

THE LAW REFORM COMMISSION
AN COIMISIUN UM ATHCHOIRIU AN DLI

ELEVENTH REPORT (1989)

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

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ELEVENTH REPORT OF THE LAW REFORM
COMMISSION

1. This Report, which covers the period from 1st January 1989 to 31st December 1989, is addressed to the Attorney General pursuant to section 6 of the *Law Reform Commission Act, 1975*.

2. **Commissioners**

The following were the Commissioners in office in 1989:

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

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

Professor William Duncan, M.A., F.T.C.D., Barrister-at-Law,
Associate Professor of Law, Trinity College 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.

3. **Staff**

The staff of the Commission consists at present of the Secretary, a Research Counsellor, three Research Assistants and three Clerical Assistants. Mr. William Binchy is Research Counsellor to the Commission. Mr. Frank Ryan is Secretary to the Commission. Ms. Una O'Raifeartaigh joined the Commission in October 1988 on a contract for one year's service and on its expiry it was extended for a further year. Mr. Patrick Dillon-Malone and Ms. Elizabeth Heffernan joined the Commission in October 1989 on contracts for one year's service.

4. 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. After its establishment, in consultation with the then Attorney General, the Commission prepared a programme for the examination of different branches of the law, which was subsequently approved by the Government. Copies of it were laid before both Houses of the Oireachtas on 4th January 1977. By 31st December 1989, the Commission had formulated and submitted to the Taoiseach 31 Reports containing proposals for reform of the law pursuant to recommendations contained in its programme, as well as 11 Working Papers, 2 Consultation Papers and Annual Reports.

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.

5. Requests by Attorneys General

On 6th March 1987, the then Attorney General requested the Commission 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.

In January 1989, the present Attorney General requested the Commission to undertake an examination of and conduct research and formulate and submit to him proposals for reform in relation to the law of defamation and contempt of court.

6. Reports

In 1987 and 1988, the Commission published the following Reports on topics contained in the Attorney General's request:

Receiving Stolen Goods
The Statute of Limitations in Cases of Latent Personal Injuries
Rape and Allied Offences
Malicious Damage
Debt Collection: (1) The Law Relating to Sheriffs

In 1989, the Commission published a further three Reports on topics contained in the Attorney General's request:

Debt Collection: (2) Retention of Title
Land Law and Conveyancing Law: (1) General Proposals
Land Law and Conveyancing Law: (2) Enduring Powers of Attorney

In addition, the Commission published a Report on the *Recognition of Foreign Adoption Decrees*, a topic contained in the First Programme.

The Year's Work

7. Child Sexual Abuse

The Commission published a Consultation Paper in August in order to ascertain the views of as wide a range of persons and interested bodies as possible on this sensitive topic. The Commission received an encouraging number of responses, reflecting highly contrasting points of view. This was followed by the holding of a Seminar in December at the headquarters of the Law Society in Blackhall Place, Dublin, at which there was a large attendance, including judges, barristers, solicitors, academic lawyers, doctors, psychologists, representatives of the Director of Public Prosecutions, the Minister for Health and the Minister for Justice, members of the Gardai, social workers, representatives of civil liberty organisations and organisations concerned with the protection of the family and others. After an opening address by the President, the Seminar was divided into three working groups, each chaired by a Commissioner, and dealing respectively with the civil law, the criminal law and the law of evidence and associated matters. Not surprisingly in this difficult area, some sharp differences of opinion emerged, but a significant degree of consensus was also evident on other aspects.

Ms. Gaffney and Mr. O'Leary also attended a *Conference on Evidence of Children in Legal Proceedings* in Cambridge from 26th to 29th June which was attended by a number of experts in various disciplines. Much of the

Seminar was devoted to evidential aspects of cases of child sexual abuse and proved to be of the greatest value.

The Commission wish to thank all those who participated in the Seminar in December and those who sent written submissions on the topic to the Commission. Their views are proving of considerable assistance to us as we formulate our final proposals, which we hope to submit to the Attorney General in the near future.

8. Sexual Offences against the Mentally Handicapped

In its Report on *Rape and Allied Offences* (LRC 24-1988), the Commission expressed its intention of examining the law relating to sexual offences against the mentally handicapped in the context of sexual offences against children (at para. 51). At the same time, as a first and obvious measure of reform, it recommended the replacement of the words "idiot", "imbecile" and "feeble minded" in section 4 of the Criminal Law (Amendment) Act 1935 with expressions more appropriate to describing persons with mental handicap.

The 1935 Act also contains the principal consensual sexual offences which fall to be considered in connection with sexual offences against the young. Although provision for consensual offences, together with certain evidentiary matters relating to competence and the oath, are common to a consideration of sexual offences against children and against persons with mental handicap, it was subsequently decided that it would be wrong to treat the two issues as assimilable. In particular, the Commission recognised that mentally handicapped persons suffer from distinct disabilities which affect both adults and children with differing degrees of severity. In consequence, a separate Draft Discussion Paper on the subject was prepared and, following its completion in July 1989, released on limited circulation to certain psychologists, psychiatrists, social workers and lawyers working in the field.

The Commission received an encouraging response to this Paper, and a final *Discussion Paper on Sexual Offences with the Mentally Handicapped*, incorporating many of the constructive criticisms and suggested improvements received, was completed in November 1989. This, in turn, was circulated for further comment to a number of experts, including judges and other members of the legal profession, members of the Gardai and of the Departments of Justice and Health, as well as psychologists, psychiatrists and social workers. The Commission once again received detailed and helpful commentaries and suggestions and, in December 1989, held a meeting with certain of the experts concerned at which the proposals for reform were discussed.

The Commission's *Report on Sexual Offences with the Mentally Handicapped* is now being prepared, and will, on completion, be submitted to the Attorney General.

9. Debt Collection: Retention of Title

In the course of the Commission's researches into various aspects of the law relating to debt collection, it was emphasised by sheriffs, particularly those concerned with the greater Dublin area, that a major problem - perhaps the most difficult - confronting them in executions today is the prevalence of "Retention of Title" clauses. These clauses provide that the ownership of goods remain in the seller until payment has been made. Their frequent use in modern business conditions means that, when a sheriff effects a seizure, he will often find that the only saleable assets of the debtor consist of goods which are immediately claimed by his suppliers as belonging to them because their bills have not been paid.

The working group established by the Commission completed its examination of the research paper prepared by Ms. Barbara Maguire on this entire topic early in 1989. The Commission express their sincere appreciation to members of the working group from outside the Commission, i.e. Mr. Justice Barron, Mr. Laurence Crowley, Ms. Jane Marshall, Mr. Marcus Beresford, Mr. John Cooke, S.C. and Mr. Brian Lenihan, B.L. They were of the greatest assistance in enabling the Commission to formulate their final proposals. Their Report on the topic was presented to the Attorney General in April.

The Central Review Committee, in its Progress Report on the Programme for National Recovery (February 1990), has since drawn attention to the Commission's recommendations in this area of the law (at p.35).

A number of other aspects of this subject remain to be dealt with by the Commission. They are:

- Garnishee Proceedings
- Appointment of Receivers by way of Equitable Execution
- The Enforcement of Money Judgments against Interests in Land

Some preliminary research work has already been done on the first and second of these topics. It is hoped to establish a small working group later to deal with the third.

10. Conveyancing and Land Law

The working group on Conveyancing and Land Law consisting of John F. Buckley, Commissioner, Mary Laffoy, S.C., George Brady, S.C., Professor James C. Brady, Ernest B. Farrell and Rory McEntee, Solicitors, continued their work on the identification of anomalies in the law and proposals for improvement during the year. Their recommendations on a number of topics were furnished to the Commission and formed the basis of the first Report by the Commission in this area, *Land Law and Conveyancing Law: (1) General Proposals*, which was submitted to the Attorney General in June.

The next matter addressed by the working group, although more confined, was nonetheless of great practical significance, i.e. *The Use of Enduring Powers of Attorney*. A Power of Attorney is a document which appoints a person, called the donee or attorney, and invests him with power to act either generally or in a manner specified on behalf of a person called the donor, who gives the power. Such a power is, however, automatically revoked under our law by, among other things, the insanity of the donor. The result is that a person who is concerned that he or she might become incapable of managing his or her affairs is unable to make provision for that possibility. In other jurisdictions this has been met by providing what are called "enduring powers of attorney". The problem is likely to become more significant in this country with the increase in the life expectancy of the population and a corresponding increase in the number of people who become senile. The Commission submitted their Report on this topic, entitled *Conveyancing Law: (2) Enduring Powers of Attorney* to the Attorney General in September.

Among the other topics which the Working Group is studying are:

1. The clarification of the law relating to the passing of risk attaching to property during the period between a contract for sale and the completion of the sale.
2. The abolition of the requirement that certain documents effecting the transfer of land be executed under seal.
3. The question of the jurisdiction of a planning authority over land below high water mark.
4. The nature of the interest in property which rests in a purchaser after completion of a contract to purchase the land.
5. The procedure for appeals under section 19 of the Registration of Title Act 1964.
6. The obligations of a vendor wishing to serve a notice compelling a delaying purchaser to complete the purchase of land in the light of the decision in *Viscount Securities Ltd v Kennedy* (Supreme Court, unreported, 6th May 1986).
7. The abolition of the requirement for words of limitation for conveyances of unregistered land.
8. Some anomalies arising from section 78 of Landlord and Tenant Act 1980.
9. The introduction of the doctrine of a Parliamentary Conveyance where an owner's right to recover has been barred by the Statute of Limitations.
10. Clarification of the Statute of Limitations as it applies to the barring of the interest of beneficiaries' personal representatives.

11. Defamation

In January 1989 the Attorney-General requested the Commission to examine and make recommendations upon the law of defamation. Throughout the year work on a Draft Discussion Paper on the Civil Law of Defamation was

ongoing. The preparation of this Paper involved an extensive review of the legal authorities, examination of reform proposals in other jurisdictions, and consultation with representatives of the Irish media, printing and publishing industries, including visits to the premises of daily and evening newspapers. Submissions from the public were received following an invitation by the Commission placed in a number of daily newspapers. In December 1989, the Draft Discussion paper was completed and Commissioners commenced their detailed examination of it with a view to publishing a Discussion Paper in the Summer of 1990.

12. Criminal Libel

The Commission interpreted the Attorney General's reference of the law of defamation as including criminal libel. Work on a draft Discussion Paper on the topic was begun in December 1989 and has now been completed. The Commission will begin their examination of the draft shortly. It covers the four common law categories of criminal libel - defamatory, seditious, blasphemous and obscene libel - and it is hoped to publish a Discussion Paper to accompany that on Civil Defamation in the Summer of 1990.

13. Contempt of Court

Work on a Draft Discussion paper on the law relating to contempt of court, which was also referred to us by the Attorney-General in January 1989, is at an advanced stage. The Commission intends to publish a Consultation Paper on the subject during 1990.

14. Seizure of the Proceeds of Crime

The Commission is continuing its examination of the feasibility of seizure of the proceeds of crime, referred to in our Tenth Report (at para. 15). A Discussion paper on the subject was finalised in December 1989, and has since been circulated to experts for comments and suggestions. A final Report on the Seizure of the Proceeds of Crime will be submitted to the Attorney General in due course.

15. Dishonesty

In May 1989, a Draft Discussion Paper was completed on the law relating to larceny, fraud and other offences contained in the Larceny Act 1916, as well as the related offence of forgery. The Paper, which represents the continuation of the Commission's examination of offences of dishonesty as begun in its *Report on Receiving Stolen Property* (LRC 23-1987), is currently being finalised with a view to circulation among experts.

16. The Rule against Hearsay in Criminal Cases

In its *Working Paper on the Rule against Hearsay* (No. 9 of 1980) and subsequent *Report on the Rule against Hearsay in Civil Cases* (LRC 25-1988), the Commission confined its provisional and final recommendations to the operation of the rule in respect of civil cases. Having regard to the special considerations which apply to criminal proceedings, in particular to the standard of proof beyond reasonable doubt which demands that convictions

be sustained only on the basis of evidence of undoubted reliability, it was decided that separate consideration and consultation be given to the rule against hearsay in criminal cases.

A Draft Discussion Paper on the Rule against Hearsay in Criminal Cases, incorporating those parts of the Working Paper which were specifically directed to criminal proceedings and providing for a summary of provisional recommendations, was accordingly completed in September 1989. Pending the completion of certain additional research into the admissibility of computer data, however, this Paper has not as yet been circulated to experts for comments.

17. Offences against the Person

The Commission has begun its examination of the law relating to offences against the person, as contained in the Offences against the Person Act 1861 and related legislation. A Draft Discussion Paper on non-fatal offences against the person, covering crimes of violence, endangerment and crimes against personal liberty, is nearing completion. The Paper will be circulated to experts in due course.

18. Indexation of Fines

This subject was one of those referred to us for examination by the then Attorney General in March 1987. A Discussion Paper is being prepared on the topic and research continues. The Commission hopes to circulate provisional proposals in 1990 for the introduction of a scheme of indexation of fines which will ensure that the value of monetary penalties is not diminished by inflation. The issue of means-related fines will be examined separately as part of our reference on sentencing policy.

19. Private International Law

During the course of 1989 the Commission continued its work on a number of topics arising out of Ireland's participation in the Hague Conference on Private International Law.

At its Sixteenth Session, held in the Hague in October 1988, the Conference decided to concentrate on a Convention on the *Adoption of Children Coming from Abroad* which it is hoped will be adopted at the Seventeenth Session in 1993. In June 1989, the Commission published a *Report on the Recognition of Foreign Adoption Decrees*, which included an examination of a Hague Convention currently in existence on *Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*. Although the Commission considers it highly undesirable that the law should remain in its present state, it concluded in its Report that Ireland should not ratify this particular Convention. Taking account of the Report of the Review Committee on *Adoption Services 1984*, the Commission presented an alternative recommendation that legislation be introduced implementing specific reforms.

In May 1989 the President attended a meeting of the Special Commission of the Conference on the operation of the Hague Conventions on the *Service of Documents Abroad* and the *Taking of Evidence Abroad*, and acted as Vice-Chairman of the session. Following this Conference, Ireland signed the Convention on the *Service of Documents Abroad*, implementing a recommendation to that effect in our Report entitled *Service of Documents Abroad Re Civil Proceedings - The Hague Convention* (LRC-22-1987).

In October 1989, Professor Duncan attended a meeting of the Special Commission of the Hague Conference on the operation of the Hague Convention of 1980 on *Civil Aspects of International Child Abduction*. In its Report on the Convention (LRC-12-1985), the Commission recommended that Ireland should sign and ratify the Convention but that appropriate implementing legislation should be enacted before accession. A further Special Commission of the Conference will be held, probably in 1992, to discuss the operation of this Hague Convention. The Commission has taken note of the Government's announced intention, following a recent case of child abduction, to ratify this convention in accordance with the recommendations contained in our Report.

Work is continuing on a Report on the *Convention on the Law Applicable to Succession to the Estates of Deceased Persons* adopted at the Sixteenth Session of the Hague Conference in October 1988, referred to in our Tenth Report.

As part of the Commission's First Programme of Law Reform, work is under way on an examination of existing international conventions designed to introduce uniformity into the substantive and conflicts of law rules governing international contracts. A Draft Discussion Paper on Contracts for the International Sale of Goods will be completed in due course. The Commission will primarily consider the possible accession of Ireland to the Hague Conventions of 1964 relating to a *Uniform Law on the Formation of Contracts*, and relating to a *Uniform Law on the International Sale of Goods*, and to the United Nations Convention of 1980 on *Contracts for the International Sale of Goods*.

Action taken on Reports of the Commission during 1989

20. Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries

In our Tenth Report, we noted that a Private Member's Bill had been introduced by Deputy George Birmingham modelled on a draft scheme proposed by the Commission in the above Report. The Commission understands that the Bill lapsed following the dissolution of the Dail in May 1989 and has not been subsequently reintroduced.

On the 8th February 1990, the Supreme Court in *Hegarty v O'Loughran and Another* unanimously upheld a judgment of Barron J which, in general terms, confirmed that the law in this jurisdiction is still the same as the law in the United Kingdom prior to 1963. The effect of the law is that a person can be deprived of a cause of action for negligence in respect of personal injuries before he is aware that he has such a cause of action. In the course of his judgment, Finlay CJ observed:

"The extent and nature of the provisions of the English Limitation Act 1963, noted by Henchy J in his judgment in *Cahill v Sutton* at page 280, which introduced into English law a discoverability context in the limitation of actions and the recommendations of the Law Reform Commission in this country with a like objective, strongly supports the conclusion that to interpret this sub-section as being based on discoverability, though possibly very desirable, would be to legislate."

McCarthy J, in the course of his judgment, also observed:

"In its Report on the *Statute of Limitations: Claims in respect of Latent Personal Injuries*, the Law Reform Commission recommended that the discoverability test should be incorporated explicitly in legislative provisions and further that time should begin to run only where the plaintiff becomes or ought to become aware that the injury is attributable, in at least some degree, to the conduct of another. I share these views but I recognise that such legislative provision would increase the spread of a different harm to society. The increase in the number of medical malpractice suits has, it is said, led to the practice of defensive medicine, which has patient/practitioner, social and economic effects. The case for a no fault system of compensation for those who suffer injury as a result of medical treatment seems so strong as to be virtually unanswerable. That also is a matter for the Legislature."

It may be noted in passing that the claims about to be brought in the United Kingdom in respect of incidents of leukaemia alleged to have been caused by the British Nuclear Fuels Reactor at Sellafield might have been successfully defended because of the legal principles reaffirmed in *Hegarty v O'Loughran and Another*, had the law not been long since changed in that jurisdiction.

21. Family Law

The *Judicial Separation and Family Law Reform Act 1989* incorporates some of the Commission's recommendations on the subject made in its Report on *Divorce a Mensa et Thoro and Related Matters* (LRC 8-1983).

22. Rape

The Criminal Law (Rape) (Amendment) Bill 1988, a Senate Bill which implements a number of the recommendations in the Commission's Report on Rape at Allied Offences, is now at committee stage in the Dail.

23. Receiving Stolen Property

The Larceny Bill 1989 incorporates a number of the Commission's recommendations in respect of handling unlawfully obtained property contained in its Report on *Receiving Stolen Property* (LRC 23-1987). In many respects, however, the Bill differs from the Commission's recommendations. For example, the Bill embraces in section 3 the complex English definition of handling and does not make it a possession based offence as the Commission recommended.

It adopts the English formula of "knowing or believing" rather than the Commission one of "knowing or being reckless" in respect of the intention necessary for the offence. However, believing is sub-defined to include "thinking" that property is *probably* stolen property. This should provide an improvement on the present situation. Nevertheless, the Commission would hope to codify the criminal law in due course and to that end would be anxious to provide one basic set of standard concepts for all offences. Recklessness has already a familiar and well tried 'pedigree' in our criminal law, is a concept basic to offences such as capital murder, rape and malicious damage and would be a cornerstone concept of any codification.

Whereas section 7(4) of the Bill broadens the definition of "stolen" to include property embezzled, fraudulently converted and obtained by false pretences it does not include property *smuggled* thus leaving receivers with a tried and trusted 'defence' and the law with a loophole through which, for example, many a stolen car will be driven. One cannot charge a receiver who avails of this defence with smuggling as the property is, in fact, stolen.

The provision regarding alternative verdicts in section 8 of the Bill does not solve the problem highlighted by the Commission which arises when a person is wrongfully convicted of larceny and acquitted of receiving or vice versa in the lower court and an appellate court is unable to rectify the situation because of the previous acquittal. The Commission recommended that all thieves should automatically be guilty of handling as well, one of the attractions of the possession based offence. Thus in any case where there was a doubt whether the suspect stole or handled the goods, he could be safely charged with handling. The recommendation, also not followed, that larceny and handling should attract the same maximum penalty flowed naturally from this recommendation.

In its original form, the Bill provided for the continuing admission of evidence of previous convictions, as under section 43(1) of the Larceny Act 1916. In its Report, the Commission referred to doubts as to the constitutional validity of this section and accordingly recommended its repeal. This recommendation has now been inserted into the Larceny Bill by way of amendment at the Report stage in the Dail.

We understand the Commission's recommendations on documentary evidence will be addressed in separate legislation now being prepared in the

Department of Justice and dealing with proof of documentary evidence in criminal proceedings generally.

24. General

The Commission claims no monopoly of wisdom and does not expect all its recommendations to be implemented as a matter of course. The Commission's primary function is to assist the Government and the legislature in reforming the law. It would greatly help the Commission in so doing if the government or sponsoring department when introducing legislation relating to a topic on which the Commission has reported would indicate in the Explanatory Memorandum its reasons for not implementing particular recommendations of the Commission. The Commission would wish to know for its guidance in preparing further reports when it was in error.