

Our New Address is:—

LAW REFORM COMMISSION,

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The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

SECOND REPORT (1978-1979)

Laid by the Taoiseach before both Houses of the Oireachtas
on 25 April 1980 pursuant to section 6 of the Law Reform
Commission Act 1975

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IRELAND

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PART I

INTRODUCTION

1. This report covers the period from the beginning of 1978 to the end of 1979 and deals with the activities of the Commission under section 4 of the Law Reform Commission Act 1975 and with other matters referred to in section 6 of the 1975 Act.

Members of the Commission

2. The Law Reform Commission is a statutory body corporate, established under section 7 of the Law Reform Commission Act 1975, consisting of a President and four other members appointed by the Government.

3. Mr Justice Brian Walsh is the President of the Commission. The other members of the Commission are Mr Justice Charles J. Conroy, Mr Roger Hayes, Professor Robert Heuston and Mr Martin E. Marren. On 20 October 1978 Professor Robert Heuston's term of office as a Commissioner ceased, but the Commission is pleased to report that Professor Heuston's contract with the Commission was renewed by the Government for a further period of three years.

Staff of the Commission

4. The staff of the Commission consists of the Secretary, three Research Counsellors, a Legal Assistant, a Clerical Officer and three Clerical Assistants.

Functions of the Commission

5. The Commission was set up to keep the law under review and, in accordance with the provisions of the Law Reform Commission Act 1975, to examine and conduct research with a view to reforming the law and to formulate proposals for law reform. The Commission has prepared a programme for the examination of administrative law, civil liability for animals, conflict of laws, criminal law, evidence, family law, privacy, sales, State Side orders and statute law. The Commission is devoting its attention to these branches of the law and has published a number of preliminary Working Papers. It presented its First Report (1977) (Prl. 6961) to the Attorney General on 1 March 1978.

Copies of the First Report and of the Working Papers were sent to each member of the Houses of the Oireachtas and to all the law schools and the law faculties in the country. Copies are also sent on a reciprocal basis to various law reform agencies outside the State. The Report was laid by the Taoiseach before both Houses of the Oireachtas on 13 March 1978.

PART II

WORK OF THE COMMISSION FROM 1978 TO 1979Subjects from the Commission's First Law Reform Programme

6. Since the submission by the Commission of its First Report to the Attorney General on 1 March 1978 the Commission has issued five preliminary Working Papers, four of which deal with some of the family law subjects referred to in the First Programme. The most recent Working Paper (No. 8-1979) deals with the judicial review of administrative action and the problem of remedies.

(1) The Law relating to Breach of Promise of Marriage

7. A Working Paper on this topic was published in December 1978 as the Law Reform Commission Working Paper No. 4-1978. It is the Commission's second Working Paper in the family law area, the first being Working Paper No. 2-1977 on the Age of Majority and the Age for Marriage. The Commission recommends principally that the present right of action for breach of promise of marriage be abolished and that provisions be enacted specifying the rights of parties to the engagement and third persons in respect of certain property matters. A general scheme of a Bill accompanies the Working Paper.

8. The Commission invited observations on the Paper to be submitted before 1 March 1979.

- (2) Working Papers Nos 5 to 7: Criminal Conversation and the Enticement and Harboursing of a Spouse; Seduction and the Enticement and Harboursing of a Child; Loss of Consortium and Loss of Services of a Child

9. During the period from December 1978 to April 1979 the Commission issued three Working Papers dealing with certain civil wrongs affecting family relations. These Working Papers are part of a comprehensive scheme of study in family law undertaken by the Commission in its First Programme. So far, the Commission has dealt with what may be described as attacks on the family from outside the family. The Commission proposes that two comprehensive Bills be prepared to cover (1) the Age of Majority and the Age for Marriage, and (2) Breach of Promise of Marriage, Criminal Conversation and the Enticement and Harboursing of a Spouse, Seduction and the Enticement and Harboursing of a Child, and Loss of Consortium and Loss of Services of a Child.

10. The Commission, having examined the law in relation to civil wrongs affecting family relations, concludes that, in order adequately to protect the family, new family actions should be created.

- (3) The Law relating to Criminal Conversation and the Enticement and Harboursing of a Spouse

11. The first of a series of Working Papers dealing with civil wrongs affecting the family is entitled the Law relating to Criminal Conversation and the Enticement and Harboursing of a Spouse. It was published in December 1978 as the Law Reform Commission Working Paper No. 5-1978.

12. The Commission makes three main recommendations as follows:

(1) The action for criminal conversation, in its present form, should be abolished, but there should be created in its place a new family action for adultery that may be taken by either spouse for the benefit of the members of the family unit (including, where appropriate, the adulterous spouse) to be defined as comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis).

It should be noted that when the action for criminal conversation was abolished in England in 1857 a new action for adultery was created in its place. This form of action was abolished in England by the Law Reform (Miscellaneous Provisions) Act 1970.

The 1970 Act originated in a Private Members Bill. The English Law Commission had stated in their Report (No. 25 (1969)) that the abolition of the action for adultery was "essentially a social question to which we are not qualified to give a final answer". For the background to the English Act, see the Law Reform Commission Working Paper No. 5-1978, pp. 20 to 23.

(2) The action for enticement of a spouse should be retained, but should become a family action for enticement that may be taken by either spouse for the benefit of the members of the family unit, including, where appropriate, the "guilty" spouse.

(3) The action for harbouring of a spouse should be abolished as it is in modern circumstances totally unreal.

Copies of the Working Paper have been available to the public since the end of December 1978.

13. The Commission invited observations to be made on the Paper on or before 1 April 1979. As in the case of the other Working Papers the date for observations is not a final date; and observations may be made still.

(4) The Law relating to Seduction and the Enticement and Harboursing of a Child

14. The Commission circulated in February 1979, for comment and criticism, a Working Paper (No. 6) on the Law relating to Seduction and the Enticement and Harboursing of a Child, and it invited observations on the Working Paper to be made before 1 May 1979.

15. The Commission treats separately (1) seduction of a child and (2) enticement and harboursing of a child, and recommends that the action for seduction as at present constituted should be abolished, and should be replaced by a single family action for seduction. It recommends that the actions for enticement and harboursing of a child should become single family actions for enticement and harboursing. As with the proposed new family action for adultery (para. 12 supra) the Commission proposes that the new right of action should be available for the benefit of all the members of the family living together and that the child's right of action be merged in the family action.

(5) The Law relating to Loss of Consortium and Loss of Services of a Child

16. In April 1979 the Commission published a Working Paper (No. 7) on the Law relating to Loss of Consortium and Loss of Services of a Child. This Paper is the seventh Working Paper issued by the Commission and the fifth in a

series on family law matters mentioned in the Commission's First Programme. Observations were invited to be submitted before 1 July 1979, but this date, as has been mentioned, is not a final date.

17. The Paper contains five recommendations as follows:

(1) The actions for loss of consortium of a spouse and for loss of services of a child should be replaced by single family actions for the benefit of all the members of the family unit residing together.

(2) The damages, which should be without monetary limit (i.e. at large), should cover:

- (a) all reasonable expenses and other financial losses incurred by the members of the family of the victim;
- (b) mental distress resulting to the members of the family;
- (c) damage to the continuity, stability and quality of the relationships between members of the family.

(3) The defence of the contributory negligence of the victim should be available to the defendant in proceedings brought against him by members of the family of the victim. This represents a change in the existing rule, whereby the contributory negligence of the victim is not taken into account.

(4) Only one action should be capable of being brought; and the court should be empowered to award such damages to each of the members of the family unit residing together as the court considers fit.

(5) The period of limitation should be the same as that for an action for fatal injuries, namely, three years.

18. The basic philosophy underlying the proposed new family actions in Working Papers Nos 5 to 7 is the protection of family solidarity and the continuity of family relationships. The new actions will give practical effect to Article 41 of the Constitution by protecting the privacy of family relations. The social policy sought to be served by the proposed family actions is not the maintenance of some alleged proprietary interest in a spouse or in a child.

(6) Judicial Review of Administrative Action: The Problem of Remedies

19. The Commission published its eighth Working Paper on the above topic in December 1979. This is its first study in the field of administrative law.

20. The Paper deals with the procedural problems lying in the way of a person who wishes to complain to the courts about administrative acts, omissions and decisions. The problems of the present system of remedies (certiorari, prohibition; mandamus, declaration and injunction) lie in the multiplicity of remedies available and in the rule regarding damages. (A claim for damages may be coupled only with an application for a declaration or for an injunction.) The Commission observes in relation to the problem of multiple remedies that, while some remedies overlap, the correspondence is not total and that this makes the choice of remedy difficult. It is observed that, while the present system of remedies offers relief to an aggrieved person, it does not do so in the most effective manner possible. The Commission outlines a single comprehensive procedure, to be styled an application for review. This will enable the plaintiff to bring his case - whatever its nature - before the High Court, and power will be vested in

the Court to treat an application for any of the old remedies as an application for review. The Commission also recommends that a claim for damages may be joined with an application for review.

21. Observations were invited on Working Paper No. 8-1979 before 1 April 1980, but as indicated in paragraphs 13 and 16 supra, this date is not a final date.

PART III

WORK IN PROGRESSSubjects from the Commission's First Law Reform Programme
and Matters referred by the Attorney General(1) The Law relating to the Liability of Builders, Vendors,
and Lessors for the Quality and Fitness of Premises

22. A Working Paper containing draft legislation on the law relating to the liability of builders, vendors and lessors for the quality and fitness of their premises was published in July 1977 as the Law Reform Commission Working Paper No. 1 of that year. Comments on the Working Paper were invited to be made by 1 November 1977. The Commission has considered the submissions received by it in response to the invitation and will soon be in a position to have the necessary Bill drafted and included in a Report of the Commission.

(2) The Law relating to the Age of Majority, the Age for
Marriage and some connected Subjects

23. The Commission devoted its second Working Paper to the study of the law relating to the Age of Majority, the Age for Marriage and some connected Subjects which it published in December 1977. The Commission is grateful to the bodies and individuals that submitted views on the Working Paper; and the Commission will be in a position to report on the subject after the necessary legislation (to be included in the Report) has been drafted.

(3) Civil Liability for Animals

24. The civil liability for animals formed the subject matter of the Law Reform Commission Working Paper No. 3-1977. The Commission is grateful to the bodies and individuals that submitted their views on the Working Paper and work on the Report has been advanced to the stage of having the necessary Bill drafted for inclusion in the Report.

(4) Family Law

25. The Commission, in its First Programme, indicated that it would undertake an examination of both the substantive and the procedural law relating to matrimonial causes and to the nature and basis of existing matrimonial proceedings generally. Since presenting its First Report (1977), the Commission has been giving priority to the study of various areas in the field of family law, including nullity of marriage, divorce a mensa et thoro, restitution of conjugal rights, jactitation of marriage and declarations as to status. The law relating to the recognition of foreign divorces, legal separations and decrees of nullity is also being examined. As has been noted supra (paras 6 to 18), several Working Papers on family law matters have already been published.

(5) The Law of Domicile

26. The Commission has examined the law concerning the domicile of married women and related matters and has already prepared a preliminary draft Working Paper on the subject. It was pointed out in the Commission's First Report (1977) that consideration of the subject raised some very

fundamental matters concerned with the question as to whether the concept of domicile should be retained at all or replaced by the concept of habitual residence. Work has commenced on the subject of habitual residence and a first draft of a Scheme for a Conflict of Laws (Habitual Residence) Bill has been prepared.

(6) Minors' Contracts

27. The position of a minor in relation to contracts was examined briefly in the Working Paper (No. 2-1977) on the Age of Majority and the Age for Marriage. However, the Commission considered the subject to be sufficiently important to warrant a separate Working Paper. A draft of this Paper has been completed.

(7) Minors' Civil Wrongs

28. The liability of a minor in respect of his wrongful actions was dealt with briefly in the Commission's Working Paper (No. 2-1977) on the Age of Majority Etc. The Commission is of opinion that the civil liability of a minor, as well as that of his parents, merits further study. The subject is one that has evoked only passing interest in common law jurisdictions although there is much uncertainty in the law. In contrast, the civil law jurisdictions have specific rules as to the liability of minors and especially as to the liability of parents for the acts of children. The Commission has already completed a Background Paper on the subject.

(8) General Scheme of a Bill to Reform the Law relating to Civil Wrongs affecting Family Relations and Connected Matters

29. The Working Papers on the law relating to criminal conversation and the enticement and harbouring of a spouse, to the seduction and the enticement and harbouring of a child, and to the loss of consortium of a spouse and loss of services of a child (i.e. Working Papers Nos 5 to 7) do not include General Schemes of Bills to implement the Commission's recommendations. It was considered at the time that the drafting of the necessary legislation would be relatively simple once the principles upon which it was to be based were settled. The Commission is at present engaged in the preparation of a Family Law Reform Bill that will cover the matters dealt with in Working Papers Nos 5 to 7, as well as the law relating to breach of promise of marriage (Working Paper No. 4). A parliamentary counsel has recently been appointed by the Commission on a fee basis to draft an Age of Majority and an Age for Marriage Bill (Working Paper No. 2) and the Family Law Reform Bill referred to supra.

(9) Evidence: The Rule against Hearsay

30. It was stated in the Commission's First Programme that the Commission proposed to examine particular areas of the law of evidence and that priority would be given to (1) areas where amendment of the law would simplify and improve court procedures, and (2) particular problems such as the hearsay rule. In a Working Paper to be published shortly the Commission examines in detail the rule against hearsay and makes a number of proposals for the reform of the law.

(10) Evidence: Private International Law

31. As part of its undertaking to revise and reform the law of evidence, both civil and criminal, and with a view to ratifying the various Hague Conventions on procedure, the Commission is engaged in preparing the General Scheme of a Bill to implement those Conventions. The Conventions are the Convention Relating to Civil Procedure (1954), the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961), the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1975).

(11) Protection of Privacy

32. As was pointed out in the Commission's First Programme, there is a growing awareness of the lack of legal protection in the area of privacy. The Commission is at present studying the whole area of the protection of privacy. Preparation of the Working Paper has already been commenced.

(12) Review of the Dublin Police Acts and the Vagrancy Act

33. The Commission has for some time been engaged on a study of the law relating to minor offences concerned with public peace and order. The proposals will deal with the existing statutory law in this area, e.g. the Vagrancy Act and the Dublin Police Acts.

34. In addition, the Commission will examine other aspects of the criminal law, such as the law concerning larceny and kindred offences, the law as to acts involving fraud and dishonesty, the mental element in crime and the legal fault required to constitute a crime and criminal responsibility (including such matters as intoxication, necessity, duress and age). (For a comprehensive account of the aspects of the Criminal Law that the Commission proposes to examine, see pp. 7 and 8 of the First Programme of the Commission (December 1976 (Prl. 5984)).

PART IV

PARTICIPATION IN INTERNATIONAL MEETINGS(1) Conflict of Laws and International Sales of Goods

35. The Commission remarked in its First Programme that, in considering the rules of private international law in any particular branch of the law, it will take account of the various international conventions on the subject. Conflict of laws and international sales are subjects that are mentioned in the Programme. The Commission has been monitoring developments in these fields and has participated (by agreement with the Department of Justice and the Department of Industry, Commerce and Tourism) in various international meetings.

(2) Draft Convention on the Law Applicable to Contractual Obligations

36. The President of the Commission, Mr Justice Brian Walsh, has, since Ireland's accession to the European Communities, been a member of the E.E.C. Committee of Experts from the nine Member States. The Committee was set up by the European Commission to harmonise the rules of private international law within the European Communities. Since 1973 the President has been leader of the Irish delegation. The Committee has recently completed work on a draft Convention on the Law Applicable to Contractual Obligations; and it is expected that the draft will be adopted sometime this year.

37. A member of the Commission and a Research Counsellor

participated as the Irish representatives at a number of international meetings concerned with the following matters:

(a) Contracts for the International Sale of Goods

A member of the Commission has (by arrangement with the Department of Industry, Commerce and Tourism) been attending the annual Sessions of the United Nations Commission on International Trade Law (UNCITRAL) since 1977. The last Session attended was that at Vienna in 1979.

(b) Private International Law

By arrangement with the Department of Justice the Commission has been represented on the Irish delegation to the various Sessions of the Hague Conference.

(c) Uniform Law on Agency of an International Character in the Sale and Purchase of Goods

A Diplomatic Conference for the adoption of a draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods was held in Bucharest from 28 May 1979 to 13 June 1979 under the aegis of the International Institute for the Unification of Private Law (UNIDROIT). Ireland was represented at this meeting by a member of the Commission, who also attended the Special Commission at the Hague (from 25 to 29 June 1979) to deal with the preparation of a Protocol to the Hague Convention of 1965 on the Law Applicable to International Sales of Goods. At this meeting a preliminary draft Convention on the Law Applicable to Certain Consumer Sales was prepared for discussion at the Plenary Session of the Hague Conference due to be held in October 1980.

PART V

GENERAL(1) Offices of the Commission

38. The Commission has been hampered in its work by the lack of proper accommodation. The Commission's offices are located on the fifth floor of River House, Chancery Street, Dublin 7; and are quite unsuitable because of roofing faults, and faults in the ventilation system which result in wide variations in temperature (between 40° and 80° F) that are apparently uncontrollable. The building has two small lifts which are out of order at least once a week and often several times in the same week. In addition, the accommodation is too small. The Commission has no alternative but to seek more suitable accommodation.

(2) Superannuation of Certain Officers of the Commission

39. The Commission has, pursuant to section 12 of the Law Reform Commission Act 1975, prepared a scheme for the granting of superannuation rights to those of its whole-time officers who are not covered by the Superannuation and Pensions Acts. The scheme has been submitted for approval to the Department of the Public Service.

In addition, the Law Reform Commission has been designated under the Superannuation (Designation of Approved Organisations) Regulations 1979, an approved organisation for the purposes of transferring pension rights under section 4 of the Superannuation and Pensions Act 1963. This will render the Commission's proposed superannuation arrangements more

flexible and will allow the Commission to join, for superannuation purposes, in a network of designated bodies operating in the public service.

(3) Background Papers and Draft Working Papers

40. The Commission has produced a number of unpublished Background Papers and Draft Working Papers. The Commission is willing to place these Papers at the disposal of persons engaged in bona fide legal research. The Papers include the following:

- (1) The Domicile of Married Women in Common Law Jurisdictions: A Comparative Study - 2 volumes;
- (2) Draft Working Paper, Domicile of Married Women and Related Matters;
- (3) Draft Working Paper, Minors' Contracts;
- (4) Background Paper, The Liability in Tort of Minors and of Parents for the Wrongful Acts of their Minor Children;
- (5) Background Paper, The Present Law relating to Divorce a Mensa et Thoro, Restitution of Conjugal Rights, Jactitation of Marriage and Declarations as to Status;
- (6) Draft Working Paper, The Hague Convention on Recognition of Divorces and Legal Separations;
- (7) Background Paper, Artificial Insemination and the Law.

(4) Working Parties and Advisory Committees

41. The Commission did not set up any working parties or advisory committees during 1978 and 1979.

(5) Examination of Other Legal Systems

42. The laws in other common law jurisdictions and in civil law jurisdictions are examined by the Commission in various Working Papers. Every effort is made to ensure that the statement on the laws in each of these jurisdictions is complete and accurate.

(6) Assistance from State Departments

43. The Commission is grateful to those Departments in the State that have been of assistance to the Commission in carrying out its functions. The Commission wishes to thank especially the Department of Justice. It also wishes to thank the Office of Law Reform at Stormont, Belfast, with which it has excellent and fruitful relations.