

ROLE OF LAW REFORM COMMISSION SINCE ITS CREATION IN 1975¹

Introduction

It was truly an honour to be asked last August to deliver the Brian Lenihan Memorial Address. At the time, it was suggested that a reflection on citizen involvement in instigating legal change would be a welcome topic in the light of my role as Chairperson of the Citizens' Assembly, although it was made clear that the choice of topic was at my discretion. In the final Report of the Citizens' Assembly, which was delivered to the Houses of the Oireachtas in June 2018, a chapter was included which contained my reflections on the Citizens' Assembly process. Because of that, I had some concern that I might be even more repetitive than usual if I chose the topic suggested. Events overtook, however, when, little more than a month later, I found myself in the position of having to get a deep understanding of the role of the Law Reform Commission (the Commission). That explains my choice of topic – on the role of the Commission since 1975.

It was a wise choice because it incentivised me to read into and around the topic. It was a wise choice for another reason. In his position as Minister for Justice, Equality and Law Reform in 2007 and 2008, Brian Lenihan had an important role in relation to the Commission's recommendations and law reform generally. Indeed, in his previous

¹ This is the text of the 2019 Brian Lenihan Memorial Address, delivered by the President of the Commission, Ms Justice Mary Laffoy, on 9 February 2019 in Trinity College Dublin, the University of Dublin. The Brian Lenihan Memorial Address is held annually and marks the substantial contribution of Brian Lenihan (1959- 2011) to Irish public life as well as his longstanding connection to the Trinity Law School as a student, scholar and later as a lecturer.

position as Minister for Children he had secured, through the assistance of the Attorney General, the involvement of the Commission in an area of adoption law. Furthermore, his father, whom I will refer to as Brian Lenihan Senior, was Minister for Justice from 1964 to 1968 during the early years of which law reform was very much to the fore in the Department of Justice.

So the choice of topic has given me an opportunity to address what I see as the important role of the Commission in law reform generally but also the contribution which the two members of the Lenihan family have made to law reform.

Position Pre-1975

Any proper analysis of the role of the Commission, which was established in 1975, and of how that role has been exercised since 1975, in reality, cannot start in 1975. In my view, the appropriate starting point is the early 1960's.

In a lecture delivered by the then Minister for Justice, Charles J. Haughey, at the International University of Comparative Sciences in Luxembourg in March 1964 (published in International and Comparative Law Quarterly, Vol. 13, 1964 at p1300), having addressed the historical background to the development of the legal system in this jurisdiction and the form and the sources of the law, the Minister outlined the Government's policy from 1961 in relation to law reform. He stated:

“In 1961 the Government decided to embark on a scheme for the systematic reform of the law and the details of such a programme were set out in a White Paper published in January 1962. The programme provides for a complete overhaul of civil law, criminal law, court practice and procedure and other legislation for which the Minister for Justice is responsible. Under the heading of civil law it envisages proposals to deal with the liability of State authorities, the making of wills and the distribution of the estates of deceased persons, guardianship of infants, occupiers and innkeepers’ liability, contracts, trustees, bankruptcy, liability for damage done by animals and registration of title to land”.

By mid-1964 the objectives of the scheme were being achieved, in that the following statutes dealing with those civil law matters had been enacted;

- Hotel Proprietors Act 1963 (reflecting the modern innkeepers!)
- Guardianship of Infants Act 1964
- Registration of Title Act 1964

Additionally, the Minister in his lecture pointed out that a Bill *“dealing fully with wills and with the distribution of estates on death will be published in the near future”*. I will focus on the outcome of this Bill later.

Another innovatory step in law reform in the early 1960’s was the enactment of the Statute Law Revision (Pre-Union Irish Statutes) Act 1962 (the Act of 1962), the effect of which the Minister summarised as having repealed 119 obsolete pre-1800 statutes. Those of us who have an opportunity to comment on the detail of that Act enjoy highlighting one or two particular statutes that were thereby affected. For instance, in

an article published in *The Irish Jurist 1987*, entitled “Law Reform in Ireland – The European Perspective”, the then President of the Commission, the Honourable Mr. Justice Ronan Keane, subsequently Chief Justice, remarked that in 1962 –

“... as a result of a spirited piece of statute law revision, we succeeded in getting rid of ‘An Act for the confirmation of Articles made at the surrender of the City of Limerick’ of 1697 and, the richest prize of all, the Act of Union itself...”

From the amusement perspective, I draw attention to the 1735 Statute entitled: “An Act for better ascertaining the Gauge and Measure of Barrels and Half-barrels in selling Beer, Ale and small Beer”, which, not surprisingly, was wholly repealed.

More importantly, some Acts were only repealed to the extent specified in the Act of 1962. Of those, I draw attention to the Registration of Deeds Act 1707. I do so not on the basis that it is my “favourite” because it was enacted during the reign of Queen Anne, whose “favourite” is topical at the moment in the BAFTA and Oscar context! Rather, it is because the remainder of the Act which was not repealed continued in effect until it was repealed more than forty years later by the Registration of Deeds and Title Act 2006. Prior to 2006, like most lawyers and administrators involved in property law, the unrepealed provisions absorbed a lot of my time.

I now return to the Bill dealing “with wills and the distribution of estates on death” referred to in the Haughey lecture. In fact, Charles J. Haughey ceased to be Minister for Justice in October 1964 and he was succeeded by Brian Lenihan Senior, who was Minister for Justice from 3rd November 1964 to 26th March 1968. During his tenure, the Act, which is described in the long title as –

“an Act to reform the law relating to succession to the property of deceased persons and, in particular, the devolution, administration, testamentary disposition and distribution on intestacy of such property, and to provide for related matters”

was enacted.

In short, the Succession Act 1965 (the Act of 1965) became law. The Act of 1965 came into operation on the 1st of January 1967, just over a year after it was enacted. It is not an exaggeration to say that it is a piece of legislation that variously impacts on every person in our changing society. Moreover, since its establishment 43 years ago, the Commission has been kept busy in endeavouring to keep that legislation, which has been existence for over 52 years, fit for purpose in our changing society.

Law Reform Commission Act 1975

It is very helpful to have a contemporary legal perspective on the background to the enactment of the Law Reform Commission Act 1975 (the Act of 1975) and the establishment of the Commission. It is to be found in an article by John O'Connor, Lecturer in Law at University College Cork, which was published in *The Irish Jurist* 1974. The author recorded that after 1965 the pace of reform of civil law slowed considerably, which was ascribed to the fact that there had been unprecedented pressure on limited civil service resources because of Ireland's accession to the EEC, and the department of Justice, which had primary responsibility for law reform, had

been heavily involved in security matters for much of the time between 1965 and 1974. However, what was perceived as a defect in the system derived from the 1962 White Paper was addressed in September 1974 by the Government and the then Attorney General, Declan Costello, subsequently President of the High Court. On 16th September 1974, the Government announced that it had decided to establish a Law Reform Commission, which it was envisaged would operate on lines broadly similar to the Law Commissions of England and Scotland and the Law Commissions of Australia and Canada. Seven months later to the day, the Act of 1975 was signed by the President. From Mr. O'Connor's perspective at the time, the passage of the Bill through the Oireachtas was attributable to *"all parties in the Oireachtas having joined in a general welcome and approval of the measure and co-operating to ensure its early enactment"*.

Provisions of the Act of 1975

Section 3 of the Act of 1975 mandated the establishment of the Commission consisting of a President and four other members appointed by the Government. It also stipulated that the Government should appoint only persons appearing to be suitably qualified "by the holding of judicial office, by experience as a barrister or solicitor or as a teacher of law or by reason of such other special experience, qualification or training as... is appropriate having regard to the functions of the Commission".

I have had the honour of being appointed as President of the Commission by the Government in October 2018 for a term of three years. Currently, my colleagues on the

Commission, who were each appointed for a term of five years from September 2015, are:

- Donncha O’Connell, Professor of Law, School of Law, NUI Galway.
- Thomas O’Malley, Barrister-at-Law, Senior Lecturer in Law, School of Law, NUI Galway.
- The Honourable Ms. Justice Carmel Stewart, Judge of the High Court.

The fifth Member, Raymond Byrne, is the full-time Commissioner, who was appointed in 2016 after a public appointments process, having been the Director of Research from 2003, and having previously lectured in law in the School of Law and Government at Dublin City University.

After four months in the Commission I am very conscious of the benefit of working with colleagues who have such a level of experience.

The functions of the Commission are set out in section 4, sub-section (1) of which provides:

“The Commission shall keep the law under review and in accordance with the provisions of this Act shall undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform”.

The interpretation section, section 1, elaborates on that duty, in that it defines “the law” as meaning the law of the State (including any private or public international law) and as

including matters of legal practice or procedure. It also defines “reform” as including, in relation to the law or a branch of the law, its development, its codification (including in particular its simplification and modernisation) and the revision and consolidation of statute law.

The structure of the Commission’s work is set out on in sub-section (2) of section 4, in which it is provided that the Commission shall, in consultation with the Attorney General, from time to time prepare for submission by the Taoiseach to the Government programmes for the examination of different branches of the law with a view to their reform. Section 5 provides that, as regards every programme so prepared, it shall be submitted by the Taoiseach to the Government, who if they approve of the programme may do so with or without modification. Apart from that approved programme based structure, section 4 (2)(c) stipulates that the Commission shall, at the request of the Attorney General, undertake an examination of and conduct research in relation to any particular matter of law and, if so requested, formulate and submit to the Attorney General proposals for its reform.

Sub-section (3) of section 4 lists certain actions the Commission may take in the performance of its functions if it considers it appropriate so to do. Those actions, in fact, reflect the manner in which the Commission carries out its work in that, for example, it examines and conducts research in relation to the legal systems of countries other than the State likely to facilitate the performance of its functions, it includes draft Bills in its

proposals for law reform, and it consults persons qualified to give opinions on a matter being considered.

Work of the Commission up to 2007

The programme structure has primarily determined the matters which the Commission has worked on from the outset, although there has been some change in that structure over the years.

First Programme

When the *First Programme of Law Reform* was approved of by the Government in January 1977 Mr. Justice Brian Walsh, a Judge of the Supreme Court, was President of the Law Reform Commission. He remained in that position until 1987, when he was succeeded by Mr. Justice Ronan Keane who was in the role until 1992. No timeframe in which the work should be carried out was stipulated in that initial programme, which primarily governed the work of the Commission for 22 years until the second programme was approved by the Government in 2000. Reflecting on the first programme in a lecture entitled *30 years of Law Reform 1975 – 2005* delivered in June 2005 to mark the thirtieth anniversary of the Commission, Mr. Justice Keane remarked that the First Programme was extremely wide in its scope, embracing virtually every aspect of the criminal law and envisaging wide ranging examinations of administrative law and family law. He commented on the limited resources available to the Commission, particularly in its early years, as inevitably resulting in work of that programme taking a long time, so that even by the commencement of the second

programme in 2000 parts of it remained uncompleted. Nonetheless, very significant reform of the law resulted from the first programme which will be illustrated by just a few examples.

In the criminal law sphere the enactment of the Criminal Justice (Public Order) Act 1994 was a consequence of the Commission's report on *Vagrancy and Related Offences* (LRC 11 – 1985). In the administrative sphere changes in the judicial review procedure in the High Court and the Supreme Court at the time resulted from the Commission's working paper entitled *Judicial Review of Administrative Action* (Working Paper 8 – 1979), in particular, the introduction for the first time of the Order 84 procedure for judicial review, which was included in the Rules of the Superior Court 1986.

In the period during which the First Programme was being worked on, the Commission was also involved in dealing with requests from the Attorney General pursuant to section 4 (2) of the Act of 1975 and the outcome of this work also led to recommendations which, in some cases, resulted in the reform of the law. In 1987, for example, the Commission received a request from the then Attorney General, John Rogers, to conduct a review in five areas including, in relation to one area, criminal law no less than four specified aspects of it. In reality, that request might be perceived as a mini-programme. Another example, which recalls the 1962 White Paper, was the Commission's report on *Occupiers' Liability* (LRC 46 – 1994), which resulted in the enactment of the Occupiers' Liability Act 1995.

However, not all recommendations for reform made by the Commission in response to requests from the Attorney General were implemented. Mr. Justice Keane referred in the 2005 lecture to the Commission's report on what he described as "an area... patently in need of reform", contempt of court, and observed that the report, which was over ten years old had never been implemented. The report in question, *Contempt of Court* (LRC 47 – 1994), which had been the subject of a request from the Attorney General in January 1989, was submitted to the Attorney General in September 1994, but 25 years later, it still has not been implemented. Nonetheless, it is still of some relevance to the current work of the Commission, as will emerge when addressing the Fifth Programme.

Second Programme

The First Programme was succeeded in 2000 by the Second Programme, which was entitled "*Second Programme of Law Reform 2000 – 2007*". It was clearly envisaged in that programme, as the title indicates, that the projects outlined in it would be completed within a specific time. While some of the projects were carried over to the Third Programme for completion, by the end of 2007 the Commission had completed its work on almost all of the projects in the Second Programme, which covered a wide range of topics and resulted in the publication of sixty documents, consultation papers and reports.

The work of the Commission on the projects in the Second Programme was still ongoing in 2005 when Mr. Justice Keane delivered his lecture. He referred in general terms to the areas and some of the topics covered by the Second Programme, two of which it is considered appropriate to refer to.

The first, he attributed to an increased awareness of the problems of vulnerable groups, particularly the disabled and the elderly, which was reflected in the programme. In fact, in 2006 the Commission issued a report on *Vulnerable Adults and the Law* (LRC 83 - 2006). That report had been preceded by two consultation papers. The earliest was published in June 2003 and was entitled *Law and the Elderly* (LRC CP 23 – 2003). The later consultation paper was published in 2005 and was entitled *Vulnerable Adults and the Law: Capacity* (LRC CP 37 – 2005). As is noted in the Report (chapter 1, para 1.02), at a general level, it mirrored the approach in the two Consultation Papers, although final detailed recommendations made in the Report diverged in a number of respects from those in the Consultation Papers. It has been a long road from 2005, when the Commission recommended new legislation on mental capacity, to the enactment of Assisted Decision-Making (Capacity) Act 2015 (the Act of 2015), which, inter alia, legislated for the matters the subject of the 2006 report and, which, by and large, has not yet been commenced. The reason for alluding to this is that the Commission's work in relation to the law on vulnerable adults is destined to continue into the future. That is because one of the projects in the Fifth Programme, to which I will refer later, requires the Commission to address the regulatory framework for adult safeguarding.

Secondly, as Mr. Justice Keane observed in the 2005 lecture, the Commission had for a long time been engaged in a review of our conveyancing and land law and this had been continued under the second programme in the form of a joint project with the Department of Justice, Equality and Law Reform, which, it was hoped, would eventually lead to among other changes, on-line paperless conveyancing transactions. Following publication in October 2004 of a consultation paper on *Reform and Modernisation of Land Law and Conveyancing* (LRC CP 34 – 2004) and a consultative process, the Commission published its report on *Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005). As everyone interested in the project is aware, the principal legal researcher and indeed, contributor, to the report was Professor John Wylie, then Professor of Law at Cardiff University. The substance of the report was a draft Bill, Land and Conveyancing Bill 2005.

It seems to me that, having regard to the complexity of the matter the subject of the joint project, the reform and modernisation of land law and conveyancing law in this jurisdiction, which was established in late 2003, the various steps in the process were effected with remarkable alacrity. The significant step was the enactment of the relevant legislation. The Land and Conveyancing Law Reform Act 2009 became law on the 21st of July 2009 and it came into operation on the 1st of December 2009.

Back in 2005, before the Commission's report on the topic was published, Mr. Justice Keane expressed the hope that the Commission's land law and conveyancing law project would result in the codification of the law in this area and would not merely make the law simple, cleaner and more accessible, but would also introduce substantive reforms, such as a removal from the law of the whole concept of feudal tenure on which our law of real property was still based at the time. That last objective has indeed been achieved. However, there remain aspects of land and conveyancing law which require further consideration by the Commission. The Fifth Programme, to which I will refer later, includes a project for examination on two of those aspects, adverse possession, which was not addressed in the Act of 2009, and prescriptive easements, which was addressed in the Act of 2009.

Although electronic conveyancing, now usually referred to as eConveyancing, was the subject of a report published by the Commission in 2006: *Report on eConveyancing: Modelling of the Irish Conveyancing System in Ireland* (LRC 79 – 2006), in reality the introduction of eConveyancing is some distance down the road. A recent publication: *eConveyancing and Title Registration in Ireland* (Clarus Press) updates position. As John Wylie points out in his chapter, the timing of the 2006 report was awful because the economic "crash" was coming down the tracks. However, as he points out, there was "a fairy godmother waiting in the wings", the Law Society. Things have moved on somewhat. It is undoubtedly in the public interest that the introduction of eConveyancing in this jurisdiction be promoted, as was obviously intended back in 2006 and that it be vigorously promoted given the passage of time since then.

Work of the Commission Since 2008

Since 2008 the work of the Commission on the reform of the law has operated under the same structure as was in force between 1977 and 2007. Two further programmes have been approved to come into operation, the Third Programme and the Fourth Programme. A further programme, the Fifth Programme, is on the cusp of the final stage of approval. Over the period since 2008, the Commission has also worked in response to requests from the Attorney General in accordance with section 4 (2) of the Act of 1975. What follows is a brief outline of each of those programmes. Apart from those programmes, during the period from 2008 the Commission's work on what is referred to as "access to legislation" has developed in a manner and to an extent which will be explained later.

Third Programme

The Third Programme specified a time limit in its title: *Third Programme of Law Reform 2008 – 2014* (LRC 86 – 2007). Accordingly, like the Second Programme it had a specified time period of seven years. As happened in the case of the other programmes, in the formulation of the Third Programme public consultative seminars were held with a view to obtaining input from the public as to the law reform projects which would be included in the programme. In relation to what will be the Fifth Programme, that process will be considered further. An interesting feature of the consultative process in relation to the Third Programme was that at the third and final

public consultation, which was held in Dublin Castle in July 2007, the then Minister for Justice, Equality and Law Reform, Brian Lenihan, gave the closing address, the keynote address having been given by Mr. Justice Michael Kirby of the Australian High Court and the former Chairman of the Australian Law Reform Commission. In the report on the Third Programme the Commission, then under the presidency of Mrs. Justice Catherine McGuinness, former Judge of the Supreme Court, set out in Appendix 2 the values on which it placed emphasis in carrying out its role. These values broadly speaking reflected the views expressed by the Minister and by Mr. Justice Kirby. As a novice Commissioner, I have found them enlightening. All three documents, to which I will briefly refer to later, are to be found on the Commission's website (www.lawreform.ie).

The Third Programme contained 37 law reform projects grouped under 9 major headings, 23 of which had been completed by 2014. I will mention just two of the projects. The first resulted in the Commission publishing a report in 2010: *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 – 2010). In broad terms, the recommendations of the Commission were implemented in legislation passed in 2017: Mediation Act 2017. Although the legislation does not conform fully with the recommendations of the Commission and action is still needed on the part of the Minister for Justice and Equality in having codes of practice put in place, the eventual enactment of the legislation is to be welcomed. The other project resulted in the Commission's report entitled: *Report on Bioethics: Advance Care Directives* (LRC 94 - 2009), which was published in 2009. I mention this project and the ensuing report

because the legislation which has resulted from the report is contained in the Act of 2015, Part 8 of which now legislates for advance healthcare directives, although most of its provisions have not yet been commenced.

It is worth recalling at this juncture an event in 2009 which threatened the continued existence of the Commission in its statutory form provided for in the Act of 1975. That was the publication in 2009 of a report which is generally referred to as the McCarthy Report: *Report of the Special Group on Public Service Numbers and Expenditure Programmes*. It was recommended in that report that a number of State agencies should be abolished, amalgamated, or their functions absorbed by a Government department. As regards the Commission, it recommended that it should no longer be convened on a permanent basis, but should be “re-convened as required to address government mandated reform agendas” (vol 1, p71; vol 2, p207). It is reasonable to infer that the existence of the recommendation and the consequential threat of periodic redundancy would have had an adverse impact on the work of the Commission, in particular, between 2011 and 2012 when there was a vacancy in the office of President. However, the appointment in 2012 of my predecessor, Mr. Justice John Quirke, retired Judge of the High Court, and of four members to the Commission indicates that the Government had decided not to implement the recommendation. From 2012 the Commission was in a position to embark on the preparation of the Fourth Programme. Indeed in the report on the Fourth Programme, which I will now consider, in setting out the contextual background to its preparation, the Government’s commitment to law reform was emphasized and reference was made to the statement in the *Programme*

for Government 2011 – 2016 to “prioritise a programme of law reform arising out of the recommendations made by the Law Reform Commission”.

Fourth Programme

Unlike the three previous reports on the Commission’s work programmes, the title of the report on the Fourth Programme did not specify a time period for the implementation of the programme. The report, which was published following approval by the Government in October 2013 - *Fourth Programme of Law Reform* (LRC 110 – 2013) - did envisage a two year time period within which the work on the programme must be carried out. It did so in the context that the report disclosed that, when the preparation for the Fourth Programme had commenced, six projects in the Third Programme remained to be completed. It is stated in the report that the Commission intended to complete those remaining projects in the first half of 2014 (para 2.06). Eleven projects were selected for the Fourth Programme and, in outlining the criteria used to select those projects, it was stated at p.10 that one criterion was resources and timeframe and this was explained as requiring that –

“... projects should be suitable for analysis in the light of the human and financial resources, current and projected at the Commission’s disposal; and should be capable of being completed within a relatively short time period and if possible within the remainder of the term of the current Commission, that is, by August 2015”.

Of the eleven projects in the Fourth Programme as approved by the Government, the first related to corporate offences and regulatory enforcement. As was recorded in the President's Foreword to the report, that emerged as a key theme at the Commission's Annual Conference in 2012 with particular emphasis on the economic setting. It was also recorded that the Commission had already begun its work on that project.

The project was completed in the last quarter of 2018 with the publication of: *Report on Regulatory Powers and Corporate Offences* (LRC 119 – 2018). The report consisted of two volumes and, even judging by the number of pages in the two volumes, 837 pages, and the weight of the two tomes, it was a colossal undertaking. While that may sound facetious, more significantly, in launching the report in October 2018, the Attorney General, Seamus Woulfe SC, concluded that the report is a valuable step in the system of regulation and corporate governance.

A project, which harks back to the First Programme, related to contempt of court and other offences and torts involving the administration of justice. That project is still being worked on, so that the 1994 Report on Contempt of Court referred to earlier, which was never implemented, is still under consideration. In 2016 the Commission produced an Issues Paper on it (LRC IP 10 – 2016) and, as usual, the Commission received submissions from interested parties and the public on the issues outlined. Subsequently, two roundtable sessions were held, the first in March 2017 involving members of the judiciary and the Courts Service and the second in May 2017, which

involved members of the legal profession and journalists, and focused on content and the protection of journalists' sources and court reporting. Unfortunately, to date the Commission has not been in a position to furnish a report on this project, which is now being considered in two modules. At present priority is being given to the module in relation to contempt. A module on relevant torts, such as embracery, will be dealt with subsequently. Obviously, having regard to multiplicity of issues in relation to contempt which the courts have had to deal with in the recent past, I am very conscious of the need to give priority to the module on contempt. I am also very conscious of the need to continue the consultation with the judiciary and the Courts Service.

Another project in the Fourth Programme which I will comment on it because of earlier references to the Act of 1965 relates to aspects of succession law. In fact, in its work on this project the Commission has already produced two reports. The earlier report, entitled *Prevention of Benefits from Homicide* (LRC 114 – 2015), which was published in 2015, addressed section 120 of the Act of 1965. In 2017 the Government published the *Scheme of a Courts and Civil Law (Miscellaneous Provisions) Bill*, Part 5 of which dealt with the recommendations of the Commission in relation to section 120. In 2017 Mr. Jim O'Callaghan T.D. introduced a private members Bill, *Civil Liability (Amendment) (Prevention of Benefits from Homicide) Bill 2017*, based on the draft Bill included in the Commission's report. That Bill passed the second stage on 4th October 2018. As I understand the position, the Government accepted the Bill in principle and proposed certain amendments that might be considered at Committee stage. That Bill has been

referred to a select Committee for “detailed scrutiny”, following which the question of whether it will go to Committee Stage will arise. One cannot predict what will happen.

In 2017 the Commission reported on another aspect of the Act of 1965 in *report on Section 117 of the Succession Act 1965: Aspects of Provision for Children* (LRC 118 – 2017). The Commission is not aware of any steps having been taken to implement the Commission’s recommendations on that very important and frequently litigated aspect of our succession law.

Apart from its continued work on contempt of court, the Commission is currently working on the following projects in the Fourth Programme:

- Project 5: Suspended sentences, which was the subject of an Issues Paper published in 2017 (LRC IP 13 – 2017).
- Project 8: Compulsory acquisition of land, which was the subject of an Issues Paper published in 2017 (LRC IP 13 – 2017).
- Project 10: Domestic implementation of international obligations, in respect of one module of which a document entitled: *Draft Inventory of International Agreements entered into by the State* (LRC IP 14 – 2018) was published in 2018.
- Project 11: Codification/Consolidation/Simplification of the Law in respect of which an Issues Paper on *Accessibility, Consolidation and Online Publication of legislation* (LRC IP 11 – 2016) was published in 2016.

In addition to its work on the Fourth Programme, the Commission is currently engaged in preparatory work on projects in the Fifth Programme and it is also addressing two matters as a result of requests from the Attorney General, in respect of each of which Issues Papers were published in 2018, being:

- Issues Paper on Privilege for Reports of Court proceedings under the Defamation Act 2009 (LRC IP 16 – 2018).
- Issues Paper on Knowledge or Belief Concerning consent in Rape Law (LRC IP 15 – 2018).

Fifth Programme

In preparing the Fifth Programme, the Commission, broadly speaking, adopted the approach which had been adopted in relation to the Fourth Programme, although the process leading to a Government decision pursuant to section 5 of the Act of 1975 has differed at the final stage to what happened in relation to the Fourth Programme.

The preparatory work began in 2017. The important aspect of it was the consultation process, the purpose of which was to provide an opportunity to all interested parties and members of the public to engage in the law reform process and to suggest areas of law that require reform, modernisation and renewal. In June 2017 the Commission wrote to Government departments, NGO's and other public interest groups inviting them to make suggestions for reform of the law which they considered suitable for inclusion in the Fifth Programme. Thereafter, consultative meetings were held around the country in the last

quarter of 2017 and the first month of 2018. In fact all but one of those meetings were held outside Dublin: in University of Limerick; National University of Ireland Galway; Dundalk Institute of Technology; and University College Cork. The only meeting held in Dublin formed part of the Commission's Annual Conference 2017. The consultative process achieved its objective in that very many suggestions were received from the attendees at the consultative meetings and very many written suggestions were received by the Commission from interested parties. The material thus received and the Commission's own analysis of it influenced the selection of projects for the Fifth Programme. The Commission was then in a position to submit a draft Fifth Programme to the Attorney General for consideration by the Attorney General's Consultative Committee in May 2018.

The Consultative Committee had been established pursuant to Government decision in March 1998. It consists of representatives from the Bar Council, the Law Society, each Government department, the Office of the Attorney General and members of the Commission. The meeting of the Consultative Committee took place in July 2018. Following that meeting and as a result of the input of the Consultative Committee, a revised draft Fifth Programme was submitted by the Commission to the Attorney General for his approval at the end of August 2018. The revised draft was referred by the Government to the Joint Oireachtas Committee on Justice and Equality.

The stage at which the process differed from what had occurred in 2013 in relation to the Fourth Programme was that the Committee did not require the members of the Commission to appear before it to discuss the draft Fifth Programme. However, the draft Fifth Programme has already been laid before the Houses of the Oireachtas and I understand it has been posted on the Oireachtas website. Accordingly, it is in the public domain. The Commission's understanding is that the Committee approved the draft Fifth Programme on 16th January 2019, being very happy with the proposed projects and not having any suggestions for change. It is the Commission's understanding that that decision was notified to the Department of the Taoiseach and that a formal motion to that effect is to be put on the Dáil Order of Business in the near future. The last step in the process, the decision of the Government pursuant to section 5 (1) of the Act of 1975 to approve of the draft Fifth Programme with or without modification is still outstanding,² but the Commission is continuing the work on some of the projects which it commenced last year, which, in general, is scoping work.

The draft Fifth Programme contains fifteen projects which relate to six areas of law and related procedural matters: courts and public law; criminal law; civil liability; evidence; family law; and land law. The fifteen projects are listed in the attached Appendix, with a view to demonstrating the very wide range of topics selected.

² The Government approved the text of the Fifth Programme without modification on 20th March 2019.

In the draft Fifth Programme the Commission has set out an abstract for each of the fifteen projects, which is intended to form the basis for the scoping and the development of the relevant project. From my perspective, having had no involvement in the preparation of the Fifth Programme, each abstract is very important and gives a very clear oversight as to what the project is about. In particular, I find the abstract on the fifteenth project to be very informative.

The fifteenth project is the project to which I alluded earlier in connection with the Commission's work on reforming land law and conveyancing, which specifies two aspects of land law for consideration in the work of the Fifth Programme: adverse possession and prescriptive easements. The abstract links the project to the Commission's earlier work under the Second Programme and to the Act of 2009. As regards the adverse possession topic, the abstract draws attention to the fact that adverse possession was addressed in the Commission's report published in 2005 and in its draft Bill, but the Act of 2009 did not include those provisions on the basis that they required further consideration in the light of the decision of the European Court of Human Rights in *J. A. Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45. The abstract indicates that the project will re-examine adverse possession taking into account the analysis in the Commission's 2005 report and also the developments since the decision in the *Pye* case, which developments are listed as including the decision of the Supreme Court in *Dunne v Iarnród Éireann* [2016] 3 I.R. 167, specifically the observation in my judgment (at para. [23]) that there would seem to be a need for review of the recommendations of the Commission made in 1989, 2002, and 2005 with

a view to bringing clarity to the law in the area of adverse possession. This aspect of project fifteen will definitely be of interest to me.

The draft Fifth Programme does not specify a period of time within which the fifteen projects are to be completed. However, when the initial draft was furnished to the Attorney General in May 2018, it was made clear that the intention of the Commission was that work involved in the fifteen projects would run from 2018 to 2021. The Commission proposed to deal with the fifteen subjects within that time span. It was acknowledged that it might not be possible to complete all of the projects, but hope was expressed that most of the projects would be completed and the remainder would have commenced.

It may be, of course, that one or more of the projects in the draft Fifth Programme will not require to be addressed by the Commission. In the case of the Fourth Programme, two of the projects did not require to be addressed by the Commission, because they were overtaken by policy proposals and enacted legislation in those areas. I understand that one of the projects in the Fifth Programme, Project 6 on perjury, is the subject of a private members' Bill which has been introduced in the Seanad. It is possible that the Commission may not have to deal with that project.

I look forward to the decision of the Government on the draft Fifth Programme, following which the Commission will publish a report on the approved work programme for the

next three years. Thereafter, I look forward to the Commission getting fully involved in that work programme.

Access to Legislation Research Work

The Commission's *Access to Legislation* work began in 2006 as a result of a request from the Government and from the Office of the Attorney General. It contains three related elements:

- The Legislation Directory
- Revised Acts
- The Classified List of In-Force Legislation

What follows is a brief description of each element.

The Legislation Directory consists of a list of all amendments to all Acts of the Oireachtas which remain in force, over 2,000, and all pre-1922 Acts which remain in force, over 1,100. It is published on the electronic Irish Statute Book (eISB), which is maintained by the Office of the Attorney General. Currently, the Commission updates the Legislation Directory each week when new legislative material is available. The full text of all of the Acts of the Oireachtas as enacted is available on the eISB and the entry for each Act contains a link to a related table, previously separately published on the Legislation Directory. The Legislation Directory tables for Acts enacted since 1978 include the following information in relation to each Act: its commencement; secondary legislation made under it; and amendments to it. The Commission has been developing

a corresponding Legislation Directory for Statutory Instruments since 2006. In recent years, with the availability of additional resources, the Commission has been able to work on extending the project back to 1972, with the objective of facilitating a comprehensive tracking of all EU related Statutory Instruments, including identifying those which remain in force. As of now, February 2019, the work on the project extending as far back as 1977 is almost completed.

The Revised Acts element of the Access to Legislation project started in 2008. In essence, it is an administrative consolidation of what may be termed “Acts–as–amended”. As of now, February 2019, over 350 Acts–as–amended are available on the Commission’s website. From the outset the selection by the Commission, following a consultative process, of a pre-2006 Act for publication as a Revised Act was based on the following criteria: whether it is in frequent use; whether it was previously accessible to the public; and whether it might ease the regulatory burden on business. In addition, all textually amended Acts from 2005 onwards, other than Finance and Social Welfare Acts, are published in Revised Act form as they are amended. Since January 2017, direct links are available on eISB from the text of an Act as enacted by the Oireachtas to the text of the Revised Act, that is to say, the Act as amended, where this is available.

As regards the third element of the Commission’s *Access to Legislation* work, the Classified List of In-Force Acts, comprises a complete list of over 2,000 Acts of the Oireachtas and over 100 significant pre-1922 Acts which remain in force. In the

Classified List the Acts have been organised under 36 general subject-matter headings, with each Act identified with its relevant Government Department. The Classified List of In-Force Acts is kept up to date. The Commission has also developed a Classified List of In-Force Statutory Instruments. This project derives from the Commission's statutory function under the Act of 1975 to keep the law under review and from its participation in the eLegislation Group in the Department of the Taoiseach.

In the interests of clarity, I should point out that the Commission's continuing work on Project 11 of the Fourth Programme referred to earlier is proceeding separately from the *Access to Legislation* work, which has just been outlined.

Going Forward

If and when, as is anticipated, the Commission gets fully involved in the Fifth Programme as approved, interested parties and the public will be engaged and their views sought on each project in a number of ways. A document, which since 2013 has been called an Issues Paper, will be published relevant to the project and the views of the public will be sought on the issues identified, which will be comprehensively explained in the document. A public seminar may be held in relation to the particular project. Moreover, roundtable discussions may be held like those which were held in 2017 in relation to contempt of court. Discussions may be held with individuals and bodies, including representatives of the Government, whose views need to be considered before any decision is made on reform.

The degree to which the Commission may be assisted in its work is well illustrated in the consultative process which preceded the Commission's Report in 2016 on *Harmful Communications and Digital Safety* (LRC 116 – 2016). As the report discloses, the Commission recognised that the views of young people on the issues covered by the project under consideration needed to be considered because they are one of the groups most affected by harmful digital communications. Therefore, the Commission organised two consultative workshops with young people aged between 13 and 17 years, facilitated by the Department of Children and Youth Affairs. The consultation involved two sessions in April 2016, with 36 young people attending on the first day and 34 young people attending on the second day. An independent report of the consultations was prepared and was included in Appendix B to the report. It is recorded in the report that the workshops greatly assisted the Commission in the development of its proposals on the role and functions of the proposed Digital Safety Commissioner. That experience is something to be borne in mind going forward.

Although, as Minister for Justice, Equality and Law Reform, Brian Lenihan expressed his views on the manner in which the Commission should carry out its functions almost twelve years ago, most of those views are still relevant today and are worth recording.

Having, noted that the Commission is by statute independent in the exercise of its functions, the Minister implicitly agreed with Mr. Justice Kirby's contribution to the effect,

as he put it, that “it’s all very fine coming up with well-thought-out proposals for the reform of the law, but the practical business of getting from that stage through the legislative process cannot be lost sight of”. He expressed the view that, accordingly, it is eminently sensible that the Commission and the Executive Branch of Government work closely together as it is the Executive which in our system most usually takes the lead role in piloting proposals through the Legislature. That is also reflected in the values set out in Appendix 2 to the report on the Third Programme, in which it was stated that, while independence is a fundamental principle, the Commission also realised that there must be proper liaison with all stakeholders in society, including the public and the Government.

The Minister also made the point that the Commission does not have exclusive rights in the area of law reform, recording that the Commission acknowledged that in its Seminar Paper. Indeed, throughout the history of the Commission other bodies with experience in specialised areas have been constituted with a view to addressing law reform. A recent example, which is to be welcomed, is the establishment by the Minister for Justice and Equality in 2017 of a Group chaired by the President of the High Court, to review and reform administration of civil justice in the State. Back in 2007, the Minister interpreted the stance of the Commission as being a practical and realistic approach to its work and as its view being that “its work does not take place in an esoteric vacuum but must be related to what is achievable”. No other approach by the Commission would be realistic.

The Minister also recognised that the Commission may have a role to play, when, as he put it, “the Court is faced with a legal lacuna that cannot satisfactorily be bridged by judicial creativity”. The Commission is indeed equipped to deal with that type of problem. It may be, as happens frequently, that the responsibility for the introduction of the amending legislation is undertaken by the relevant Government department. A recent example of this was the enactment of the Mental Health (Renewal Orders) Act 2018 as a consequence of the decision of the Court of Appeal in *AB v Clinical Director of St. Loman’s Hospital & Others* [2018] 2 I.L.R.M. 242.

Finally, the Minister reminded the Commission and, indeed, everybody, that the elected legislature is constitutionally the sole law making body; and the elected Government is the principal conduit for bringing forward legislative proposals, thereby reminding the Commission then and now that implementation of recommendations of the Commission is out of the hands of the Commission. In the report on the Third Programme it was recorded that about 70% of the Commission’s recommendations up to that point in time had been, or were, in the process of being implemented. That is still the position. Nonetheless, I think it is worth recording the Commission’s view at that time, as set out in the report on the Third Programme, on the implementation of recommendations. It stated:

“The Commission is firmly of the view that its recommendations should be rooted in rigorous analysis, which should also be tested against the question: ‘will they work in practice?’ We believe that this approach will ensure that our work

remains relevant to society – and to the public representatives in Government and the Oireachtas”.

I share that view.

Conclusion

Having spent considerable time viewing the work of the Commission over the past 43 years I have been constrained to ask myself whether anything has been overlooked. One thing springs to mind: the comma. That is prompted, albeit not entirely, by the unfortunate position in which Winston Smith found himself in the last chapter of Orwell’s *Nineteen Eighty-Four*. It raises the question whether we need a sub-Committee of a sub-Committee of the type to which he was appointed to deal with one of the minor difficulties that arose in the compilation of the Eleventh Edition of the Newspeak Dictionary, which was something to do with the question of whether commas should be placed inside brackets or outside.

That issue is for another day.

APPENDIX

Projects in the Draft Fifth Programme

A. COURTS, PUBLIC LAW AND THE DIGITAL ERA

1. Reform of Non-Court Adjudicative Bodies and Appeals to Courts
2. Regulation and Oversight of Vulnerable or At-Risk Adults
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
 - Bad character evidence
 - Privilege

E. FAMILY LAW

14. Aspects of Family Law

- Proper Provision on Divorce
- Foreign Divorces

F. LAND LAW

15. Aspects of Land Law

- Adverse Possession
- Prescriptive Easements