983)

The Domicile and Recognition of Foreign Divorces Act, 1986 abolished the domicile of dependency of married women according

to which they were deemed to have the same domicile as their husband, thus implementing one of the recommendations in this Report.

(4) Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983)

On 3 December, 1987, Deputy Alan Shatter presented, as a Private Member's Bill, the Judicial Separation and Family Law Reform Bill 1987. This proposes changes in the law, some of which were recommended by the Commission in this Report. In particular, it proposes to extend significantly the grounds on which an application for judicial separation may be presented to the court by either spouse and granted by the court, but in a manner different from that recommended by the Commission. The Bill also contains in Part 2 detailed provisions relating to ancillary, financial, property and custody orders, some of which are in line with the Commission's recommendations. The Commission had also recommended many procedural and structural reforms, relating to such matters as the informality of proceedings and recourse to counselling services. The Bill's provisions reflect the substance of these recommendations.

(5) Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985)

The rules recommended in this Report for recognition of foreign divorces and legal separations involving the replacement of domicile by criteria largely based on habitual residence have not been implemented pending consideration by the Government of the wider question of adopting habitual residence as a general connecting factor in our rules of private international law. The Domicile and Recognition of Foreign Divorces Act, 1986 provides for the recognition of a foreign divorce if it is obtained in a country where either spouse is domiciled or is recognised in the country or countries where they are domiciled.

(6) Judicial Review of Administrative Action: The Problem of Remedies (Working Paper No. 8-1979)

Order 84, rules 18 to 27 of the Rules of the Superior Courts, enacted on 17 January, 1986, gives effect to most of the recommendations in this Working Paper. An application for an order of certiorari, mandamus, prohibition or quo warranto must now be made by an application for judicial review entitled in the names of the plaintiff and the defendant. It has been made permissible to join a claim for damages with an application for judicial review. The High Court is empowered to dismiss an application for review where it is satisfied that the applicant has not sufficient interest in the matter to which the application relates. The revised Rules do not give effect to the recommendation in the Working Paper that the procedure by way of quo warranto should be abolished.

