



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

**FIFTH PROGRAMME
OF LAW REFORM**

[LRC 120 – 2019]

Report

Fifth Programme of Law Reform

(LRC 120 - 2019)

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ISSN 1393-3132

About the Law Reform Commission

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular, by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. This *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation work makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, the Classified List and the Revised Acts. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. The Classified List is a separate list of all Acts of the Oireachtas that remain in force organised under 36 major subject-matter headings. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to selected Revised Acts that were enacted before 2005 and Revised Acts are available for all Acts enacted from 2005 onwards (other than Finance and Social Welfare Acts) that have been textually amended.

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FOREWORD BY THE PRESIDENT

1. In introducing this Report on the *Fifth Programme of Law Reform* I must acknowledge at the outset that I have had no input into its development. The credit goes to my predecessor as President of the Commission, Mr. Justice John Quirke, and my fellow Commissioners. I must also acknowledge that I greatly admire the process and the work which resulted in the *Fifth Programme*.
2. As happened with the Commission's earlier Programmes, the content of the *Fifth Programme* is the result of very extensive consultation process, which, as outlined in Part 2, took place over approximately fifteen months from June 2017 to August 2018. On behalf of the Commission I express gratitude to all those who assisted the Commission in producing the draft *Fifth Programme* in August 2018, in particular to:
 - those who facilitated and those who participated in the consultative meetings around the country in University of Limerick, NUI Galway, Dundalk Institute of Technology, and University College Cork;
 - the speakers at the Commission's 2017 Annual Conference in Dublin Castle and all those who participated in the discussion on the development of the Fifth Programme at the Conference;
 - the members of the Attorney General's Consultative Committee on Law Reform, being representatives of all Government Departments, the Law Society of Ireland, the Bar Council of Ireland and the Commission; and
 - individuals and bodies from whom the Commission received written submissions and those who attended meetings with the Commission.
3. The importance of public consultation in relation to the content and the Commission's development of a Programme of Law Reform cannot be emphasised too strongly, nor can the invaluable contribution which members of the public, private organisations, and public organisations make to such content and development.
4. The consultative process resulted in the draft *Fifth Programme* being submitted to the Attorney General in August 2018. As is outlined in Part 2, the draft, having been approved by the Oireachtas Joint Committee on Justice and Equality, was approved by the Government without modification on 20th March 2019. On behalf of the Commission I express gratitude to the Attorney General, Séamus Woulfe SC, and his officials for their assistance in the production of the *Fifth Programme*, and also to the Chair and members of the Oireachtas Committee and to the Government for bringing the *Fifth Programme* into existence.

5. As with the Commission's previous Programmes of Law Reform, the fifteen projects in the *Fifth Programme* cover a wide range of key areas of law, including:
 - Courts, Public Law and the Digital Era;
 - Criminal Law and Criminal Procedure;
 - Civil Liability and Civil Procedure;
 - Evidence;
 - Family Law; and
 - Land Law.
6. There is also considerable diversity in the range and focus of the projects in those areas. In this connection, I think it is appropriate to draw attention to the criteria which were used to select the projects for the *Fifth Programme*, as set out in Part 2. I consider that the application of those criteria is in the public interest and I envisage that they will continue to be applied in the future.
7. Another aspect of the process which I consider to be of particular benefit is the inclusion of an abstract in relation to each project, as set out in Part 1. Each abstract identifies the scope of the project and will underpin the work of the Commission on the project, including the publication of an Issues Paper. While I find each abstract particularly helpful because I was not involved in the preparation and development of the *Fifth Programme*, the existence of each abstract is unquestionably necessary for bringing clarity to the nature and extent of the Commission's task in relation to the project.
8. As of now, May 2019, the Commission is still working on five of the projects in the *Fourth Programme*, as well as two projects that were the subject of requests from the Attorney General, and it has been concentrating on completing those projects. The Commission has also started working on some of the projects in the *Fifth Programme* and it is hoped that it will publish Issues Papers and Reports in relation to most, if not all, of those projects over the next three years, over which period the collaborative and consultative processes will continue.

Ms Justice Mary Laffoy

President

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PART 1

THE FIFTH PROGRAMME OF LAW REFORM

In accordance with section 5(1) of the *Law Reform Commission Act 1975*, on 20 March 2019 the Government approved the Commission's *Fifth Programme of Law Reform*. The 15 projects in the *Fifth Programme*, and the areas of law to which they pertain, are:

A. Courts, Public Law and the Digital Era

- (1) Reform of Non-Court Adjudicative Bodies and Appeals to Courts
- (2) A Regulatory Framework for Adult Safeguarding
- (3) Privacy and Technology in the Digital Era

B. Criminal Law and Criminal Procedure

- (4) Structured Sentencing
- (5) Review and Consolidation of the Law on Sexual Offences
- (6) Perjury
- (7) Compensating Victims of Crime
- (8) Regulation of Detention in Garda Custody

C. Civil Liability and Civil Procedure

- (9) Caps on Damages in Personal Injuries Litigation
- (10) Protective Costs Orders
- (11) Liability of Hotels and Related Establishments
- (12) Liability of Unincorporated Associations

D. Evidence

- (13) Aspects of the Law of Evidence
 - (a) Bad Character Evidence
 - (b) Privilege

E. Family Law

(14) Aspects of Family Law

- (a) Proper Provision on Divorce
- (b) Foreign Divorces

F. Land Law

(15) Aspects of Land and Conveyancing Law

- (a) Adverse Possession
- (b) Prescriptive Easements

The Commission sets out below an abstract for each of the 15 projects in the *Fifth Programme of Law Reform*. These abstracts will form the basis for the scoping and development of each project, including where relevant the preparation and publication of Issues Papers in order to inform the Commission's analysis of the areas of law involved in the projects. In Part 2 the Commission outlines the background to the development of the *Fifth Programme*.

1. Reform of Non-Court Adjudicative Bodies and Appeals to Courts

- 1.01 As with most jurisdictions, Ireland now has a great array of quasi-judicial bodies empowered, usually by legislation, to adjudicate issues and disputes in particular areas. They include An Bord Pleanála, the International Protection Appeals Tribunal, the Residential Tenancies Board and the Social Welfare Appeals Office.
- 1.02 The profusion of such adjudicative bodies is inevitable in the modern administrative state, but they have grown up over many decades on a case-by-case basis, without any standard approach to procedural matters or their relationship with the courts, including by way of appeal or review.
- 1.03 The Commission noted in its 2016 report on the law of evidence the varying procedures and rules of evidence among quasi-judicial bodies.¹ A number of submissions received during the consultation process for this Fifth Programme have drawn attention to the great multiplicity of avenues of appeal from these bodies, and the confusion that this generates. Questions pertaining to related issues, such as the standard of proof to be applied, and access to legal representation, may also be examined.
- 1.04 This project will therefore examine the case for a reformed system, including the approach to evidential matters and simplifying the avenues of appeal to the courts from such bodies. The Commission notes that significant reforms have been enacted in the UK in the *Tribunals, Courts and Enforcement Act 2007*, which implemented the majority of the recommendations in the 2001 Leggatt Report.² The 2007 Act lays down a single basis for appeals from the quasi-judicial bodies within its scope, and the project will examine to what extent this may be a useful reform model for this jurisdiction. The Commission is conscious that other aspects of the reforms in the UK 2007 Act, notably the consolidation of the various bodies into a single tribunal structure with uniform powers and procedures, may present constitutional questions in Ireland under Articles 34 and 37. The Commission will have regard to these important questions in developing the project, and will also review relevant reforms in jurisdictions other than the UK.

¹ *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC-117 2016), Appendix A.

² Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001).

2. A Regulatory Framework for Adult Safeguarding

- 1.05 In a Seanad debate on a Private Member's Bill, the *Adult Safeguarding Bill 2017*, the Minister for Health stated that the Government agreed that there was a need for an appropriate statutory framework for the safeguarding of vulnerable or at-risk adults. The Department of Health and a number of other bodies also made detailed submissions requesting the Commission to include this matter in the Fifth Programme.
- 1.06 The Commission has previously completed work in this general area, including the 2006 report³ which recommended the replacement of the adult wardship system with legislation on adult capacity based on a functional test of capacity, largely reflected in the *Assisted Decision-Making (Capacity) Act 2015*.
- 1.07 In developing this project, the Commission will (taking account of any parallel work in this area) consider a range of matters, including:
- (1) co-ordination of any new proposed powers of existing or new bodies with other regulatory and oversight bodies, such as the Health Information and Quality Authority on health matters, the Central Bank on financial matters and the Department of Employment Affairs and Social Protection on social welfare matters;
 - (2) powers of entry and inspection, in particular the question of being able to gain access not only to commercial premises but also to a private dwelling;
 - (3) other powers, such as those considered by the Commission in its Fourth Programme project on Regulatory Powers and Corporate Offences, on which the Commission published its Report in 2018,⁴ and
 - (4) access to sensitive data, including financial information.

³ *Report on Vulnerable Adults and the Law* (LRC 83-2006).

⁴ *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018).

3. Privacy and Technology in the Digital Era

- 1.08 This project will consider aspects of the impact of the digital era on the law.
- 1.09 The Commission will give priority to examining how technology in the digital era has affected traditional views of privacy. In particular, it will explore to what extent the Commission's previous work in this area in the late 1990s, concerning privacy and surveillance,⁵ needs to be reconsidered in the context of the internet era, and to what extent this area (where the state and, increasingly, private sector actors are involved) has evolved in the interim. The project will also take into account the impact of recent EU and ECHR law, which the Commission examined under its Fourth Programme in its project on harmful communications and digital safety.⁶
- 1.10 The project may also explore other aspects of the impact of technology on substantive and procedural law.
- 1.11 In terms of substantive law, the project may (taking account of any parallel work in this area, nationally and internationally) examine a discrete area concerning the future impact of interconnected digital devices – the "Internet of Things" (IoT). For example, the development of autonomous vehicles and vessels is likely to have significant effects on the interaction between road traffic law or maritime regulations on the one hand, and product liability law on the other, and such a discrete project could therefore identify reforms that would be required in this developing area of law.
- 1.12 As to procedural law, the project might also examine the possible use of online dispute resolution (ODR).⁷ While ODR has the potential to give greater effect to the right of access to the courts and the right to an effective remedy, there are concerns that an excessive reliance on it could have consequences for the right of access to independent legal advice and the quality of legal adjudication generally.

⁵ *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57-1998).

⁶ *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

⁷ The Commission is conscious that, in 2017, the Department of Justice and Equality published the *General Scheme of a Courts and Civil Law (Miscellaneous Provisions) Bill* that, among other matters, proposes to empower the Rules of Courts committees to make provision for eFiling and other electronic processes in civil cases.

4. Structured Sentencing

- 1.13 Ireland, by contrast with many other common law jurisdictions, has a largely unstructured sentencing system in which sentencing judges enjoy a wide measure of discretion in individual cases.⁸ In recent years, however, the appellate courts have delivered a series of judgments that have provided significant sentencing guidance for a number of offences.⁹ In addition, the *Judicial Council Bill 2017* proposes that the Judicial Council would include a Sentencing Committee empowered to collate information on sentencing, to conduct research on sentencing and to publish sentencing guidance.
- 1.14 A number of submissions suggested that the Commission should examine this area. While the developments already mentioned indicate that other bodies have provided important guidance in this respect and will continue to do so, the Commission nonetheless considers that it could provide useful complementary analysis, building on its previous work in this area. This work has included its 1996 report on sentencing in general,¹⁰ its 2013 report on mandatory sentences,¹¹ and its project on suspended sentences under its current Fourth Programme.¹²
- 1.15 This project will therefore consider to what extent the general principles of sentencing, combined with a suitable sentencing information database, could provide the basis for a structured sentencing system. The objective of such a system might be to achieve uniformity or consistency of approach rather than uniformity of outcomes, which could involve a combination of guidance from appellate courts and the information from the Sentencing Information Committee of the Judicial Council. The Commission will examine a number of models in this respect, including the Sentencing Council of England and Wales and the development of sentencing guidance in Northern Ireland under the auspices of the Lord Chief Justice.

⁸ O'Malley, *Sentencing: Towards a Coherent System* (Round Hall, 2011).

⁹ See for example *The People (DPP) v Ryan* [2014] IECCA 11 (firearms offences), *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116 (assault causing serious harm), *The People (DPP) v Z* [2014] IECCA 13, [2014] 1 IR 613 (rape and child cruelty), *The People (DPP) v Road Team Logistic Solutions* [2016] IECA 38 (health and safety) and *The People (DPP) v Casey* [2018] IECA 121 (burglary).

¹⁰ *Report on Sentencing* (LRC 53-1996).

¹¹ *Report on Mandatory Sentences* (LRC 108-2013).

¹² *Issues Paper on Suspended Sentences* (LRC IP 12-2017). The Commission intends to publish its Report on this project in 2019.

5. Review and Consolidation of the Law on Sexual Offences

- 1.16 During the public consultation process, the Commission received a large number of submissions concerning the need to review specific aspects of sexual offences law and for the consolidation of the law.
- 1.17 As to the specific aspects of the law, the project will examine:
- (1) the definition of rape;
 - (2) sexual history evidence;
 - (3) whether the doctrine of recent complaint ought to be abolished;
 - (4) the discretionary corroboration warning;
 - (5) the anonymity of accused persons in sexual assault cases;
 - (6) whether trials for sexual assault should be heard otherwise than in public;
 - (7) the high attrition rate in sexual offences cases, and whether procedural and other reforms could have an impact on this; and
 - (8) separate legal representation for complainants.
- 1.18 As to consolidation, while the enactment of the *Criminal Law (Sexual Offences) Act 2017* has provided for significant reform,¹³ it did not involve complete consolidation of the law, and it remains the case that some sexual offences on the statute book date back to the 19th century.
- 1.19 Both aspects of this project will take due account of relevant work by the Department of Justice and Equality in relation to sexual offences.

¹³ This Act was further amended by the *Criminal Law (Sexual Offences) (Amendment) Act 2019*.

6. Perjury

- 1.20 The law of perjury is at present a common law offence subject to various ancillary matters provided for in a number of ancient statutes, such as the *Perjury Act 1586* and the *Perjury Act 1729*. More recent legislation has also provided for context-specific offences, such as section 25 of the *Civil Liability and Courts Act 2004*, which provides for an offence of giving false or misleading evidence in personal injury cases.
- 1.21 The Commission previously referred to the law of perjury in its 1990 report on oaths and affirmations,¹⁴ and while it did not make any recommendations for reform having regard to the scope of that report it acknowledged that it might be desirable to restate the law in modern language and with suitably updated penalties.
- 1.22 A number of submissions to the Commission suggested the need for a review of the law of perjury. A modern statement of the law of perjury, including a clear definition and updated penalties, would bring important clarification to the law. The Commission is conscious that this area of law has been subject to review and reform in a number of other common law jurisdictions, and will have regard to these developments in developing this project.

¹⁴ *Report on Oaths and Affirmations* (LRC 34-1990), p.21. The recommendations in that Report were subsequently incorporated into the Commission's *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

7. Compensating Victims of Crime

- 1.23 The Criminal Injuries Compensation Scheme was established on a non-statutory basis in 1974, primarily to address the needs of victims of crime who would otherwise be unable to obtain compensation in a civil claim against the offender. It was amended in 1986 in a significant respect by confining its scope to compensation for special damages (quantifiable loss, such as loss of wages) and excluding compensation for general damages (damages for the pain and suffering involved).
- 1.24 This project will examine whether the Scheme is in need of reform, particularly having regard to Ireland's obligations to compensate victims of crime under Directive 2004/80/EC relating to compensation to crime victims. The project will examine whether the Scheme should be amended to include claims for general damages experienced by the victim, and any other aspects that may require reform.
- 1.25 A number of submissions received by the Commission raised concerns about the operation of the Scheme in the context of sexual crimes. For example, the Scheme provides that a victim is not entitled to compensation where he or she is cohabiting with the offender, which is likely to exclude many victims of sexual violence. It also provides that no compensation is payable where the victim was in some way responsible for the crime, including by way of provocation, which may exclude victims of domestic violence. Submissions have also raised concerns about the interaction between the Scheme and section 6 of the *Criminal Justice Act 1993*, which provides a procedure whereby a criminal court may order an offender to pay compensation to the victim in respect of any personal injury or loss resulting from the offence.

8. Regulation of Detention in Garda Custody

- 1.26 At present, detention in Garda custody is principally regulated by the *Criminal Justice Act 1984* and relevant Regulations made under the 1984 Act, such as the *Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987*, the *Electronic Recording of Interviews Regulations 1997* and the *Suspension of Detention under section 4(3A)) Regulations 2011*.
- 1.27 Submissions to the Commission have suggested that the current legislation may not be compliant with emerging constitutional requirements or those under the European Convention on Human Rights (ECHR). This has the potential to hinder the effective operation of the criminal justice system, including the criminal trial process, and thus presents significant risks to the rights of detainees and of victims of crime, and to the public interest in the effective operation of the criminal justice system.
- 1.28 This project will therefore examine a number of legal issues concerning persons who have been arrested in relation to a criminal offence and who are detained in Garda custody. The issues will include: the scope of the right of access to a lawyer; the provision of information; the provision of medical assistance; the question of consular assistance for foreign detainees; and the provision of a translator or interpreter. The project will examine these issues having regard to the relevant provisions of the Constitution and the ECHR. The project will also take account of relevant EU Directives, namely those which the State has exercised its option to adopt, as well as those which the State may choose to adopt in the future. The project will also take account of the work of the Commission on the Future of Policing.
- 1.29 This project will also consider the present statutory arrangements in relation to other forms of detention, and will evaluate whether consolidation, or an effort to make the powers relating to the various forms of detention more uniform, should be considered.

9. Caps on Damages in Personal Injuries Litigation

- 1.30 A number of submissions suggested that the Commission examine aspects of civil liability in personal injuries claims, including the level of damages in such cases. The Cost of Insurance Working Group¹⁵ and the Personal Injuries Commission¹⁶ have been examining a wide range of issues concerning the cost of motor, employer and public liability insurance, and this has included aspects of the award of damages in such cases. Having regard to the general submissions received, and to a request from the Working Group and the Department of Justice and Equality, the Commission will examine whether it is appropriate to legislate for a cap to be placed on the levels of damages which a court may award in respect of some or all categories of personal injury claims.
- 1.31 The Commission has previously examined this area,¹⁷ including in its 2000 report which recommended that the law on damages should be developed primarily by case law.¹⁸ The courts have, in a series of cases, including *Sinnott v Quinnsworth Ltd*,¹⁹ *Yun v Motor Insurers Bureau of Ireland*²⁰ and *Shannon v O’Sullivan*,²¹ laid down what have been described as “caps” or “tariffs” on general damages (damages for pain and suffering), which take account of the injuries suffered by a plaintiff and in some instances the level of special damages awarded (for example, for loss of earnings and medical care costs). These caps or tariffs have been adjusted by the courts over the years, taking account of general economic conditions and medical costs inflation. The current project will consider, having regard to the current role of the courts in this area, whether it would be constitutionally permissible or otherwise desirable to provide for a statutory regime that would place a cap on damages in personal injuries cases. The project will also have regard to developments in related aspects of the law on damages, such as the provision for Periodic Payment Orders under the *Civil Liability (Amendment) Act 2017*, and to developments in other comparable jurisdictions.

¹⁵ See <http://www.finance.gov.ie/what-we-do/insurance/the-cost-of-insurance-working-group/>.

¹⁶ See <https://dbei.gov.ie/en/Who-We-Are/Department-Structure/Commerce-Consumer-and-Competition-Division/Personal-Injuries-Commission/Personal-Injuries-Commission.html>.

¹⁷ *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000).

¹⁸ A similar view was taken by the Law Commission for England and Wales in its 1998 Report *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No. 257).

¹⁹ [1984] ILRM 253.

²⁰ [2009] IEHC 318.

²¹ [2016] IECA 93.

10. Protective Costs Orders

- 1.32 A number of submissions have suggested that access to justice through the courts in the context of civil litigation (other than the limited range covered by the *Civil Legal Aid Act 1995*) has become increasingly difficult for many individuals owing to the prohibitive costs involved, and that a general system of Protective Costs Orders (PCOs) may assist in alleviating this. The usual rule in civil litigation in Ireland is that “costs follow the event”, that is, that the unsuccessful party must pay the successful party’s costs (and their own costs); but this rule does not apply until the case has been decided in court, or settled. Individuals are therefore usually required to fund a claim from their own resources, with the added risk that if they are unsuccessful they will be required to pay the other party’s legal costs also. It has therefore been suggested that the costs involved in civil litigation deter many individuals from initiating, or defending, proceedings.
- 1.33 PCO systems can take a variety of forms, but usually act to protect one party from bearing another party’s costs in the event that they are unsuccessful, a reversal of the usual rule that costs follow the event. Some PCO schemes prohibit a party from claiming their costs even if they are successful, others are silent on this issue, while still others allow the party to recover their costs in the event that they are successful. A form of PCO was put on a statutory footing in Ireland under the *Environment (Miscellaneous Provisions) Act 2011* in respect of a limited number of cases that fall within the UNECE Convention on Access to Information on the Environment (the Aarhus Convention), as implemented in Directive 2003/35/EC (the amending EIA Directive). This project will examine the case for the introduction of a wider statutory scheme for PCOs, taking account of the development of such arrangements in other jurisdictions.

11. Liability of Hotels and Related Establishments

- 1.34 The *Hotel Proprietors Act 1963* replaced the common law duties of hotel proprietors with a statutory code, and also implemented the 1962 Council of Europe Convention on the Liability of Hotel-keepers concerning the Property of their Guests.
- 1.35 The 1963 Act provides that, subject to certain exclusions (such as for motor vehicles parked in the hotel property by staying guests), the hotel is strictly liable for the damage, loss or destruction of a guest's property. Liability under this strict liability rule is limited to €127 (£100), which has not been altered since 1963.
- 1.36 The 1963 Act also replaced the common law duty of hotelkeepers to charge only "reasonable" prices with a duty to provide accommodation, food and drink "at the charges for the time being current at the hotel." This provision does not appear to reflect the reality of hotel prices in the second decade of the 21st century, where the vast majority of hotel rooms are booked online, with algorithms and specific factors such as the occurrence of a major sporting or other public event playing a prominent role in determining the price to be charged.
- 1.37 The project will examine to what extent the 1963 Act is in need of reform having regard to developments since its enactment. This includes: the effect of inflation since the financial limit of €127 on the strict liability regime was set in 1963; the impact of online booking on the duty concerning charges; whether the 1963 Act should be extended to guesthouses, hostels, traditional bed and breakfast establishments and comparable online-era short-term letting arrangements; and the effect of general civil liability legislation enacted since 1963, including the *Occupiers' Liability Act 1995* and the *Equal Status Act 2000*.

12. Liability of Unincorporated Associations

- 1.38 The 2017 decision of the Supreme Court in *Hickey v McGowan*²² has identified the need for a review of the civil liability of unincorporated associations. The plaintiff alleged that he had been sexually abused between 1968 and 1972 by a member of the Marist Order of Religious Brothers, an unincorporated body. The Court held that, while the plaintiff was entitled to seek and obtain judgment against individuals who were members of the Order between 1968 and 1972 on the grounds of their vicarious liability as a group, he could not obtain judgment against the Order as such. The likely effect of this was that the plaintiff would not obtain judgment against the current assets of the Order.
- 1.39 The decision in the *Hickey* case reflects the long-established common law view that an unincorporated body, which also includes many sporting clubs, has no separate legal character distinct from its members. Thus, in *Murphy v Roche and Ors*,²³ the High Court held that the plaintiff, a member of a GAA club who fell and injured himself at a dance on the club's premises, could not sue the club because he would, in effect, be suing himself. It has been suggested that this exclusion from civil liability of unincorporated associations is difficult to reconcile with the right to equal treatment under Article 40.1 of the Constitution and the right of access to the courts under Article 40.3 and under Article 6 of the European Convention on Human Rights.²⁴ By contrast, criminal liability may be imposed on an unincorporated club, at least in respect of statutory offences. Thus, in *Director of Public Prosecutions v Wexford Farmers Club*,²⁵ the High Court held that the defendant club could be convicted for an offence under the *Intoxicating Liquor Act 1988*, which applies to a "person" and which was defined in the *Interpretation Act 1937* (and now in the *Interpretation Act 2005*) as meaning both a corporate body and an unincorporated body of persons.
- 1.40 The project will therefore address: whether and when separate legal personality may be ascribed to unincorporated associations; and whether members should be able to sue their own unincorporated associations, including sports clubs. The project may also address whether there is a need for greater clarity as to the criminal liability of unincorporated bodies.

²² [2017] IESC 6, [2017] 2 IR 196.

²³ [1987] IR 656.

²⁴ See McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury, 2013) at para 39.25.

²⁵ [1994] 2 ILRM 295.

13. Aspects of the Law of Evidence

1.41 The Commission’s 2016 Report on *Consolidation and Reform of Aspects of the Law of Evidence*²⁶ made wide-ranging recommendations for reform of 3 major areas of the law of evidence (hearsay, documentary evidence and expert evidence) as well as for the consolidation of all existing pre-1922 and post-1922 *Evidence Acts* (18 in total). A number of submissions received by the Commission argued the need to continue to review other aspects of the law of evidence, and this project will examine 2 areas, bad character evidence and the law of privilege.

(a) Bad Character Evidence

1.42 The law concerning bad character evidence, also termed “misconduct evidence,” “background evidence” or “similar fact evidence”, refers to the introduction of evidence, notably by the prosecution in a criminal trial, of some previous dishonourable or disreputable conduct on the part of the accused, be it criminal or otherwise. The traditional common law rule is that such evidence is not admissible where it is introduced for the purpose merely of demonstrating that the accused is a person of general ill-repute and is therefore more disposed towards criminality. The rule was addressed by the Supreme Court in 2011 in *The People (DPP) v McNeill*²⁷ and while the Court clarified its application to the extent that it concerned the introduction of “background evidence” it was also noted that the law would benefit from a comprehensive review, which could take account of the case law on the area that has been built up in Ireland and in other jurisdictions, and also of relevant contemporary learning in the field of psychology and sociology.²⁸

(b) Privilege

1.43 A number of submissions suggested that the Commission should also examine the law of privilege. It was noted that the present law reflects older values as to the kinds of relationships that had developed up to the 19th century. The Commission will assess to what extent the law needs reassessment, including for example how counselling communications should be dealt with. While this has been addressed to some extent in the *Criminal Law (Sexual Offences) Act 2017*, the wider context of the law of privilege remains to be addressed.

²⁶ *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

²⁷ [2011] IESC 12, [2011] 2 IR 669.

²⁸ [2011] IESC 12, [2011] 2 IR 669, at para 169 (O’Donnell J).

14. Aspects of Family Law

- 1.44 Submissions received by the Commission identified the need to address specific aspects of family law, notably the law of divorce, and this project will address 2 areas, proper provision on divorce and the recognition of foreign divorces and marriages.

(a) Proper Provision on Divorce

- 1.45 Article 41 of the Constitution provides that, in a divorce case, a court must determine whether proper provision has been made for the spouses involved, and this requirement is also reflected in the *Family Law (Divorce) Act 1996*. Considerable case law has arisen on this issue, and while the 1996 Act provides for certain matters to be taken into account, the determination of “proper provision” remains primarily a matter for judicial discretion. Among the issues that have given rise to debate in the case law is the extent to which ongoing payments or lump sum awards may be made: see, for example, the Supreme Court decision in *T v T*.²⁹ The project will consider to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of this judicial discretion, in particular to assist spouses to reach settlements and resolve disputes more efficiently and at lower financial or cost.

(b) Foreign Divorces

- 1.46 Several submissions to the Commission raised concerns about the uncertainty surrounding the basis for the recognition of foreign divorces. In *H v H*,³⁰ the Supreme Court held that the current test was based on whether one of the spouses was domiciled in the foreign jurisdiction, as opposed to one of the spouses being habitually resident in that jurisdiction. The determination of “domicile” includes an assessment of the intention of the person to remain in the foreign jurisdiction, which has proved complex to determine in some instances, whereas a test of habitual residence can be determined by factual circumstances alone, which may be less complex. The Supreme Court considered that the test could be changed by legislation, and this project will therefore consider whether the current test should be reformed.³¹ In addition, the project may also examine issues relating to the recognition of foreign polygamous and proxy marriages, which the Supreme Court in *HAH v SAA & Ors*³² also suggested would benefit from further review.

²⁹ [2002] IESC 68, [2002] 3 IR 334, at 364.

³⁰ [2015] IESC 7, [2015] 4 IR 560.

³¹ In its 1985 *Report on Recognition of Foreign Divorces and Legal Separations* (LRC 10-1985), the Commission recommended the introduction of a residency-based requirement, rather than one of domicile.

³² [2017] IESC 40.

15. Aspects of Land and Conveyancing Law

1.47 The Commission’s 2005 report on reform and modernisation of land and conveyancing law,³³ which included a detailed draft Bill, led to the enactment of the *Land and Conveyancing Law Reform Act 2009*. A number of submissions received indicated the need to review some matters not addressed in the 2009 Act or which require further examination. This project will examine 2 aspects of this area of law, adverse possession (not addressed in the 2009 Act) and prescriptive easements (addressed in the 2009 Act).

(a) Adverse Possession

1.48 The Commission’s 2005 report and draft Bill had addressed adverse possession but the 2009 Act did not include these provisions on the basis that they required further consideration in light of the decision of the Grand Chamber of the European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom*.³⁴ The project will re-examine this area, taking account of the analysis in the 2005 report and also developments since the decision in the *Pye* case.³⁵

(b) Prescriptive Easements

1.49 The submissions received indicated that some elements of the reforms in the 2009 Act concerning prescriptive easements, notably the registration requirements, have created difficulties in practice. A prescriptive easement is one acquired through long use or enjoyment, such as a right of way. Given the high number of such easements, it is important that the law in this area remains clear. The project will therefore examine whether the 2009 Act may need to be amended to prevent any ongoing confusion, and to prevent any uncertainty concerning the ambit of the rights involved.

³³ *Report on Reform and Modernisation of Land Law and Conveyancing* (LRC 74-2005).

³⁴ (2007) 46 EHRR 1083.

³⁵ See, for example, *Dunne v Iarnród Éireann-Irish Rail* [2016] IESC 47, [2016] 3 IR 167, at para. 23 (Laffoy J) and Wylie, “Adverse Possession – Still an Ailing Concept?” (2017) 58 Ir Jur 1.

PART 2

BACKGROUND TO THE DEVELOPMENT OF THE FIFTH PROGRAMME

2.01 In this Part the Commission sets out the background to the development of the Fifth Programme.

The Commission's functions

2.02 The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975* (the 1975 Act). The 1975 Act provides that the Commission's role is to keep the law under review and to conduct research with a view to the reform of the law. Law reform is defined under the Act to include:

- the development of law
- its codification (including its simplification and modernisation), and
- the revision and consolidation of statute law.

2.03 The Commission's law reform role is carried out primarily under a Programme of Law Reform. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available on the Commission's website, www.lawreform.ie. About 70% of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

2.04 The Commission's Access to Legislation work makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, Revised Acts and the Classified List. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to over 100 Revised Acts that were enacted before 2005 and to all textually amended Acts enacted from 2005 onwards (other than Finance and Social Welfare Acts). The Classified List is a separate list of all In-Force Acts of the Oireachtas (and statutory instruments made under them) organised under 36 major subject-matter headings.

Programmes of Law Reform

- 2.05 In accordance with the 1975 Act, a Programme of Law Reform is prepared by the Commission, in consultation with the Attorney General, and contains a specific number of areas of law that require examination with a view to their reform. When a Programme of Law Reform is approved by the Government, the Commission examines and researches the subjects set out in it and, if appropriate, formulates proposals for the reform of the law in those areas. The Commission's First Programme of Law Reform was in place between 1977 and 1999. The Second Programme of Law Reform ran from 2000 to the end of 2007.
- 2.06 The Third Programme of Law Reform ran from 2008 and was close to completion in 2012. The Commission therefore concluded that preparations should begin in 2012 on the development of a Fourth Programme of Law Reform, which was approved by Government in October 2013. By mid-2017, the Commission had either completed or made significant progress on the projects in the Fourth Programme and the Commission therefore began the consultation process that led to the formulation of this *Fifth Programme of Law Reform*.

Subject-Matter of Projects Examined During Lifetime of Fourth Programme

- 2.07 Since beginning work on the Fourth Programme of Law Reform in October 2013 to the end of 2018, the Commission had published 21 documents – Issues Papers and Reports – containing proposals for law reform covering the specific topics in the Programme as well as in response to requests from the Attorney General to examine specific areas of law under the 1975 Act. The general subject areas addressed, or being addressed, include the following:

Civil Liability and Commercial Law

- Prevention of Benefit from Homicide
- Privilege for Court Reports under the *Defamation Act 2009*

Courts and Courts Service

- Contempt of Court

Criminal Law and Procedure

- Disclosure and Discovery in Criminal Cases
- Knowledge or Belief Concerning Consent in Rape Law
- Suspended Sentences

Criminal Law and Regulatory Powers

- Regulatory Powers and Corporate Offences
- Harmful Communications and Digital Safety

International Law

- The Domestic Implementation of International Obligations

Land Law and Succession

- Section 117 of the *Succession Act 1965*: Aspects of Provision for Children
- Compulsory Acquisition of Land

Legislation and the Statute Book

- Accessibility, Consolidation and Online Publication of Legislation

Development of the Fifth Programme

- 2.08 The Commission outlines briefly here the context within which the *Fifth Programme of Law Reform* was developed. In this respect, the Commission engaged in a wide-ranging consultation process so that the Programme would reflect current and anticipated needs of Irish society.

The context for the Fifth Programme

- 2.09 In preparing the Fifth Programme, the Commission considered that its content should take account of relevant reform-related developments both nationally and internationally, including:
- the Government's commitment to the implementation of a progressive law reform programme in its *Programme for a Partnership Government* (2016);
 - the wider context of regulatory reform, including the embedding of pre-legislative scrutiny of Scheme of Bills and detailed scrutiny of Private Member's Bills by Oireachtas Committees, with which the Commission has been happy to engage where it involves its research work;
 - international focus on the role that law reform and legislative revision and consolidation can play in economic recovery, discussed in the OECD's 2010 *Report on Regulatory Reform in Europe: Ireland*;

- ongoing debate concerning the importance of international standards, including human rights standards; and
- the potential impact that Brexit may have on law reform.

Criteria used to select projects for the Fifth Programme

2.10 In approaching the question as to what projects should be included in the Fifth Programme, the Commission used the following selection criteria:

- (a) *Public benefit* – projects must meet a real community need by providing a remedy for a deficiency or gap in the law, including the need to modernise an outdated law.
- (b) *Suitability* – projects should be suitable for analysis by the legal expertise available in the Commission, supplemented by appropriate consultation with other professionals and interested parties.
- (c) *Mix of projects and resources* – the Programme should include a mix of narrow-focus projects and wider-focus projects that are relevant to society, so that the Commission’s resources are not tied up in one project.
- (d) *Avoid duplication* – projects should not overlap with the work of other bodies engaged in law reform activities, but should complement such work where appropriate.

Consultation process

2.11 The Commission’s public consultation process on the Fifth Programme began in June 2017 and extended to January 2018.

2.12 In June 2017, the then President of the Commission, Mr Justice John Quirke, sent letters to a wide range of public bodies and NGOs inviting submissions on the *Fifth Programme of Law Reform*. Among the bodies were:

- Barnardos
- Central Bank of Ireland
- Free Legal Advice Centres (Flac)
- Government Departments (16 Secretaries General)
- Irish Business and Employers Confederation (IBEC)
- Irish Congress of Trade Unions (ICTU)

- Irish Human Rights and Equality Commission (IHREC)
- Irish Penal Reform Trust (IPRT)
- Law Commissions of England/Wales, Scotland and Jersey
- Law Schools and Faculties of Third Level Institutions
- Medical Council
- Nursing and Midwifery Board
- Office of the Director of Corporate Enforcement (ODCE)
- Oireachtas Committee on Justice and Equality
- Ombudsman
- Ombudsman for Children.

2.13 Also in June 2017, the Commission posted a general notice on its website, www.lawreform.ie, inviting submissions for consideration for inclusion in the *Fifth Programme of Law Reform*. This notice was copied by a number of online discussion forums and blogs.

2.14 The letters and website notice were intended to provide the widest opportunity for all interested parties to engage in the law reform process and to suggest areas of law that require reform.

2.15 The Commission made extensive use of its website to publicise the consultation process for the Fifth Programme. In addition to the public consultations discussed below, the Commission invited suggestions for law reform in written or oral format. A dedicated email address, fifthprog@lawreform.ie, was created and the majority of submissions were submitted to the Commission via this contact point. The Commission stressed that there was no required format for making a submission and that there was no requirement to use technical legal language. This was to encourage submissions from members of the public and to ensure that the consultation process was as broad as possible. The details of the public consultations were publicised on the Commission's website, the Bar Council website, the Law Society website and other legal network sites.

2.16 During the second half of 2017 and into January 2018, the Commission also held a series of 5 consultative meetings throughout the country seeking views on the projects that might be included in the *Fifth Programme of Law Reform*. These were as follows:

- 11th October 2017: University of Limerick;

- 1st November 2017: Dublin Castle, the Commission's 2017 Annual Conference (see further below);
- 22nd November 2017: NUI Galway;
- 10th January 2018: Dundalk Institute of Technology;
- 31st January 2018: University College Cork.

2.17 The Commission's 2017 Annual Conference, held in Dublin Castle on 1st November 2017, focused on the development of the *Fifth Programme of Law Reform*. The Conference speakers addressed the wide social and economic setting for the development of a new Programme of Law Reform. The speakers were:

- Mr Justice Frank Clarke, Chief Justice,
- Ms Dearbhail McDonald, Group Business Editor, Independent News and Media and
- Senator Michael McDowell SC, former Attorney General and former Minister for Justice and Equality.

2.18 The Commission also held meetings with a number of individuals and representative groups, including those who had made written submissions as to possible projects to be considered for inclusion in the Fifth Programme.

2.19 During the consultation period from June 2017 onwards, the Commission received 70 written submissions (see the Appendix) suggesting more than 126 areas of law for inclusion in the Fifth Programme. All submissions were fully considered by the Commission against the selection criteria set out above.

Discussion by Attorney General's Consultative Committee, by Oireachtas Joint Committee and approval by Government

2.20 On 25th July 2018, the Commission met with the Attorney General's Consultative Committee on Law Reform to discuss the 15 projects in the draft *Fifth Programme of Law Reform* which the Commission had prepared. The Consultative Committee comprises representatives of all Government Departments, the Law Society of Ireland, the Bar Council of Ireland and the Commission. One of its functions is to assist the Attorney General in consultations with the Commission on the preparation of a programme of law reform. The Consultative Committee discussed in detail the 15 projects in the draft Programme and expressed satisfaction with the range of topics included.

2.21 The draft Programme was then forwarded to the Attorney General who submitted it for initial consideration by the Government. The Government agreed to forward the draft Programme for consideration by the Oireachtas Joint Committee on Justice and Equality.

- 2.22 The Joint Committee laid the draft Programme before the Houses of the Oireachtas. At its meeting held on 16th January 2019, the Joint Committee considered the content of the draft Programme and expressed its approval of the content and did not propose any changes.³⁶
- 2.23 The Government subsequently discussed and considered the draft *Fifth Programme of Law Reform* at its meeting held on 20th March 2019 and, in accordance with section 5(1) of the *Law Reform Commission Act 1975*, approved the Programme. Part 1 of this Report sets out an abstract for each of the 15 projects in the Programme as approved by Government.

³⁶ *Report of the Joint Committee on Justice and Equality on the Fifth Programme of Law Reform* (February 2019).

APPENDIX

LIST OF WRITTEN SUBMISSIONS

The Commission would like to thank all persons who assisted in the development of this *Fifth Programme of Law Reform*. In particular, the Commission would like to thank all those persons who took the time to make submissions and to attend public consultations. The following is a list of individuals and bodies who made written submissions:

American Chamber of Commerce
Association of Consulting Engineers of Ireland
Barnardos
John Brady, TD
Killian Brennan
Lucy-Ann Buckley
Joan Campbell, Barrister-at-Law
Central Bank of Ireland
Judge Pauline Codd
Commission for Regulation of Utilities (CRU)
Community Law and Mediation Centre
Vicky Conway
COPE Galway
Louise Crowley
Yvonne Daly
Department of Children and Youth Affairs
Department of Health
Department of Housing, Planning and Local Government
Department of Justice and Equality
James Devenney
Senator Máire Devine
Director of Public Prosecutions, Office of the

Disability Federation of Ireland

Dublin Rape Crisis Centre

Education Equality

Paul Farrell

Stewart Ferguson

Kieran Fitzpatrick

Free Legal Advice Centres (Flac)

Anna Giblin

Carmel Goggin, Barrister-at-Law

Vincent Griffin

Health Information and Quality Authority

Health Service Executive

Irish Congress of Trade Unions (ICTU)

Irish Criminal Bar Association

Irish Human Rights and Equality Commission (IHREC)

Irish Observatory on Violence Against Women

Irish Penal Reform Trust (IPRT)

Irish Small and Medium Enterprises Association

(ISME) Irish Translators' and Interpreters'

Association Senator Collette Kelleher

Shane Kennedy

Shane Kilcommins

M Lane & Co Solicitors

Linda Lambert

Law Society of Ireland

Legal Aid Board

Simon McArdle

Patricia McCafferty

Mary Morris

Joseph Mooney

Éanna Mulloy SC
National Disability Authority
National Safeguarding Committee
National Women's Council of Ireland
Claire O'Connor
Liam O'Connor
Páraic Ó Súilleabháin
Ombudsman, Office of the
One Family
Ted O'Shea
Kathryn O'Sullivan
Personal Injuries Assessment Board (PIAB)
Joan Power
Rape Crisis Network Ireland
Royal Institute of Architects in Ireland
Sage Advocacy
Senator Lynn Ruane
Ann Ryan
LK Shields Solicitors
Sisters of Mercy
Society of Actuaries in Ireland
Society of Chartered Surveyors Ireland
Standards in Public Office Commission
Brigid Timmons
Tusla (National Child and Family Protection Agency)
Molly Wells

