Remarks at the Launch of the Law Reform Commission's Report on its Fourth Programme of Law Reform Wednesday 27th November 2013 at 5pm

Good evening.

President, Commissioners, Ladies and Gentlemen.

I am honoured and delighted to accept the Law Reform Commission's invitation to launch this important publication, the Report on the Fourth Programme for Law Reform.

The Background

The Commission, as you know, was established by Statute in 1975.

The task of the Commission as stated in the Act is to; "keep the law under review and...undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform."

Reform is defined under the 1975 Act as "...the codification of the law including in particular its simplification and modernisation and the revision and consolidation of statute law."

For the past 38 years, the Commission has been true to its calling.

It is the role of the Oireachtas to take the lead in Law Reform and that of the Commission to seek to ensure on an ongoing basis that the laws of the land are just and equitable, that anomalies are addressed and eliminated and that access to justice is available to every citizen in a speedy and affordable fashion.

The Commission as a permanent, independent body of experts dedicated to the legislative welfare of the nation plays a distinct and complimentary role in the law reform process.

The need for change and reform arises in many distinct ways;

- Judgments from the Court interpret and construe the law, frequently identifying anomalies and inconsistencies.
- Judge-made principles and Rules may need evaluation and clarification particularly if being applied to circumstances not contemplated by the judge in the first place

- Legislation over time may become obsolete or operate unfairly or in a way never intended by the drafters.
- It is important that our laws are responsive to changes in values and to the need for inclusiveness at every level in our multi-cultural society.

The Law Reform Commission is exceptionally well placed to carry out a comprehensive, robust evaluation and analysis of any particular area of the law and to make recommendations to address deficiencies, injustices, inequities and to render the law more relevant, more responsive and more capable of delivering justice.

I note that in the course of this year alone you have completed and published a final Report on Missing Persons, and also published and launched a Report on the Law relating to Juries, and a Report on Mandatory Sentencing.

If we are to become a society of values, our laws must constantly be reviewed to safeguard and expand the freedom of our citizens and to ensure that our rights are sustained and that our steps towards greater prosperity are shielded from rapacious corporate abuse.

The Fourth Programme

The Process

The Fourth Programme we have here is the culmination of an intense process of dialogue and engagement between the Commission and interested parties and stakeholders.

This comprehensive public consultation has afforded the widest possible opportunity for all citizens and interested parties and stakeholders to engage directly in the law reform process and to identify areas of law which the Commission might consider ripe for analysis, review and reform. I understand that over 200 written submissions were received during public consultation. Also I note that the Commission travelled outside of Dublin for meetings and discussions. This robust approach and dialogue has helped to generate a real consensus around the 11 key legal priorities identified by the Commission in this the Fourth Programme.

1. Corporate Offences and regulatory enforcement

It is injurious to democracy if a perception is allowed to persist that white collar offences are not amenable to appropriate criminal sanction. The decision of the Commission to examine our existing laws pertaining to corporate misconduct is to be welcomed. This will necessarily involve analysis of our current laws and their limitations. If we are to have reform, it is vital that we understand the deficiencies that exist and the legislative and other impediments that have led to a strong public perception that we lack responsive capabilities and appropriate sanctions in areas such as accounting, auditing, and corporate governance.

As we move towards regaining our economic sovereignty, it is imperative that a robust and comprehensive review is carried out so that, insofar as possible, we can proceed to inject systemic resilience and accountability into our corporate criminal law. The Commission may consider looking at other jurisdictions and to evaluate how mechanisms such as "Deferred Prosecution Agreements" operate and whether there are aspects of these which can be grafted on to our system of fixed charge notice offences for use in the regulatory context.

No doubt the Commission will be interested in evaluating how section 184 of the Australian Corporations Act 2001 has worked. It is a measure which was introduced to curb recklessness or intentional dishonesty on the part of company directors.

We need to devise constitutionally compliant sanctions to protect our citizens and to ensure the appropriate regulation of the banking and financial institutions and corporations generally.

Regulators

I welcome the decision of the Commission to look at the powers and functions of regulators.

One wonders "who will regulate the regulators"?

Are they truly the champions of the consumer as they were intended to be? Many believe that the role of the regulator should be more clearly defined.

Regulatory enforcement has the potential to be a catalyst for reform if provided with adequate investigative tools.

2. Criminal Law

(i) Disclosure and Discovery

There has been a growing concern that Discovery orders particularly, in rape cases may trench in certain aspects of privacy and personal health and may even have a chilling impact on the willingness of complainants of sexual assault to come forward or to fully cooperate with the prosecution process. At issue is whether an accused charged with a sexual offence is entitled to seek discovery of material relating to the complainant which is not in the possession of the DPP but is rather held by the Rape Crisis Centre, by a health professional or a health authority.

There are great sensitivities surrounding these issues and competing interests are at stake including the fundamental value in our society that an accused is entitled to a fair trial. The Commission will have the opportunity to evaluate the issues in a calm dispassionate way and may look at how other common law jurisdictions have addressed this issue. Ultimately, legislation could create certainty and clarity for all the parties involved.

In all the areas of criminal law under consideration, the work of the Commission will undoubtedly dovetail with the review which is in progress within the Department of Justice and Equality in relation to sex offences legislation. I have no doubt that the strong and positive working relationship between the Commission and the Department of Justice & Equality will result in significantly enhanced legislation on sexual offences coming before the Houses of the Oireachtas in due course.

(ii) Suspended Sentences

In sentencing we need consistency and coherence of approach and perhaps the time has come for some mechanism to be considered to facilitate this.

Suspended sentences have been part of Irish sentencing jurisprudence for over one hundred years. In Re McIhagga the Supreme Court, O'Dálaigh C.J. 29th July 1971, the suspended sentence was described as "a valid and proper form of sentence". A considerable jurisprudence has developed in relation to suspended

sentences particularly in the Court of Criminal Appeal and it has been recognized as a valuable and flexible sentencing tool enabling the court to take into account the personal circumstances of the offender.

A statutory foundation for suspended sentences is to be found in section 99 of the Criminal Justice Act 2006 which was subsequently amended in 2007 and again in 2009. Subsequent litigation at Court of Criminal Appeal level suggests however that there are a number of potential legal issues that need to be addressed to make this sentencing option fit for purpose.

Tom O'Malley is the acknowledged expert in this area.

(iii) Contempt of Court

The European Court of Human Rights in Strasbourg has considered the issue of contempt of court on a number of occasions and indeed our own courts have had occasions to explore its limitations. There is a good deal of confusion between criminal contempt and civil contempt and the review proposed by the Commission is to be welcomed. The Commission did a good Consultation Paper in 1991 and a revisiting is timely.

(iii) Cyber-bullying

The information super-highway has conferred extraordinary benefits and opened vast possibilities for society. However, those who use technology to cause harm or to engender fear, debase its value and need to be held to account. It is important that our legislation be fit for purpose to address this issue.

Cyber-bullying causes profound mental anguish and distress and it is timely to subject it to a proper comparative analysis to evaluate how other jurisdictions are dealing with the issue and to see whether we can provide protections, especially for young people, that are reasonable, proportionate and fair.

3. Succession

I fully understand that succession law is not an area that sets pulses racing. The Succession Act 1965 came into force on the 1st January 1967 almost forty-seven years ago. Over the years, a very significant body of jurisprudence has come into being interpreting and construing the meaning and effect of its provisions. Take for example section 117 which deals with the circumstances where a parent who makes a will fails to make proper provision for a child. In 1996 the period of time within which a child could bring a claim was reduced from twelve months to six months from the date of the grant of probate. The Courts have interpreted this time limit as strict and cannot be extended under any circumstances whatsoever. In the case of an infant, or in the case of a child with disability, this can cause injustice. In other jurisdictions with similar laws, the Courts have flexibility to give extensions of time in special circumstances.

There are anomalies which are thrown by the introduction of the Civil Partnership legislation which need to be examined. This is something which the Commission is well placed to do.

Of course there are many other aspects of the Succession Act that warrant consideration. How jointly owned assets are to be treated by the law when one co-owner has been found guilty of causing the death of the other. Judge Mary Laffoy in the important judgment of Cawley v. Lilis December 2011 pointed out that section 120 deals with the distribution of property owned by a deceased person but not with the distribution of property in which an unworthy potential successor has existing rights. Perhaps the decision in Crippen 1911 is not fit for purpose in this day and age.

I know that Commissioner Marie Baker works in this field and I have no doubt that many other aspects of succession law may also be considered perhaps including legal right shares of surviving spouses and if the law in relation to cohabiting couples needs to be better aligned.

4. Compulsory Acquisition of Land

Some of the key legislation in relation to compulsory acquisition dates from the early Victorian era and particularly the 1840s. I welcome the prospect that the Commission may consider the consolidation and codification of this area of the

law so that greater transparency and clarity is brought to bear on the assessment of compensation where land is compulsorily acquired. There would appear to be some serious anomalies in our compulsory acquisition law and the focus of the Law Reform Commission is to be welcomed.

5. Landlord and Tenant Law

In the area of residential tenancies and the rights of residential tenants, the reforming zeal of Michael Davitt has never held sway. This I regret. Security of tenure in residential tenancies is conducive to social stability.

The operations of the PRTB (Private Rented Tenancy Board) might be looked at.

It is in the interests of society and landlord and tenants that cheap, speedy remedies are available to resolve disputes. There should be real consequences if a landlord wrongfully withholds a substantial deposit unreasonably at the end of a tenancy.

6. International Obligations

I am mindful that one of your Commissioners is the eminent Professor Donncha O'Connell is an acknowledged expert on the domestic recognition and enforcement of international Treaties and our human rights obligations.

Any guidance, expertise or assistance that the Commission may be in a position to provide in relation to the more efficient and timely transposition of our international law obligations is to be greatly welcomed.

Conclusion

So in conclusion I acknowledge with appreciation the breadth and extent of the now launched Fourth Programme.

I want to take this opportunity to pay tribute to the extraordinary leadership, energy and focus, that Mr. Justice Quirke has brought to his role as President since he took office just last year.

Your work even in that short time President has strengthened the foundations of our human rights.

The work of the Commission in the words of Primo Levi is "a war without end" but one that you are greatly equipped to pursue.

As John F. Kennedy said "change is the law of life and those who look only to the past or present are certain to miss the future".

I express my thanks again to everybody who works here at the Law Reform Commission for the work done and I look forward with great optimism to this phase in the development and advancement of law reform in Ireland.

Thank you very much indeed.