

Half a Century of Change: The Journey of Law Reform

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Law Reform

Our purpose is to review Irish law and make proposals for reform. We also work on modernising the law to make it easier to access and understand. Our proposals are developed in a process which starts with a Consultation Paper. Consultation Papers examine the law and set out questions on possible changes to the law. Once a Consultation Paper is published, we invite submissions on possible changes to the law. We consult widely, consider the submissions we have received and then publish a Report setting out the Commission's analysis and recommendations.

Many of the Commission's proposals have led to changes in Irish law.

Our mandate is provided for by law

The Law Reform Commission was established by the Law Reform Commission Act 1975 to keep the law under independent, objective and expert review.

You can read all our publications at www.lawreform.ie.

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We make legislation more accessible to the public. We do this by offering three resources:

- **The Legislation Directory** is an online directory of amendments to primary and secondary legislation and important related information.
- **Revised Acts** bring together all amendments and changes to an Act in a single text that you can search online. They include selected Acts that were enacted before 2005, and all textually amended Acts enacted from 2005 on (except for Finance Acts and the Social Welfare Consolidation Act 2005. A revised Social Welfare Consolidation Act is in preparation).
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In addition, we are engaged in a continuation of the Statute Law Revision Programme which aims to identify obsolete legislation for repeal.

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FOREWORD

Frank Clarke*

President of the Law Reform Commission

The then Attorney General Declan Costello promoted the establishment, in 1975, of the Law Reform Commission. Despite coming close to disbandment at the hands of "An Bord Snip" during the recession, the Commission has now completed 50 years of work in seeking to meet the aims of its initiator. This collection of papers stems from the 50th anniversary conference organised by the Commission in September of this year. To those, we have added a paper written by Declan Costello at the time of the establishment of the Commission and two papers written at relevant times by my predecessors as President, Mr. Justice Ronan Keane and Ms. Justice Mary Laffoy. We have also added a paper written by our Head of Research, Siobhán Ní Chúlacháin, which was presented at a conference celebrating the 50th anniversary of the office of the Director of Public Prosecutions (itself also an initiative of Declan Costello) which complements the paper of the impact of the Commission's work in the field of Criminal Law delivered by Professor Liz Heffernan at our own conference.

It might be said that the broad theme of our conference, and thus of the papers which we publish here, was a reflection on the impact of the Commission on law reform over the past half century but also how we may develop our work into the future. In that later context, it is worth recording that our conference also included a vibrant discussion (chaired by Commissioner Eileen Roberts) exploring the experiences of similar commissions in other jurisdictions with legal systems close to our own. It is worth recording the significant international co-operation in the field of law reform as shown by the presence of senior figures from Northern Ireland, Scotland, England and Wales, and also from Australia. Indeed a meeting on the fringes allowed our colleagues from Northern Ireland (who have been suffering from severe resource difficulties in recent times and who have been exploring collaboration with the academic legal community as a partial mitigation) to learn of the very established and successful similar collaboration in Southern Australia.

* Mr. Justice Frank Clarke was Chief Justice of Ireland and is President of the Law Reform Commission.

The papers included in this volume explore the impact of the Commission in selected areas including criminal law as already mentioned, land law in the paper of Mr. Justice Bryan McMahon and the law relating to capacity as explored by former Commissioner Patricia Rickard Clarke. Many other examples could have been chosen.

Broader themes were reflected in the papers of Mr. Justice Maurice Collins on the interaction of the Constitution with law reform proposals and the role of the European Court of and Convention on Human Rights as explored by Ms. Justice Úna Ní Raifeartaigh. That later analysis also brings to mind the important fact that any proposal for reform must nowadays take into account our obligations under the Convention but also mandatory requirements of the law of the European Union. Indeed the Commission, in determining how to allocate its research resources, must always have regard to likely measures of EU Law. There is little point in coming up with reform proposals if there may soon be mandatory EU measures which either mandate the law in the area in question or greatly limit the extent of national discretion. The interaction of law reform with the legal academic world was also addressed by Commissioner Andrea Mulligan in a thought-provoking paper.

We were anxious that the conference should also focus on the important (and perhaps not widely publicly known) work which the Commission does on access to legislation. Former Commissioner Ray Byrne, who played a central role in developing this vital service, contributed an insightful paper on the topic.

Last but by no means least, we were honoured by the presence and papers from the Chief Justice (himself a former Commissioner who spoke of the early development of the Commission) and the Attorney General. With a view to the future, the Attorney's comments on how the Commission can interrelate with the practicalities of the legislative process provide much scope for discussion.

Finally, I would like to thank all of those who contributed to making the conference such a success - not only the contributors whose papers are produced here but also the panellists and session chairs. A particular thanks must go to the Commission's dedicated staff who went far beyond the call of duty in the behind the scenes organisation that makes everything look effortless on the surface. And then there are our brilliant young research staff who not only played a vital role in organisation but who also acted as research assistants to our contributors. I hope that this publication is a fitting tribute to all involved.

ADDRESS TO THE LAW REFORM COMMISSION'S 50TH ANNIVERSARY CONFERENCE

Attorney General Rossa Fanning¹

Introduction

President of the Law Reform Commission, Chief Justice, distinguished guests, friends and colleagues, may I begin by saying it is a real pleasure to be here this morning to celebrate the 50th anniversary of the Law Reform Commission.²

For half a century, the Commission has been at the forefront of legal innovation, a vital actor in assisting our laws to evolve with the times and reflect the values and needs of our changing society.

The Commission's dedication to consistency, improvement, and accessibility of the law has strengthened our statute book and deepened public trust in the rule of law in Ireland.

It is therefore a privilege for me to be here with you this morning to celebrate this milestone and to begin by acknowledging the work and commitment of the Commissioners and the staff of the Commission over that extended period.

I might also at this stage publicly congratulate Professor Oonagh Breen of the Sutherland School of Law in UCD, and Owen O'Sullivan of William Fry, the two galacticos whose appointments were announced just in time for this Conference and thank Mr. Justice Maurice Collins and Professor Andrea Mulligan who they are due to replace, if, indeed, it could ever be said that Maurice Collins or Andrea Mulligan are replaceable.

¹ Rossa Fanning S.C. is Attorney General of Ireland.

² This speech was written with the research assistance of Marianne Joyce, senior researcher at the Law Reform Commission.

History

Now, it was brought to my attention when considering what I might say to you this morning that the Chief Justice had already selected the low-hanging fruit of the history of the Law Reform Commission over the past 50 years.

That angle had occurred to me too, not least when I recently saw a grainy photograph on social media in tribute to the late Professor William Duncan with the other members of Ronan Keane's Commission from 30 odd years ago. But in any event, I decided that if he was going to speak about the past, my focus should instead be on the future.

But before I turn to address the future role of the Law Reform Commission, I would like to take a moment to reflect on why I am here today as Attorney General.

As many of you will be aware, there is a strong institutional connection between our two offices that emanates from the vision and the commitment to law reform of my predecessor and later President of the High Court, Declan Costello.

It was Costello who proposed the idea of establishing the Commission in May 1974, when he presented a Bill in the Dáil that would eventually become the Law Reform Commission Act 1975.

Costello was of course the penultimate person to serve as Attorney whilst a member of the Oireachtas. The final person, for the moment at least, was his successor John Kelly who briefly served as Attorney from May to July 1977 following Costello's appointment to the High Court.

Back in 1975, when the Commission was established, Costello aimed to create an institution that broadly resembled those already operating in other common law jurisdictions such as Canada and Australia, with the clear intention that it would operate under a broad and inclusive mandate.³

He stated that:

"The programme of law reform will not be confined to areas of law of a technical nature which might be of concern only to a limited group of people. It will cover areas of social policy, where legal

³ Finola Flanagan, "Programme of law reform must identify priorities" *The Irish Times* (17 December 2012) < <https://www.irishtimes.com/news/crime-and-law/programme-of-law-reform-must-identify-priorities-1.3490> > accessed 17 November 2025.

knowledge and expertise are necessary to assist in the formulation of reforming legislation.”⁴

Links With AGO

If Declan Costello was the midwife of the Commission, the legislation established a permanent institutional relationship with the Office of the Attorney General. When taking the Bill through the Seanad in 1975, Costello said that:

“The role of the Attorney General in the past has not been of any significance in the law reform processes. It is proposed that it will be different in the future.”⁵

Despite maintaining complete operational independence, the Commission collaborates with my Office in a number of different ways.

As a result of our statutory relationship, there are two specific capacities in which the Attorney General contributes to the Commission’s primary task, of “reforming the law and formulating proposals for law reform”.⁶

Firstly, when developing a Programme for Law Reform, the Commission consults with, among other stakeholders, the Attorney General to identify the areas of law that may require reform; and

Secondly, the Commission examines particular fields of law, upon the Attorney General’s request and a number of my predecessors have exercised this power on different occasions.

In addition to these statutory connections, our offices today collaborate through other initiatives as well. For example, the Commission works with my Office in updating the online Legislation Directory, which is an essential source of public information. We also collaborate each Summer on the public law access internship programme.

The institutional connection is also underscored by the contribution of a number of senior people who have moved to the Commission after serving in senior leadership roles in Merrion Street, and in that regard, I am thinking of course of

⁴ Taken from the statement issued by the Government Information Service on behalf of the Attorney General, as referenced in O’Connor, “The Law Reform Commission and the Codification of Irish Law” *The Irish Jurist* (1974) 14, at page 16.

⁵ Declan Costello, *Seanad Éireann Debates* (10 April 1975) vol 80 no 2 <https://www.oireachtas.ie/en/debates/debate/seanad/1975-04-10/13/> accessed 19 November 2025.

⁶ Section 4(1) of the Law Reform Commission Act 1975.

Richard Barrett, formerly Deputy Director General in the AGO, who is a full-time Commissioner and played an important role in organising the programme of events for the 50th anniversary and indeed Finola Flanagan, a former Director General who also served in the Commission.

Game Changing Projects

Since its inception, the Commission's work has shaped countless aspects of our legal system, including, to choose but a small number of examples:

In its Report on Non-Fatal Offences Against the Person in 1994, the Commission recommended reform of both common law and statutory rules on non-fatal offences.⁷ The Commission also recommended that most of the Offences Against the Person Act 1861 should be repealed and these recommendations were realised in the Non-Fatal Offences Against the Person Act 1997.

The Commission's Report on the 'Reform and Modernisation of Land Law and Conveyancing Law' in 2005 spanned almost 400 pages in length.⁸

After that Report was published, the Minister for Justice, Equality and Law Reform (with the Attorney General's approval) requested the assistance of the Commission to prepare a Bill to implement the recommendations fully, which work ultimately resulted in the enactment of the Land and Conveyancing Law Reform Act 2009.

A final example which I would draw your attention to is the Mediation Act 2017, which was influenced by the Commission's 'Report on Alternative Dispute Resolution: Mediation and Conciliation' from 2010.⁹

The Future Role for the LRC

But whilst these and numerous other examples may be cited to demonstrate the many historical successes of the Commission, when we look forward to the next 50 years, it seems to me reasonable to suggest that the Commission must continue to evolve, just like the law it seeks to reform.

⁷ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994).

⁸ Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004).

⁹ Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010).

It can't be controversial to say that any consideration of the future value of the Law Reform Commission must have significant regard to the process by which law is actually made in Ireland today.

Now that I have been in Government for getting on for three years, I have some reflections on that process.

With apologies to Otto von Bismarck who memorably recommended that those who like sausages or laws should not see either being made, it seems to me that our laws, by which I mean the Acts of the Oireachtas, can, at the level of principle, to borrow President Clarke's signature expression, be divided into four categories.

The first category is EU transpositions. Of course, the majority of these are effected by Statutory Instrument under the Regulation-making power contained in Section 3 of the European Communities Act, 1972. But many of the transpositions involve a degree of policy choice that, without rehearsing the voluminous case-law, renders it legally safer to transpose by means of primary legislation.

The obvious point is that realistically, the Commission cannot play much of a role in this category. Closely analogous is laws where a political decision is made to ratify other types of international agreement and the legislation follows that political decision. The legislation that is in drafting at present to facilitate ratification of CETA following the Supreme Court's decision in Costello is such an example.

This type of legislation is the ineluctable consequence of the political position of the State and the Commission's role is minimal.

The second category is what I might describe as regular fixtures. They include the Finance Bill, the Appropriation Bill, the Social Welfare Bill and the annual Health Insurance Bill that updates community rating calculations.

Our system is such that revised legislation in these areas is required to be passed annually. There are other examples of periodically required legislation such as the Houses of the Oireachtas Commission legislation that regulates the funding envelope for the Oireachtas, which must be enacted every three years.

Again, whilst there is plenty to say about the process by which we enact such legislation and that is something that my Office and I maintain dialogue with Government Departments about, it is not obviously fertile terrain for the Commission's involvement.

The third category is that of urgent policy initiatives that respond to political imperatives. For example:

- the Financial Emergency Measures in the Public Interest Act 2009 and the Central Bank and Credit Institutions (Resolution) Act 2011 were both enacted following the financial crisis in Ireland; and

- the Emergency Measures in the Public Interest (Covid-19) Act 2020 was enacted, as well as the Residential Tenancies Act 2020, were enacted in response to the Covid-19 pandemic.

Although it is, I can assure you, challenging to make policy and legislate at the pace that sudden events sometimes necessitate, the reality is that in some circumstances at least, it is unavoidable.

The problem with all of these circumstances is that the contemplative process of Law Reform and the work of this Commission is, to a significant degree, excluded.

So, that leaves us with the fourth and final, residual, category, which is what I might describe as the legislation that underpins slow-burn domestic policy.

So, for instance, if you were going to reform the law on Co-operative Societies it would be a multi-year project as it is never on a priority list because it is never a truly urgent concern.

Thus, the drafting of the Co-operative Societies Bill was first approved by Government in 2022. The pre-legislative scrutiny report was published in 2023, and the legislation has been in drafting ever since and is now at an advanced stage.

It is a good example of the proposition that in the legislative space, the urgent can sometimes be the enemy of the important.

That difficulty arises as a consequence of how modern Government operates here, and in truth, in many other jurisdictions.

On Wednesday, the Government approved and published the Government Legislation Programme for the Oireachtas Autumn Session that began this week and runs up to Christmas. In total, the Legislation Programme features 142 Bills (34 Bills for Priority for Publication; 33 Bills for Priority Drafting; and 75 other Bills for consideration).

It is an ambitious list and it would be impossible to do it all by Christmas as there are limitations in bandwidth at a policy formation level and at a drafting level but it is at least a statement of the Government's political intent and most of the items on it will see the light of day in the Houses of the Oireachtas, if not by Christmas then at some point in 2026.

The reality of the meetings leading up to the finalisation of the Government Legislation Programme is that Departments compete with each other on grounds of comparative urgency for inclusion of their Bills in the three different lists.

The "A List" is the Priority for Publication List. The "B List" is the Priority for Drafting List and the "C List" is the "All Other Legislation" List.

The problem with that tiered system is that if a Bill is never submitted as a priority by the sponsoring Department, it can languish in that third list for years; constantly being leapfrogged by more urgent projects.

If it is a complicated and lengthy project, particularly one that is incapable of being completed in the lifetime of the current Dáil then the political appetite and policy bandwidth in Government Departments may also be lacking.

So, when you take a step back, this to me is where the Commission can continue to add significant value to the formation of public policy.

When you look at it this way, it is not just desirable that the Commission has good institutional knowledge of Government in the form of Commissioners like Richard Barrett – it is in fact essential that the Commission has people within its ranks that have real experience of Government.

In this context, and with that in mind, I wish to offer three points for future consideration by the Commission, and in truth, for consideration by me in my future engagement with the Commission.

First, I think this milestone serves as an opportunity to reflect on the pace of the Commission's Work Programmes and to consider the ways in which the Commission might accelerate the work undertaken to ensure that the results remain relevant by the time of completion.

The Programmes of Law Reform are the primary means through which the Commission performs its function of keeping the law under review with the intention of reforming it.

At present, the Commission is working through the Fifth Programme of Law Reform,¹⁰ which received Government approval on 20 March 2019.

While a number of worthy projects were originally included in this Programme, the Commission, together with my Office, decided in the summer of 2023 to conduct a review of the projects outstanding on this Programme, and indeed the Fourth Programme, and to assess which projects would be brought to fruition.

Following this review, the Commission decided to discontinue a number of projects on the basis that they had been overtaken by events since the Programme had been approved in 2019.

For example, the proposed project on 'Perjury' had been overtaken by the Criminal Justice (Perjury and Related Offences) Act 2021; and the intended project concerning 'Structured Sentencing' had been overtaken by the Sentencing

¹⁰ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120-2019).

Guidelines and Information Committee that was established by the Judicial Council Act 2019.

While this review was a beneficial exercise, it only occurred over four years after the Fifth Programme had been approved; by which point, a number of developments had intervened.

This review serves as an important reminder of how quickly the law is changing and how the Commission must keep pace with these changes if its efforts are to remain purposeful.

Going forward, I think the Commission can take a number of steps to maximise efficiency and to ensure that future Programmes of Law Reform, including the Sixth Programme, are meaningful and impactful.

The Commission, I think, would benefit from conducting regular reviews, of these Programmes to track the progress of their related projects and determine the continued relevance of each one.

There is little value in dedicating years of work to an initiative, if by the time it is completed and the final Report is published, the project itself has become outdated.

Second, the Commission can continue to play a crucial role in simplifying and consolidating laws to make the legal system more accessible.

To maintain their effectiveness, laws must be simplified and codified overtime to reflect the evolving needs of society.

The statute book is already vast, and the enactment of new laws should not be regarded as a solution to every issue or challenge we are presented with.

At EU level, the European Commission is in the process of simplifying EU regulation to ensure that the EU remains competitive on the global stage, particularly in light of concerns expressed in the Draghi Report.

Similarly, in Ireland, there is an increasing realisation that there is a stifling effect of over-regulation and that it imposes real costs upon business.

Third, I think that there is a critical role for the Commission to play in how law is actually made, because at the moment it could in my view be suggested that the Commission is an overlooked and under-utilised resource in the legislative process.

Currently, the way the system is designed, it is difficult for the Commission to filter into the legislative process but there are ways in which the Commission can assist Government, particularly with respect to slower, longer-term policymaking.

Complex policy change is best achieved in a comprehensive and deliberate way and that is undoubtedly a process in which the Commission can continue to play a constructive role.

There is a tendency in Government to establish Inter-Departmental Groups to examine significant policy questions but where the underlying questions are primarily those of legal policy, I believe that there may be mechanisms worthy of consideration by which the Commission could play a greater role in assisting Government with policy formation.

Conclusion

So, I look forward to meeting again soon with you President Clarke and your newly constituted Commission to discuss these matters, but today we celebrate a remarkable legacy of progress and I am confident that we can expect a future where the Law Reform Commission remains a guiding light for legislative reform.

THE HISTORY OF THE LAW REFORM COMMISSION

Chief Justice Donal O'Donnell*

It is a pleasure to be invited to speak today and to address the history of the Law Reform Commission over the past fifty years.¹ That is, however, a more than usually daunting task not just because it has already been comprehensively and elegantly addressed by two distinguished former Presidents of the Law Reform Commission, both Ronan Keane in 2005 on the 30th anniversary of the establishment of the Commission, and by my much respected colleague, Mary Laffoy, in her Brian Lenihan lecture in 2019, but also because I suspect I may have been chosen for this task as I am one of the decreasing band of people who were actually in Farmleigh House in 2005 and I am so old that my legal career broadly parallels the life of the Law Reform Commission.

It is, however, a pleasure to be here not least because I think I can claim that I am the sole example in the history of the LRC of what is otherwise that staple of the legal profession: the family firm. My father was a Commissioner between 1997 and 1999, and I served on the Law Reform Commission both as a Senior Counsel and Judge between 2005 and 2012, a time which I hoped would be described in the conference brochure as a golden age, but which I now discover is regarded as one of the lowest points of the Law Reform Commission's existence, when of course it faced possible abolition. It does seem particularly appropriate at this point to emphasise that enduring principle of research: that correlation is not, however, causality.

However, as I say the history of the Commission has been largely told, so I hope I will be forgiven for providing a somewhat thematic and impressionistic account.

The Starting Point

First, the starting point of a statutory body should normally not be too difficult to find, in this case the Law Reform Commission Act of 1975 which established a Commission to "keep the law under review" and "undertake examinations and

* Mr Justice Donal O'Donnell is Chief Justice of Ireland and a former Law Reform Commissioner.

¹ This speech was written with the research assistance of Marianne Joyce, senior researcher at the Law Reform Commission.

conduct research with a view to reforming the law and formulate proposals for law reform.

The new Commission was largely and correctly seen as the brainchild of the then Attorney General, Declan Costello, and unusually, since he was a sitting TD, he was able to pilot the Bill through the Oireachtas, so we know more about his thoughts and ambitions for the LRC than might otherwise be the case.

However, most accounts of law reform in Ireland take a much earlier starting point, correctly in my view. Indeed, Ronan Keane went back to 1828 and the speech of the reforming Lord Chancellor, the Scot, Lord Brougham, who said:

“It was the boast of Augustus...that he found Rome of brick and left it at marble...But how much nobler will be our Sovereign’s boast, when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter – found it the patrimony of the rich – left it the inheritance of the poor; found it the two edged sword of craft and oppression – left it the staff of honesty and the shield of innocence.”²

This starting point was much more than a characteristically elegant historical illusion: if you can ignore the early Victorian language, the sentiment is strikingly modern, and the ambition expressed is yet to be achieved.

This then is the first theme: the idealism and ambition involved in the work of law reform, and the fact that it was and is the idealism of lawyers and the fact that it is a shred belief of lawyers irrespective of their political outlook. It was A.V. Dicey, himself no wild eyed radical, who said that the function of a lawyer was not simply to know what the law was yesterday. I think he was saying that any competent lawyer, whatever their disposition, area of practice, politics or world view, had to have an opinion on what the law should be tomorrow.

Statute law reform of the 1960s

The next development worth noting, is the flowering of law reform in the Department of Justice in the Statute Law Revision section of the Department of Justice in the early 1960s, associated with the then Minister for Justice, Charles Haughey, and his successor, Brian Lenihan, and particularly, with Roger Hayes then Assistant Secretary, who was to become a member of the Law Reform Commission in 1977 until 1984. Among the activities of this section of the Department of Justice

² Lord Brougham of Vaux, House of Commons Debates (7 February 1828) vol 18 col 247 <<https://hansard.parliament.uk/Commons/1828-02-07/debates/ea35061b-544e-45cf-8b5f-b4cad6694458/StateOfTheCourtsOfCommonLaw>> accessed 19 November 2025.

were the Defamation Act 1961, the Civil Liability Act 1961, the Guardianship of Infants Act 1964, and of course the Succession Act 1965. It is part of a programme in respect of which the then Minister Mr. Haughey said ambitiously, that “we now have a clearly defined programme of law reform which will be pursued consistently and systematically until we have provided a system of law which is in all respects just and equitable as well as being an accord with the best traditions and ideals of our people”.³

This then is a second and perhaps sobering theme. You do not need a Commission to reform the law. Significant and dramatic changes to the law can be effected and policy decisions taken within Government without the barriers to persuasion and implementation which a Commission faces, and therefore, proposals are more likely to reach the statute book. This highlights the fact, that what any law reform body can add is independence, authority because of its membership and, it is hoped, an impressive research capacity, and permanence with a developed reputation for excellence.

Establishment of the Law Reform Commission

In 1975 the Law Reform Commission was established, but it was not so much a child of its time, as of an earlier decade. In 1975 Ireland was a war-torn island and suffering severe economic shocks in the aftermath of the oil crisis. The zeitgeist of the Law Reform Commission harks back a decade earlier to a more optimistic time. In his speech in the Dáil Declan Costello spoke the recent establishment of Commissions in Australia, Canada, Scotland and England and Wales. It is quite clear from the Dáil debates that close attention was being paid to the precedent of the earliest established of these Commissions in England and Wales, and it was worth looking at that period then in a little more detail. The establishment of the Law Commission in England and Wales was closely associated with the reforming Labour Lord Chancellor in the new Wilson Government of 1964, Gerald Gardiner. In 1963 he had authored a pamphlet with Andrew Martin (later to become one of the first Law Commissioners) entitled *Law Reform Now!*⁴

It is difficult now to recall the atmosphere of that period particularly in the United Kingdom which had an inevitable overflow into this country. It was characterised by a confident belief in endless economic growth and developments in technology and labour-saving devices, which would make life much easier, and which would incidentally move politics decisively away from the old class struggle of the early twentieth century, and towards issues of personal development and quality of life

³ Haughey, “Law Reform in Ireland” (1964) 13 *International and Comparative Law Quarterly* 1300, at page 1300.

⁴ Gardiner and Martin, *Law Reform Now!* (Victor Gollancz, 1963).

and the old ideological answers would no longer suffice. It was encapsulated in a famous speech made by Harold Wilson to the Labour Party Conference of 1963 where he said that the new Britain was going to be forged in “the white heat” of a scientific revolution. And that approach was itself heavily influenced by the example of the Kennedy administration in Washington, which was both youthful and modernising.⁵ It drew on the best brains from universities, and industry, the so-called ‘best and brightest’. Their defining approach was technocratic and reflected a belief that accurate research and intelligent analysis could provide a correct answer to any problem. It was of course expected that the answers provided would be broadly progressive, but that was a consequence of the method and not driven by ideology.

This explains why the establishment of the Law Commission in England and Wales was one of the very first pieces of legislation introduced by the new Labour Government. Speaking in the House of Lords, Lord Gardiner said

“...We are on the threshold of a scientific revolution.... We must all be more efficient. Shall not the law be expected to display that degree of efficiency that we expect in any other walk of public life?”⁶

That ambitious technocratic approach, the scientific method, efficiency, a willingness to learn from business and industry is what drove the belief in law reform. It is of course true that the world proved a lot more difficult than the youthful technocrats of the early 1960s anticipated,⁷ and in the United States, the United Kingdom and in Ireland we learned some bitter lessons, but it remains even in a scaled back form, part of the core justification for any exercise in law reform: that good research, and intelligent analysis, will provide a better answer which will be self-evident to everyone irrespective of their occupation or political beliefs.

Lord Gardiner’s speech also referred to another theme. He said with some surprise, that he noticed that although the legal profession was, he considered, extremely conservative, the law reform project was strongly supported by all young lawyers whether they be labour, liberal or conservative. I do not know if it is true to say today that all lawyers are conservative or that these labels can usefully be applied, but the fact that there was and remained broad support within the legal profession whatever the area of expertise or political allegiance, is itself an important theme of successful law reform. That is a theme which has been reproduced in this

⁵ See Sandbrook, *White Heat, A History of Britain in the Swinging Sixties*, (Abacus, 2009).

⁶ Lord Gardiner, House of Lords Debates (1 April 1965) vol 264 col 1156 <<https://hansard.parliament.uk/Lords/1965-04-01/debates/8a792889-771c-4b3a-a0b9-32c83d243264/LawCommissionsBill>> accessed 19 November 2025.

⁷ See Halberstam, *The Best and the Brightest*, (Random House, 1972) recounting the impact of the approach of the cadre of brilliant young recruits in the Kennedy and Johnson administrations which was to have disastrous consequences in the Vietnam war.

jurisdiction. I appreciate, that to modern eyes, Declan Costello and Charles Haughey may appear to come from the same background - they were certainly pale and male - but in my view, it is difficult to imagine two people who differed so significantly in political approach, outlook, and temperament and yet, both were champions of law reform in Ireland.

Debate on the English Law Commission highlighted two issues that have remained relevant and to some extent unresolved over the past fifty years. First, whether the membership of the Commission should be limited to lawyers, or whether it should involve non-lawyer members with expertise in other disciplines such as sociology or economics, and second, the related question, whether the Commission should focus on what might be described as 'lawyers' law' - technical issues where there was a consensus that the existing law was ineffective, or should consider broad policy issues. Lord Wilberforce expressed the view that law reform was much too serious a matter to be entrusted to lawyers, but in the event the Law Commission Act provided that the membership of the Commission would all be legally qualified. Eleven years later, Declan Costello in the Dáil adopted Lord Wilberforce's language, and expressed his view with which Mary Robinson agreed, that the Commission should also include non-lawyers with expertise in other areas, and that was provided for in the Act. However, perhaps less is made of this over the lifetime of the Commission, than might have been anticipated in 1975. This may have been because of a range of factors. In 1975 it was clearly anticipated that one of the areas the Commission would particularly focus on was the field of family law where rapid social change was occurring, and there was a clear disconnect between social reality and legal provisions. In that context, it made sense to have, for example, a social scientist with expertise in the area, but if the menu the Commission was to address was much more varied, it would be difficult to find somebody with a particular skill fit to contribute across the legal landscape, but the provision in the Irish Act permitting non lawyers to be appointed Commissioners remains an important and distinctive one.

The Early Commission

The first Commission was a very distinguished body. In addition to the first non-lawyer, Dr. Helen Burke of UCD, it was composed of Charles Conroy, the former President of the Circuit Court, Martin Marren, a prominent solicitor, and two giants of Irish law, Brian Walsh, then the Senior Ordinary Judge in the Supreme Court as President, and Professor Robert Heuston, the then Regius Professor of Law in TCD. The composition of the Commission was its own indication of the scale of its ambition, and the hopes that were being expressed for it.

It is now clear however that the first Commission did not fulfil all the ambitions it had intended to. There may be a number of reasons for this. First, as the experience in the UK and US showed, it was perhaps naïve to think that there was a perfect technocratic solution for all problems, which could be identified with a little effort

by the right people. Second, the timing was much less propitious in 1975 than it had been in 1964. Ireland was facing very difficult economic circumstances and distracted by the bloody conflict in Northern Ireland, and the corresponding security issues in this jurisdiction, and it is perhaps possible to say in retrospect, that the choice of topics focused on by the Commission may not have supplied the quick confidence - reinforcing wins that might have established the Law Reform Commission's position more securely. Furthermore, in demanding economic times it is not difficult to persuade the funding departments to reduce the level of support. Accordingly, there was a period during which the Commission had no offices, and lost members, who were not replaced, and it was staffed only by its research counsellors. It was some compensation however, that those counsellors were people of such ability such as William Binchy and Bryan MacMahon.

In 1982/3, it was seriously considered that the Commission should simply be dissolved. The then Attorney General John Rogers was, however, a supporter of the idea of the Commission, and it was partly due to his efforts that it was rebooted and as it were, relaunched. This period shortly after its establishment was the Law Reform Commission's first brush with mortality but, as it happens not its last or most serious. However, even this early phase of the Commission shows that Ireland is a small country with a small legal community. Individuals had a significant effect, both positive and negative.

The Commission developed slowly over the following years and produced important reports. At a time when Irish legal publishing was dormant to non-existent, the Law Reform Commission's reports were a valuable source of authoritative statements of the law even if not all the reports were implemented. It is interesting however, that during this period, the experience of other Law Commissions was quite telling: the Commissions in Australia and Canada were abolished, in part because it appeared that incoming governments did not approve of the extent to which the Commissions addressed contested issues of policy.

This illustrates a different theme. The choice is arguably not a binary one between policy issues and technical lawyers' law. It is arguable that there is a continuum from some technical and practical legal issues extending to questions of almost pure policy. It might be said that for a Commission to be effective, it must find the sweet spot and avoid the extremes concentrating on uncontroversial issues, which could be resolved by either the common law decisions of the courts or simple statutory amendment on the one hand, and contestable and controversial policy issues, in respect of which lawyers have no particular expertise or status on the other. Such controversial policy issues can be dealt with within the normal political sphere and are arguably more properly dealt with there and the function of the law might be to simply give effect to a democratic choice. This is a further theme: effective law reform combines technical adjustment and some element of policy, and a Commission, to be effective and accepted, must find the balance point between the two.

The Golden Age

The golden age of the Law Reform Commission coincides with the membership in the Commission of a new wave of Commissioners, and at the risk of embarrassing them I would highlight in this respect the impact of Ray Byrne director of research, and subsequently a commissioner Patricia Rickard Clarke who was a commissioner for 15 years between 1997 and 2012 – and in this case correlation is causality. Patricia had considerable administrative and organisational skills as well as her legal training and had a commitment to reform of the law particularly on issues related to the elderly, vulnerable adults and important though neglected issues of property law such as multi-unit developments. This energetic phase of the Commission coincided with the Celtic Tiger, and the Commission found it relatively easy to expand, to attract further staff, and to move premises.

However, this very success and expansion made it a bigger target when the financial crash arrived, and perhaps the lowest point in the Commission's history came when it discovered that it had been included in the 2009 McCarthy report – the so called An Bord Snip Nua– on public sector bodies in respect of which drastic financial savings were to be made. In the case of the Commission, it was recommended that it should be effectively abolished, on the basis that the law reform function was capable of being dealt with in-house in the relevant government departments. This proposal came as a considerable shock to the Commission, not least because it had been made without any engagement with the Commission or, it appears, any understanding of its work. This shows perhaps that the strength of a body is often its weakness. The independence of the Commission, and the fact that its point of contact with the Government is the Attorney General's office, is a necessary part of the Commission's structure. However, it also means that it is far removed from central government, and more vulnerable when the State comes under severe financial pressure and when outlying areas are among the first to be targeted.

The then Attorney General, Paul Gallagher, was very instrumental in persuading the Government not to abolish the Commission. This was a significant achievement, given the pressure the State was under at the time, and the strong imperative to avoid any exceptions to a package of cutbacks. It also highlights another important theme, which is the role of the Attorney General. All Attorneys have, I believe, been supportive of the Commission, but at critical times, the intervention of Declan Costello, John Rogers, Paul Gallagher in their different ways, were vital to the establishment and continued existence and success of the Commission. So, no pressure Attorney!

Changes and the Future of the Commission

The Commission survived and stabilised, came off life support and is now once again producing important reports. There have of course been significant changes

in the landscape since 1975 and indeed 1964. Less law reform is now effected by common law decisions of the Courts. Government departments are now more focused on research and policy. The practice of law has shifted from fact based private law disputes to issues of public law. Judges, particularly in the superior courts, tend to be more occupied with issues of law. Conversely, academic lawyers are less focused on changes to the existing law and both academic and practising lawyers have become more specialised, as have other disciplines. There is an increasing demand for speedy answers. These are all challenges, and the old answers will not suffice. It seems unlikely that a Senior Ordinary Judge in the Supreme Court would become a full-time President of the Law Reform Commission or that the Regius Professor would become a commissioner. On the other hand, increased health and longevity and a reduced retirement age produces more youthful and energetic retirees and it is a personal pleasure to note that there is a life after the Supreme Court!

A Law Reform Commission in the next 50 years must adapt to all these changes, discard some old assumptions and practices and explore new routes or rediscover old and unused pathways. But what Declan Costello said in 1974 remains true:

“It is necessary to have an agency for law reform capable of reviewing the law as a whole; it is desirable that the agency should be at once impartial and expert; it should be composed of persons engaged full-time in the task of law reform; it should be able to consult freely with members of the legal profession and obtain the assistance of outside experts from other disciplines; it should command respect; it should work in close co-operation with the Government and through the Government with Parliament.”⁸

Lord Brougham’s clarion’s call in 1828 remains vital, and inspirational: find the law dear and leave it cheap, find it a sealed book and leave it a living letter, find it the patrimony of the rich and leave it the inheritance of the poor, find it a sword of craft and oppression, and leave it the staff of honesty and the shield of innocence.

It is still a task worth devoting ourselves to.

⁸ Declan Costello, Dáil Éireann Debates (4 February 1975) vol 277 no 10 <<https://www.oireachtas.ie/en/debates/debate/dail/1975-02-04/30/>> accessed 17 November 2025.

THE IMPACT OF THE ECHR ON LAW REFORM IN IRELAND – A PERSPECTIVE FROM STRASBOURG

Ms. Justice Úna Ní Raifeartaigh*

Introduction¹

I was a young research assistant in the Law Reform Commission from 1988-1991, and indeed I was in the first intake of (three) junior research assistants by that body.² At the time, the Commission seemed to me a long-established venerable institution, but looking back in the year of its 50th birthday, I now realise that it was actually quite a young institution at the time, only 13 years old. With the benefit of hindsight, I can now also see that I started to work there at the dawn of the impact of the technological age on legal research. This meant that in conducting comparative research for the Commission, I had access to the legal search engine Lexis as well as exploring the jurisprudence of the European Court of Human Rights via Hudoc. I remember, among other things, animated discussions about the decision in *Soering v United Kingdom*³ in the corridors of the Commission, which was at that time situated in a building on the corner of St. Stephen's Green at the bottom of Harcourt Street. This was probably the first time that the role and caselaw of the European Convention on Human Rights really started to feature in my thinking, and it sparked an interest that I maintained throughout my subsequent legal career in Ireland.

Thirty years later, in July 2024, I had the honour of being elected as a judge of the European Court of Human Rights. I have now spent a mere 14 months or so working as a judge in the Court, but despite the brevity of this period, my perspective has undergone a radical shift. It is not just that I am no longer a

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¹ This speech was written with the research assistance of Caoilin Young, researcher at the Law Reform Commission.

² Hitherto the Commission had employed senior researchers only, and this was its first foray into hiring junior research assistants straight out of university. Gráinne de Búrca, Rachel Hussey and I were the first three to be hired in that capacity, but there have been hundreds of research assistants since then.

³ *Soering v United Kingdom* App no 14038/88 (ECtHR, 19 January 1989).

member of the Irish judiciary, and am now “the judge elected in respect of Ireland”, to use the formal title, in an international court. Rather it is that when one moves from Dublin to Strasbourg, one’s perspective undergoes a radical shift from one which views the Convention from the point of view primarily in terms of its impact on Irish law to one which views its role in the context of a web of forty-six different and widely varying jurisdictions, stretching from Finland to Malta and from Iceland to Azerbaijan. I hope to bring a little of this altered perspective to you today. If we think of the law of the Convention as a body of water, a river, perhaps, like one the many flowing through the beautiful city of Strasbourg and which are fundamental to its life and character, I have moved from one riverbank to another. Where once I looked at the river from the Irish riverbank, I now look back at Ireland from the opposite side.

Assessing the ECHR’s Influence on Law Reform in Ireland

(To paraphrase “The Life of Brian”) What has Strasbourg ever done for us?

Before doing so, however, I will touch briefly upon the influence of the Convention on the development, and reform of, Irish law. I do not propose to dwell on this because this audience, full of legal experts, needs no reminding of how the Convention and the Court’s interpretation of it has had a significant influence on the Irish legal landscape. It takes only a quick roll-call of some familiar litigant names (*Lawless*,⁴ *Airey*,⁵ *Norris*,⁶ *Open Door Counselling*,⁷ *McFarlane*,⁸ *Independent Newspapers*,⁹ *A, B and C*,¹⁰ *O’Keeffe*)¹¹, and a moment’s reflection on the change brought about by those cases, to appreciate that there has been an inverse relationship between the small number of Irish cases in Strasbourg and their impact on the Irish legal system, and indeed, Irish society. And, of course, it is not merely the Irish litigants who have had an impact; cases from other countries have had

⁴ *Lawless v Ireland (No. 3)* App no 332/57 (ECtHR, 1 July 1961).

⁵ *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

⁶ *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988).

⁷ *Open Door and Dublin Well Woman v Ireland* App no 14234/88; 14235/88 (ECtHR, 29 October 1992).

⁸ *McFarlane v Ireland* App no 31333/06 (ECtHR, 10 September 2010).

⁹ *Independent Newspapers (Ireland) Limited v Ireland* App no 28199/15 (ECtHR, 15 June 2017).

¹⁰ *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010).

¹¹ *O’Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014).

equal if not more impact; let us think of *Winterwerp* and mental health detention;¹² *Murray* and adverse inferences in criminal legislation;¹³ *Salduz* and the right of access to a lawyer during police custody,¹⁴ to select just a few, somewhat random, examples.

Another interesting way, perhaps, to think of the breadth and depth of the impact of the ECHR is to reflect on the wide variety of mechanisms by which its impact has been infused throughout the Irish legal system, which include (i) Legislation;¹⁵ (ii) Decisions of the Irish courts;¹⁶ (iii) Changes in police practice;¹⁷ (iv) Executive action such as the establishment of the civil legal aid scheme, influence on the prison building programme, or the establishment of a compensation scheme after the *O’Keeffe* case.¹⁸ One might even include the holding of the constitutional referendum on the creation of the Court of Appeal, the need for which had been partly highlighted by the ‘length of proceedings’ line of caselaw in Strasbourg.¹⁹ Of course, one of the most important areas where the influence of the Convention has been felt was its role in the signing and acceptance of the Good Friday Agreement; and indeed, its role prior to that in bringing an international perspective to bear on cases arising from the conflict in Northern Ireland.²⁰ Moreover, it is worth remembering the influence of Council of Europe bodies other

¹² *Winterwerp v the Netherlands* App no 6301/73 (ECtHR, 24 October 1979).

¹³ *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 8 February 1996).

¹⁴ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

¹⁵ Again, some random examples include mental health legislation after decisions such as *Croke v Ireland* App no 33267/96 (ECtHR, 21 December 2000) and *D.G. v Ireland*, App no 39474/98 (ECtHR, 16 May 2002) and the Criminal Law Sexual Offences Act 1993 after *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988).

¹⁶ Irrespective of whether ECHR law was merely an ‘influence’ when it was purely at an international level (e.g. Costello J and proportionality in *Heaney v Ireland* [1994] 3 IR 593 or post-2003), via the mechanisms of the European Convention on Human Rights Act 2003, after that year; here one might use *Simpson v Governor of Mountjoy and others* [2019] IESC 81 and prison conditions as an example.

¹⁷ Examples include no longer using internment after *Lawless v Ireland (No. 3)* App no 332/57 (ECtHR, 1 July 1961) or section 52 of the Offences against the State Act, after *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000); and the new practice of allowing solicitors to be present during police interviews if requested by the client, after *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

¹⁸ *O’Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014); see also Government of Ireland, *O’Keeffe v Ireland Action Plan* (Department of Education and Youth, 30 July 2025).

¹⁹ Including cases like *McFarlane v Ireland* App no 31333/06 (ECtHR, 10 September 2010) and *Keaney v Ireland* App no 72060/17 (ECtHR, 30 April 2020).

²⁰ For example, *Lawless v Ireland (No. 3)* App no 332/57 (ECtHR, 1 July 1961), *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000) and *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 8 February 1996).

than the Court, such as the Committee for the Prevention of Torture,²¹ and GREVIO; and materials other than the Convention itself, such as Council of Europe Recommendations on numerous topics and other Conventions such as the Istanbul Convention on Domestic Violence.

Given that we are here today to celebrate a Law Reform Commission birthday, it is also worth pausing to note the pattern of influence of the ECHR on Commission Consultation Papers and Reports across the years.

But Let's not Get Carried Away

On the other hand, it is also important not to overstate the influence of the Convention in the Irish legal system, and equally important not to reduce the story of its influence in Ireland to a simplistic one of single-factorial cause and effect. Legal change in Ireland over the last 50 years has been the product of a multiplicity of influences. To begin with, let us never underestimate the influence of the evolution of Irish social and political opinion over time, itself the product of many influences, including exposure to international radio and television, accession to the European Union, the development of technologies, and greater opportunities for travel abroad, to name but a few. And then, of course, there are other key *legal* influences, foremost among them being the Constitution and the European Union, but without forgetting other international instruments ratified by Ireland as well as the caselaw and legislation of other common law jurisdictions, which has long been a feature of Irish legal analysis.

There is now an interesting relationship between the Constitution, the EU Treaties and the Convention with cross-fertilisation occurring in many directions around the triangle.²² This is all the more so since the coming into force of the Charter of Fundamental Rights of the European Union and likely to be deepened further if,

²¹ See the latest report on Ireland from the Committee for the Prevention of Torture, *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 31 May 2024* (Strasbourg, 24 July 2025, CPT/Inf (2025) 22).

²² See the online blog of Prof. Dr. iur. Johan Callewaert, a recently-retired Registrar of the ECtHR, for ongoing discussion of various aspects of the EU-ECHR relationship and useful further references in this context. The blog can be accessed at "Prof. Dr. iur. Johan Callewaert" <<https://johan-callewaert.eu/>> accessed 10 November 2025. See also O'Leary, "The EU Charter Ten Years On: A View from Strasbourg" in Bobek and Adams-Prassl (eds) *The EU Charter of Fundamental Rights in the Member States* 1st ed (Bloomsbury, 2020); O'Leary, "Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU" (2016) 56 *Irish Jurist* 4; Lenaerts, "The ECHR and the Court of Justice: Creating Synergies in the Field of Fundamental Rights Protection" (26 January 2018) <https://www.echr.coe.int/documents/d/echr/speech_20180126_lenaerts_eng> accessed 10 November 2025.

and when, the EU accedes to the Council of Europe.²³ The Constitution-Convention relationship has been frequently the subject of attention in Irish Supreme Court decisions, with our apex court sometimes criticising the over-readiness of Irish legal practitioners to rely on Convention cases and arguments to the neglect of constitutional ones.²⁴ This may be a product of what I have elsewhere described as an enthusiasm for *prêt-à-porter* jurisprudence; it is easier for a busy practitioner to take a developed line of authority already hanging on the rail of another court's jurisprudence than to go to the time and trouble of stitching together a novel argument from local fabrics. However, such rebukes notwithstanding, there is little or no evidence of judicial nationalism or resentment of the Convention's incorporation into Irish domestic law.

It is interesting to note that Ireland's attitude to the Convention was positive from the outset.²⁵ In his monumental book, *Human Rights and the End of Empire*, Brian Simpson provided a detailed and fascinating account of the immediate background to the drafting of the Convention as well as the drafting process itself. His emphasis is on the UK approach to the Convention in the immediate post-War era, but it is instructive about the attitude of many other countries, including that of Ireland. It is a careful historical record which quickly dispels what is perhaps another 'easy narrative', namely that of idealistic, post-war politicians metaphorically linking arms in a spontaneous and collective urge towards justice, tolerance and peace. On the contrary, what emerges from his description is a myriad of political manoeuvrings by countries driven by their geopolitical self-interests, and – as regards some countries including the UK – a sense that the 'human rights' project was 'for others'; and a corresponding sense of shock when it was applied to themselves, for example in the first Cyprus case.²⁶ The Irish historical experience in the preceding centuries had been different, however; and the young Irish State, having been in the early years excluded from the United Nations by reason of Russia's veto, was anxious to support the Convention and sent a top-level delegation to the negotiations. This included, of course, the

²³ See the Steering Committee for Human Rights, *Interim Report to the Committee of Ministers, for information on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the revised draft accession instruments in the appendix* (CDDH, 4 April 2023).

²⁴ An example of a Supreme Court decision containing such criticism is *Clare County Council v McDonagh* [2022] IESC 2, [2022] 2 IR 122; see paragraphs 45 – 64 of the judgment of the Court, delivered by Hogan J.

²⁵ For more in-depth analysis of Ireland's relationship with the Convention, see O'Donnell, "The ECHR Act 2003: Ireland and the Post-War Human Rights Project" [2022] 6(2) *Irish Judicial Studies Journal* 1 and O'Malley, "Ireland and the European Court of Human Rights" [2023] 7(2) *Irish Judicial Studies Journal* 10.

²⁶ See Simpson, *Human Rights and the End of Empire* (Oxford University Press, 2001) at Chapter 18.

celebrated Nobel prize-winner, Sean McBride.²⁷ Attitudes to the Convention, then, as now, were and are hugely conditioned by a country's own history and culture.

The Perspective from Strasbourg

With this last thought still in mind, let us turn, then, to the perspective on Ireland from Strasbourg.

The first thing that strikes you when you are an Irish judge in Strasbourg is the paucity of cases from Ireland. Very few Irish cases currently come to the Strasbourg court. Since I have been in office, none have been brought to Chamber (7 judges) or Committee (3 judges) level, and only a small number were dealt with under the Single Judge procedure and deemed inadmissible. There is in existence, of course, the pending interstate case brought by Ireland against the United Kingdom concerning the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023,²⁸ but what is singularly absent is an ordinary, day-to-day, week-to-week or even month-to-month diet of Irish cases. The Strasbourg court operates a system of lawyer teams which is organised country by country. There is a Unit Bulgaria, a Unit France, a Unit Greece and so on. The size of the team is in proportion to the number of cases concerning that country (and therefore, the volume of work generated for the Court by that country). Because of the small number of Irish cases, Ireland does not have a self-standing Irish team. Moreover, the Irish judge works almost exclusively on cases concerning other countries. I am currently in Section III of the Court which deals with the following countries: Greece, Estonia, Azerbaijan, Albania, Bulgaria, Ireland, Serbia, Andorra, and Slovenia. My docket concerns (weekly) Chamber and Committee cases from those countries, (less frequent) Grand Chamber cases from any of the 46 countries, and Single Judge cases from a country other than Ireland and which, in my case, is also outside the Section group of countries. The small number of cases concerning Ireland may be contrasted with the figures for certain other countries; for example, while Ireland at time of writing has 4 pending applications, Turkiye has over 21,000 applications, Ukraine over 7,000, Romania, almost 4,000, Greece, Italy, Poland and Azerbaijan in or about 2,000 each. There are approximately 8,000 cases concerning Russia which predate its expulsion in 2022. This snapshot of the Court's caseload is in itself an interesting indication of the relatively low visibility of Ireland on the Court's radar of worries.

There are many reasons for the low number of Irish cases in Strasbourg, however, and while some of this state of affairs is indeed, and thankfully, attributable to the fact that Ireland has a healthy and well-established democracy, a large of part of it

²⁷ See Kennedy and O'Halpin, *Ireland and the Council of Europe - From isolation towards integration* (Council of Europe, 2000).

²⁸ *Ireland v United Kingdom* App no 1859/24 (17 January 2024).

stems also from the strength of Irish constitutional protection for similar or overlapping rights. Domestic remedies for breaches of constitutional rights are of course stronger than those provided for by the 2003 Act in respect of Convention rights, and the “sequencing” approach whereby constitutional arguments are addressed before Convention ones is also important in this regard.²⁹ A separate but related point is that Irish judges have considerable experience in the area of judicial review and have had little difficulty adopting Convention-style analysis, unlike the judiciary of some countries whose different legal history has not furnished them with much experience in this particular skill-set. This in turn means that Irish court judgments are well-placed in the context of the current Strasbourg emphasis on subsidiarity,³⁰ and “process-based review”.³¹

However, low case numbers are not always a guarantee of a happy relationship between the Strasbourg court and public opinion in a particular country. One has only to cast a glance across the Irish Sea to see this; at the time of writing, some political parties in the United Kingdom have made exiting the Convention system a cornerstone of their party policy, despite the fact that there are very few findings of violation against that jurisdiction.³² In contrast, and for the moment at least, it

²⁹ For example, *Carmody v Minister for Justice* [2009] IESC 71.

³⁰ The principle of subsidiarity, which was always at the core of the Convention system, was formally inserted into the Preamble of the Convention by Protocol No 15. This principle imposes a shared responsibility between the State Parties, the Court and the Committee of Ministers, but the primary responsibility to ensure the application and effective implementation of the Convention lies with the State Parties and national authorities and, in particular, courts.

³¹ There is a large academic literature on these concepts. See, as an example, Spano, “The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law” (2018) 18 *Human Rights Law Review* 3, 473 for an overview of the Court’s shift from what he describes as a “substantive embedding phase” to a “procedural embedding phase” with its emphasis on “process-based review” in the caselaw. For an analysis of the extent to which this “procedural turn” has in fact impacted at the level of caselaw in the ensuing years, see Arnardóttir, “The “procedural turn” under the European Convention on Human Rights and presumptions of Convention compliance” [javascript:](#) (2017) 15 *International Journal of Constitutional Law* 1, 9. Discussion of process-based review continues, and particularly in relation to whether and how it should function in the context of a State which has major democratic problems or which fails to respect the Court’s judgments.

³² The ECtHR has delivered 331 judgments finding at least one violation of an ECHR right against the UK since its first judgment against the UK in 1975. This represents 1.5% of the Court’s 22,784 judgments which have found at least one violation against any State since its inception in 1959. In 2024, the UK also continued to have the lowest rate per capita among all Member States. In that year, the Court issued one judgment finding the UK in violation of an ECHR right; and 0 in respect of seven States (Ireland, Andorra, Estonia, Finland, Liechtenstein, San Marino and Sweden). The judgment in question in 2024 concerned the payment of “success fees” to lawyers who had represented clients who had successfully brought defamation and privacy proceedings against *Associated Newspapers Ltd v United Kingdom* App no 37398/21 (ECtHR, 12 November 2024).

seems fair to say that the Irish political and legal community, and probably the general Irish public, support the Convention, or at least do not have strong objections to it. Insofar as such intangible things can be assessed, my general sense at the Strasbourg Court is that the feeling is mutual: Ireland is considered to be a good supporter of the Convention 'project', with an overall attitude of co-operating with the Court and respecting its judgments. Much appreciated, additionally, are specific projects or gestures from Ireland, such as its ongoing funding of the Court's webcasts of hearings, and a recent financial donation to a fund for projects marking the 75th anniversary of the Court.

The relatively high level of acceptance of the Convention in Ireland, while mirrored in some other Council of Europe countries, stands in contrast to some other States in the Convention system. Of course, in some ways, it is like comparing apples and oranges. The historical and current political context in many of the countries in the Convention system is very different from ours. Some have emerged from Soviet regimes or bloody wars in the not-too-distant past, and some have retreated from early and promising signs of meaningful democratic society back to situations which generate debate as to whether the appropriate description now is "authoritarian" or "totalitarian". Further, it is not so long since the Council of Europe expelled Russia (March 2022),³³ by reason of the escalation of the war of aggression against Ukraine, and the Court continues to deliver judgments in cases which were lodged before Russia's expulsion and, indeed, judgments concerning the conflict itself: see, most recently, the *Ukraine and NL v Russia*.³⁴

There has been a downward trend in the annual number of ECtHR judgments finding violations against the UK since the Human Rights Act (HRA) 1998 came into force in October 2000. The HRA incorporates ECHR rights into UK law. It was introduced as a way to 'bring rights home', and enable people to protect their rights in domestic courts, rather than face the time and financial costs of bringing a case to Strasbourg. See the Equality and Human Rights Commission, "The Human Rights Act" (15 November 2018) <<https://www.equalityhumanrights.com/human-rights/human-rights-act>> accessed 10 November 2025 and the Government of the United Kingdom, "Rights Brought Home: The Human Rights Bill" (October 1997) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf> accessed 10 November 2025.

³³ On 16 March 2022, the Committee of Ministers of the Council of Europe, in the context of a procedure launched under Article 8 of the Statute of the Council of Europe, adopted Resolution CM/Res(2022)2, by which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022. On 22 March 2022, the Court, sitting in plenary session in accordance with Rule 20 § 1, adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights. It stated that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

³⁴ *Ukraine and Netherlands v Russia* App nos 8019/16, 43800/14, 28525/20, and 11055/22 (ECtHR, 9 July 2025). The judgment runs to 497 pages.

Russia may provide an extreme example of the irrelevance of talking about the Convention in the same breath as law reform. However, the Council of Europe is faced with problems in many other States where law reform is, at least nominally, still on the agenda but the democratic challenges are profound. Some have fundamental systemic problems such as the absence of an independent and impartial judiciary, severe curtailment of freedom of expression and assembly with a view to silencing political opposition or unpopular minorities, the widescale use of arbitrary detentions and unfair trials, and endemic corruption. In this context, an unwillingness to implement Convention standards through a process of law reform manifests itself in different ways. Here, it is interesting to observe not only about the absence of law reform, but also the use of stratagems to conceal its absence.

Sometimes the unwillingness to comply with the Court's judgments assumes a form more covert than simply blatantly refusing to take action. No doubt the Council of Europe people directly involved in the execution of judgments would have many stories to tell, but in my limited time on the Court I have nonetheless observed a few interesting techniques. One is that of a country 'buying off' applicants in bulk with small compensation awards under the friendly settlement procedure without making the necessary systemic changes in terms of individual rights. Another is making unilateral declarations and then failing to honour them, with the result that the case has to be reinstated at a later date; a classic delaying tactic.³⁵ A third potential hazard, particularly in this era of process-based review and subsidiarity, is that the domestic judicial response to a finding of a procedural violation is, in new domestic proceedings, simply to dress up the same substantive conclusion in Convention clothes without addressing the core underlying problem. So, ironically, the renewed emphasis on subsidiarity could itself be used to subvert the Court's essential role in highlighting abuses of human rights, were the Court not to be vigilant. Indeed, this is true of other doctrines underpinning subsidiarity, such as the "fourth instance" doctrine and the requirement to exhaust domestic remedies. So, for example, we might see a State repeatedly re-arresting and detaining a particular individual, each time on a new pretext, and then try to use the 'non-exhaustion' rule to try to block Strasbourg's consideration of the case when the detainee complains about what is now his third, fourth, or fifth arrest or detention without waiting for the lengthy domestic proceedings to come to an end while he or she remains in prison. All of this means that the Court must be vigilant to potential abuses and sensitive to context. But this in turn may lead to

³⁵ The Court encourages alternative dispute resolution mechanisms such as friendly settlements and unilateral declarations. See Article 37(1)(c) of the Convention which permits the Court to strike cases out in certain circumstances.

accusations of double standards; more subsidiarity for some States than others. The balancing act is tricky both in theory and in practice.³⁶

Speaking of using the Convention to subvert the Convention, allow me also to refer to the Article 18 caselaw, which is a relatively new, but increasingly common, feature of Strasbourg jurisprudence. The object and purpose of Article 18 of the Convention was to prohibit the misuse of power, and it was designed with a broad scope aimed at preserving democracy and protecting rights and freedoms from the dangers posed by totalitarianism. It was intended to prevent abusive and illegitimate limitations of Convention rights and freedoms through State actions which are introduced under the pretext of organising the exercise of these freedoms on its territory, while in reality having the opposite effect. Leading judgments in this regard include *Merabishvili v Georgia*,³⁷ *Navalnyy v Russia*,³⁸ *Ilgar Mammadov v Azerbaijan*,³⁹ *Kavala v Türkiye*,⁴⁰ and *Ukraine v Russia (re Crimea)*.⁴¹

In the face of so much chaos and conflict in Europe, and some State responses to the Court's judgments which may range from negative to hostile, one sometimes faces the 'What's the point?' argument in relation to the work of the Court. If countries want to ignore the Convention standards, the argument goes, they will; so, what is the point of the Court continuing to hand down judgments or even for the country to be kept within the Council of Europe? A strong theoretical answer is a matter for another day,⁴² but at a practical level, I have found it interesting, here on the ground in Strasbourg, to find that those who most favour the continued dogged protection of human rights are often the judges, lawyers and applicants from the most problematic countries. I have heard phrases "beacon of hope", "a roadmap to democracy", and "a formal record of ill-treatment and

³⁶ "Moreover, within this process-based mechanism, the Court may grant deference if national decision-makers are structurally capable of fulfilling that task. This means that the foundations of the domestic legal order have to be intact. States that do not respect the rule of law, a fundamental principle that permeates the whole of the Convention system, and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review": Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 Human Rights Law Review 3, 473 at 493.

³⁷ *Merabishvili v Georgia* App no 72508/13 (ECtHR, 28 November 2017).

³⁸ *Navalnyy v Russia* App nos 29580/12 and 4 others (ECtHR, 15 November 2018).

³⁹ *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 29 May 2019) at paragraph 189 (infringement proceedings).

⁴⁰ *Kavala v Türkiye* App no 28749/18 (ECtHR, 11 July 2022) at paragraph 144 (infringement proceedings).

⁴¹ *Ukraine v Russia (re Crimea)* App nos 20958/14 and 38334/18 (ECtHR, 25 June 2024).

⁴² An interesting perspective on the long-term impact of international opinion on domestic law is provided in de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press, 2021).

injustice for posterity” directly from the lips of some of those people when I asked them about the utility of the Court’s judgment in the face of persistent or systematic non-execution. These phrases I bring to you come not from academic textbook writers wearing rose-tinted glasses, but directly from the lips of judicial and legal colleagues at the Court whose views have been forged in the furnace of real-life experiences. If the “human rights” project is seen in some Irish quarters as ‘soft’ law, it is certainly not seen as such by those, or the loved ones of those, who have suffered death, torture, inhuman or degrading treatment, arbitrary detention, or the crushing of basic civil and political freedoms such as expressing opinions or engaging in peaceful protest. Perhaps, where the Court has least traction, paradoxically, is where its pronouncements may be most needed and valued. This is, after all, a Court whose key feature from the outset was the right of individual petition. It is a Court for the citizens of the countries, not a Court for the Governments of those countries.

One final thought based on my new perspective in Strasbourg. As an Irish lawyer and judge, I heard many criticisms among Irish lawyers and judges of the Court of which I have now become a member. It has been said, for example, that its approach is too academic, or that the reasoning is insufficiently complex or nuanced when compared to a domestic superior court judgment, or that the judgments are repetitive and lack style. It is important to bear in mind that the Strasbourg Court has extremely limited resources (especially compared with the CJEU), and a huge volume of cases. The system encompasses forty-six countries, approximately 700 million potential applicants, and 40 languages. Indeed, the first and most basic task for those in the post-room of the Court is to sort between the applications in the Latin alphabet and those in the Cyrillic alphabet. Translation is only done into the French and English languages, and even then, only when it is considered strictly necessary, for budgetary reasons. There are currently more than 60,000 applications pending. Issues are becoming ever more complex (think, for example, of the questions posed by new technologies or climate change) and profound shifts of scale are presented by the so-called “conflict cases”, that is to say, cases arising out of conflicts between States, or between States and former States (e.g. Russia). Other more prosaic but practical challenges involve those such as drafting by the Committee (17 judges in the case of a Grand Chamber judgment) in a multicultural, multilingual environment where judges’ backgrounds differ enormously, not only in terms of legal expertise but also their legal professional background and the overall political context from which they have been drawn. The judgments must be sufficiently international and speak at a level of intelligibility and relevance for forty-six different countries, and yet remain judicial in character and focus on the facts of the case at hand.

Frankly, given the challenges, my view is that it is impressive that the Court has worked as well as it has done. An institution with such ambitious goals built on such fragile and complex foundations is bound to suffer from defects and can be an easy target for criticism. But it has done more than survive; more and more

States have ratified the Convention, and more and more people petition the Court every year. When one reads about the Convention's drafting process and its origin story, it was not at all guaranteed that this would be its future.

Will this continue? Nothing is guaranteed. The current geopolitical climate presents many challenges for the Court. I am glad that Ireland, for the present at least, supports the Court's project, even if it may disagree with the outcome in particular cases and grumble occasionally about being misunderstood. Humans all over Europe are subjected to the kinds of ill-treatment that inspired the creation of the Convention in the first place, and even the sanitised paper versions of their stories that pass across our desks on a daily basis can sometimes chill the blood. For that reason, I want to leave you with this final thought. When one looks at the Strasbourg jurisprudence from the Irish coast, one tends to think almost in bilateral terms, namely about Ireland's relationship with the European Convention. But the reality is that the Convention sits at the centre of a web of international relationships and Ireland is an important part of that web. By supporting the Council of Europe and the Court, Ireland is contributing not only to the protection of Convention rights in our own country but standing in solidarity with people in countries who do not have the luxury of rights we sometimes take for granted. As a small island at the Western edge of Europe, our national preoccupations and sense (rightly or wrongly) of our relative safety from the dangerous winds blowing in other parts of Europe should not blind us to the big picture, or to the importance of our firm commitment to this important collective human endeavour.

Happy birthday, Law Reform Commission. Lá breithe sona duit!

HOW THE LAW REFORM COMMISSION HAS BEEN FACILITATING ACCESS TO LEGISLATION AND HOW MORE COULD BE DONE

Ray Byrne^{*}

Abstract

The Commission has made many significant contributions to the fundamental aim of law reform, which the Law Reform Commission Act 1975 defines as involving, among other matters, codification of law (including its simplification and modernisation) and the revision and consolidation of statute law.¹ To take just one example, virtually all the key principles of insurance contract law were codified in the Consumer Insurance Contracts Act 2019. The Commission's long-established work on Access to Legislation includes: publishing and maintaining over 550 Revised Acts (the full text of Acts in their as-amended form); tracking amendments to all Acts through the Legislation Directory (formerly the Chronological Tables of the Statutes); ensuring that the Statute Law Revision Programme completes the removal of all obsolete pre-1922 legislation; and publishing and maintaining the Classified list of Legislation (all in-force Acts of the Oireachtas and their Statutory Instruments organised under 36 titles).

How the Law Reform Commission Has Been Facilitating Access to Legislation: The Consumer Insurance Contracts Act 2019 as an Example

The Law Reform Commission's statutory mandate under section 4 of the Law Reform Commission Act 1975 is to keep the law of the State under review with a view to its reform. Section 1 of the 1975 Act defines "law reform" to include:

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¹ I am extremely grateful to Mr Cameron Moss, LL.B (NUI), LL.M (EALT), Legal Researcher in the Law Reform Commission, for his assistance in preparing this paper. This included, but was by no means limited to, a detailed exchange and discussion between us on the important issue of "where and what" is the Stationery Office. That discussion is reflected in the paper.

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

That is a daunting mandate, and even if, 50 years later, the answer to the question “are we there yet?”, is “not quite”, it is also true that the Commission has made many significant contributions to codification, simplification and modernisation of our law. There are many examples that could be given,² of which I would like to mention the codification of virtually all the key principles of insurance contract law in the Consumer Insurance Contracts Act 2019. Some of the core principles and rules of insurance contract law date from 18th century and early 19th century case law, such as the 1766 decision of Lord Mansfield in *Carter v Boehm*.³ Delivering the judgment of the Court of King’s Bench Lord Mansfield CJ stated that the case turned on the principle of good faith, which he explained as follows:

“The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; [...] sed cum quod tuscias, id ignorare emolumentum tui causa velis eos, quorum intersit id scire.* Cicero, *De Off*, lib. 3, c.12, 13... The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract which one privately knows, and the other is ignorant of and has no reason to suspect.”⁴

The reference by Lord Mansfield to “Cicero, *De Off*, lib. 3, c.12, 13” is to the Roman lawyer-politician-orator-philosopher Marcus Tullius Cicero’s *De Officiis (Of Duties)* written in 44 BC, Book 3 of which is titled *The Conflict between the Right and the Expedient*. The Latin quotation used by Lord Mansfield, and translation, is:

² The Commission maintains on its website an Implementation Table that tracks how about 70% of its Reports have been implemented in Acts of the Oireachtas and, where relevant, Rules of Court. That rate of implementation compares favourably with those of comparable law reform bodies: see Percival (ed), *Changing the Law: A Practical Guide to Law Reform* (Commonwealth Secretariat and Commonwealth Association of Law Reform Agencies, 2017), at page 158.

³ *Carter v Boehm* (1766) 3 Burr 1905.

⁴ *Carter v Boehm* (1766) 3 Burr 1905, at pages 1910 – 11.

"Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; [...] sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire. (It is one thing to conceal; not to reveal is quite a different thing;... The fact is that merely holding one's peace about a thing does not constitute concealment, but concealment consists in trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it.)"

Cicero's distinction between, on the one hand, saying nothing and, on the other hand, saying something that is misleading, is the fundamental basis for the current law on misrepresentation, which can be found in legislation such as the Sale of Goods and Supply of Services Act 1980 and the Consumer Rights Act 2022. So, if a person is selling a car, and allows the buyer to look under the bonnet to check the engine, to kick the tyres and to check the car's mileage (kilometrage does not sound, or read, plainly), there is no concealment and no misrepresentation. The seller does not have to tell the buyer that, because the car has high mileage, the engine's timing-belt may need replacing.⁵ That information might be useful, but there is no unlawful misrepresentation from saying nothing: this expedient silence is permissible, even if not entirely ethical.⁶

Cicero wrote that concealment is something very different: it would need to be something like covering up the mileage reading on a car so that the buyer cannot see it. That kind of misleading concealment is "trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it." Cicero's *De Officiis* remained a widely prescribed text in English universities in the 18th century. And, as indicated by its citation in *Carter v Boehm*, it also influenced key principles in the emerging English mercantile/ commercial law of that time. Cicero's views on "concealment" in *De Officiis* were also cited by the 18th century French lawyer Robert Pothier in his textbook on sale of goods law, *Traité du Contrat de Vente*. Pothier was one of the "founding fathers" of the *Code Civil des Français*, Napoleon's Civil Law Code of 1804.

Sir Mackenzie Chalmers, who drafted the Sale of Goods Act 1893, also acknowledged Pothier's influence on the content of the 1893 Act. The 1893 Act remains in force in Ireland in 2025 for business-to-business (B2B) sales, while the Consumer Rights Act 2022 has replaced the 1893 Act in sales to consumers (B2C). In the United States, both Cicero and Pothier were quoted extensively in Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*,

⁵ I also appreciate, and apologise, that this example appears to involve a car propelled by fossil fuel. A future version of this paper will refer to the seller not revealing that, due to high mileage, the fusion-powered battery will need replacing.

⁶ And Lord Atkin also reminded us, in *Donoghue v Stevenson* [1932] UKHL 1, [1932] AC 562, that not all moral principles convert into legal principles.

the leading early 19th century textbook on equity in the US, first published in 1835. That text was written by Joseph Story, a US Supreme Court Justice who was also simultaneously Professor of Law in Harvard University. It is clear, therefore, that important principles in modern commercial law and equity can be traced to Cicero, even if he is rarely cited in 21st century case law.

Later English and Irish decisions on the “good faith” test elevated this to a test of “utmost good faith” (*uberrima fides*), and extensive case law added that an insured person was required to disclose information that a hypothetical “prudent insurer” might have thought relevant, even if the particular insurer might not have thought that information relevant. Courts had expressed unease with that “prudent insurer” test, and at least one Supreme Court judge had queried what, if anything, the “utmost” epithet added to the “good faith” principle.

This is where the Law Reform Commission came in, 10 years ago, with its report on Consumer Insurance Contracts,⁷ which was the culmination of the Commission’s seven-year project on reform of insurance contract law. The 2015 Report recommended wide-ranging reforms, including adjusting the “good faith” duty of disclosure so that it resembled more what Lord Mansfield had said in 1766: a duty to act in good faith (no epithet needed) in response to clear, precise, questions from an insurer. And, by contrast with the position in 1766, contemporary insurance undertakings are well capable of drafting precise risk-based questions to put to potential insured persons, with the assistance of entirely appropriate risk-based big data analytics.

⁷ The Commission began work on the insurance contract law project in 2008: Law Reform Commission *Annual Report 2008*, at page 32. In 2011, the Commission published its Consultation Paper on Insurance Contracts: see Law Reform Commission, *Consultation Paper on Insurance Contracts* (LRC CP 65-2011), which was followed by the Law Reform Commission, Report on *Insurance Contracts* (LRC 113-2015) which completed the project. This was, clearly, a large project by any standards, illustrated by the 7 years involved in completing it (which was being done alongside many other law reform projects). The Law Commission of England and Wales and the Scottish Law Commission divided a comparable joint project on insurance contract law into four separate project elements. The many reforms that were enacted from their work in this area have included the UK Third Parties (Rights against Insurers) Act 2010, the UK Consumer Insurance (Disclosure and Representations) Act 2012 and the UK Insurance Act 2015. All these were, naturally, of great assistance to the Commission in Ireland in its own project, as was the highly influential work of the Australian Law Reform Commission, led by its inaugural Chair Mr Justice Michael Kirby, in its 1982 Report on Insurance Contracts; see Australian Law Reform Commission, *Insurance Contracts* (ALRC Report 20). The Commission’s project should not in any way be compared with the joint project of the two British Law Commissions, except to suggest this: perhaps the Commission in Ireland could be awarded at least “4 output credits” for its insurance contracts project, and a “5th bonus output credit” for proposing that all the reforms be enacted in a single Act, an approach with which the Oireachtas clearly agreed. The same might be said for other multi-element projects that the Commission continues to carry through to conclusion, such as its 4 volume Report on a Regulatory Framework for Adult Safeguarding; see Law Reform Commission, *Report on A Regulatory Framework for Adult Safeguarding* (LRC 128-2024).

But there was a lot more to the 2015 Report than addressing reform of the “utmost good faith” principle, and the changes since 1766 in the aleatory balance between the parties to an insurance contract. The 2015 Report also discussed a wide range of issues on which the courts had expressed considerable unease with other long-established insurance principles, including:

- insurance warranties, notably “basis of contract” clauses, which the courts acknowledged had led to unjust results in a number of individual cases;
- third party rights, in respect of which a series of cases had acknowledged that it was clear that insurance contracts had been entered into for the benefit of a third party, but that there were practical difficulties for the third party to confirm this in order to obtain the benefit of the insurance cover (Joseph Heller could have written a novel based on those cases).

In a number of these decisions, the courts considered that they were not in a position to change these long-established insurance contract principles. This was primarily because they were so well-established that, to change them, might be seen as amounting to impermissible “judicial legislation”, and thus a clash with Article 15.2.1^o, which clearly provides that the Oireachtas is the sole law-making authority in Ireland, and thus a cornerstone of the rule of law in Ireland.

It might be said, therefore, that this is precisely the kind of law reform project for which the Law Reform Commission was established. In other words, this was a daunting project to undertake because of the scope of the problem, but at the same time it was also an extremely important project to take on because of the impact for virtually all members of society. For entirely sensible reasons, most people take out insurance policies every year; and in the case of motor insurance, good sense is combined with mandatory statutory reasons. The mandatory requirement in the Road Traffic Acts to have third party motor insurance is also entirely sensible. And that mandatory requirement is, in practice, increasingly unavoidable because of improved shared information sources that are now digitally available to An Garda Síochána, “on the spot”, at the roadside.⁸

The main recommendations in the 2015 Report were that:

- the proposed reforms should apply not only to individual consumers but also to SMEs: both were already included in the Central Bank’s Consumer Protection Code, and also already within the jurisdiction of the Financial Services and Pensions Ombudsman;

⁸ A reader of this paper might think that I mention this example of “digital-by-backfilling” (as opposed to “digital by design”) for reasons connected with a particular recommendation in the Commission’s Report on Accessibility of Legislation in the Digital Age: see Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020), but I must leave that to each reader to assess.

- the “utmost good faith” principle should be replaced with a pre-contractual plain “good faith” duty to answer the insurer’s specific questions;
- insurance warranties should be abolished;
- third-party rights in insurance contracts should be reformed;
- insurable interest should be abolished;
- there should be proportionate remedies for breach of insurance contract terms;
- the rules on subrogation in insurance contracts should be (modestly) reformed; and
- the insurer should have a plain “good faith” post-contractual duty to deal with claims.

As usual, the Commission’s 2015 Report included a draft Consumer Insurance Contracts Bill, and this was adopted as a Private Member’s Bill, the Consumer Insurance Contracts Bill 2017. There was cross-party support for the 2017 Bill, and significant additions and improvements were also made during the Oireachtas debates, and it was ultimately enacted as the Consumer Insurance Contracts Act 2019.

You could describe the 2019 Act as a “mini-code” – and, therefore, a modest tick to codification under section 1 of the 1975 Act – in that most of the key principles and rules concerning insurance contracts were enacted in the 2019 Act, supplemented by a number of important Insurance Regulations, and the Central Bank’s (regularly updated) Consumer Protection Code. The effect of section 3 of the 2019 Act is that the Central Bank may make further Regulations and Codes of Practice in connection with the requirements of the 2019 Act; and the 2019 Act also now forms part of the Central Bank’s general regulatory and supervisory framework under the Central Bank Acts. The effect of section 4 of the 2019 Act is that the Financial Services and Pensions Ombudsman may take account of the requirements of the 2019 Act in making determinations under the Financial Services and Pensions Ombudsman Act 2017.

The 2019 Act is also an example of good, even smart, regulation: the principles and policies are in the principal Act, with the details cascading down from the principal Act in the form of Regulations, statutory Codes and guidance material.

But what of one of the other requirements of law reform, as defined in section 1 of the 1975 Act, simplification of the law? Well, this is what the Commission proposed in section 7 of the draft Consumer Insurance Contracts Bill in its 2015 Report:

“Pre-contractual duties of the consumer and insurer

7. — (1) The duties in this section replace, at the pre-contractual stage of a consumer contract of insurance, the principle of utmost good faith (*uberrima fides*) and any duty of disclosure (including any duty on the consumer to volunteer information) that applied prior to the coming into force of this section (whether that principle or duty arose at common law or under an enactment).

(2) The pre-contractual duty of disclosure of a consumer is confined to providing responses from questions asked by the insurer, and the consumer shall not be under any duty to volunteer any information over and above that required by such questions.

(3) Where the insurer requests the consumer at the pre-contractual stage to provide information to the insurer, the insurer shall be under a duty to ask specific questions, in writing, and shall not use general questions.”

It could be argued that it may have been all very well for the Commission to include in section 7(1) of its draft Bill a “purpose clause”, but would the Oireachtas’ Office of Parliamentary Legal Advisers (OPLA), who provide advice on Private Member’s Bills, and would the Office of Parliamentary Counsel to the Government (OPC) in the Office of the Attorney General, who also had to assess the drafting standards in the 2017 Bill after the Government signalled their formal approval through a money message?⁹ The answer is revealed in the text of section 8 of the Consumer Insurance Contracts Act 2019, which reads:

“Pre-contractual duties of consumer and insurer

8. (1) The duties in this section replace, at the pre-contractual stage of a contract of insurance, the principle of utmost good faith (*uberrima fides*) and any duty of disclosure of a consumer (including any duty on the consumer to volunteer information) that applied prior to the commencement of this section (whether that principle or duty arose at common law or under an enactment).

(2) The pre-contractual duty of disclosure of a consumer is confined to providing responses to questions asked by the insurer, and the

⁹ Article 17.2 of the Constitution requires that the Taoiseach, on behalf of the Government, must deliver a “money message” to the Ceann Comhairle of Dáil Éireann where any public funds would need to be spent to implement a proposed Bill, such as the 2017 Bill.

consumer shall not be under any duty to volunteer any information over and above that required by such questions.

(3) Where the insurer requests the consumer at the pre-contractual stage to provide information to the insurer, the insurer shall be under a duty to ask specific questions, on paper or on another durable medium, and shall not use general questions.”

So, the Commission’s recommendation in its 2015 Report and draft Bill, that it is appropriate and useful to include a “purpose clause” in legislation, setting out not just the statutory rule, but what its purpose is, appear to have been deemed acceptable by OPLA and OPC.¹⁰ Thus, another modest tick to simplification of the law under section 1 of the 1975 Act. It is not, of course, the only example of a purpose clause. Indeed, more general purpose clauses, or statements of general principles, can be found in, for example:

- section 6 of the Education Act 1998 (general objects clause);
- section 8 of the Assisted Decision-Making (Capacity) Act 2015 (guiding principles for the 2015 Act, which can be traced to section 4 of the Commission’s Draft Scheme of a Capacity Bill in its 2006 Report),
- section 13 of the Legal Services Regulation Act 2015 (6 objectives for the Legal Services Regulatory Authority (LSRA), and 5 professional principles for legal practitioners),
- section 7 of the Judicial Council Act 2019 (Bangalore Principles of Judicial Conduct), and
- section 4 of the Policing, Security and Community Safety Act 2024 (5 policing principles).

In conclusion on the Commission’s draft Bill and 2015 Report, and its implementation in the Consumer Insurance Contracts Act 2019, this is just one example of how the Commission has contributed to making the law more accessible by using clear and, relatively speaking, plain language.

¹⁰ In pre-digital era language, this may, of course, have been more a case of *nihil obstat* rather than *imprimatur*.

The Guiding Principles in the Law Reform Commission's Report on Accessibility of Legislation in the Digital Age

The OECD Framework and Good Practice Principles for People-Centred Justice (2021) stated:¹¹

“[A] people-centred justice system would seek to continuously simplify and make more accessible the processes and language of all parts of the justice system, including the formal institutions, to make them accessible for all and thus to give effect to the rule of law, while ensuring protection of fundamental rights and procedural guarantees.”

That OECD publication was written in 2021, about a year after the Commission published its Report on Accessibility of Legislation in the Digital Age.¹² The OECD and the Commission are in full agreement that accessibility is a fundamental aspect of substantive justice. Indeed, the OECD publication fully reflects the Commission's mandate in the 1975 Act that law reform includes simplifying the language of the law. The Commission's approach in its Report on Consumer Insurance Contracts,¹³ discussed above, also reflects this approach.

The 2020 Report contained this set of guiding fundamental principles and policies:

- **Laws should be accessible:** at the very least, laws must be publicly available, which is consistent with national policies on Better Regulation (and which the Council of Europe set out at the beginning of this century in its Recommendation on the delivery of court and other legal services to the citizen through the use of new technologies Rec (2001) 3;
- **Rule of law:** in a country that operates clearly under the rule of law, everyone should be able to know the current state of the law;
- **Economics and legal costs:** consolidation of our laws would assist in reducing the cost of legal services, including regulatory compliance, for individuals, businesses and for State bodies; and
- **Digital policy:** “digital by design”, including “GovTech” are clear Government policies, and involve using “digital as default”, and applying data processing to improve delivery of public services.

¹¹ OECD, *OECD Framework and Good Practice Principles for People-Centred Justice* (2021) at page 64.

¹² Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020)

¹³ Law Reform Commission, *Report on Consumer Insurance Contracts* (LRC 113-2015)

Indeed, just last year, in *Conway v An Bord Pleanála*,¹⁴ the Supreme Court reaffirmed the direct link between the rule of law principle and the promulgation and accessibility of laws, and located the source for those elements of the rule of law in Article 15.2.1° of the Constitution.¹⁵

I think we could all agree with the guiding principles set out by the Commission in 2020, and the importance attached by the Supreme Court in *Conway* to the promulgation and accessibility of laws as important elements of the rule of law. The big issue, though, is how to put them into practice, and that is what the Commission's 2020 Report was aiming to achieve, and I will come back to that a little later.

Legislation is the Main Source of Law, and of Litigation

In Ireland, as in every other developed country, whether common law or civil law, most of the key areas that can be regulated are, predominantly, regulated by legislation. These include:

- agricultural production and food safety: EU law has a huge influence on this;
- business activities law, such as in the Companies Act 2014;
- civil liability: the Civil Liability Act 1961, as amended, while not as comprehensive as the French Civil Code, contains important statutory rules on civil liability;
- commercial law, including competition law and consumer protection: the Competition Acts and the Consumer Rights Act 2022;
- criminal procedure, and virtually all of the criminal offences, and some of the general principles of criminal liability, such as defences to the main non-fatal offences, the defence of insanity and defence of the dwelling;¹⁶

¹⁴ *Conway v An Bord Pleanála* [2024] IESC 34.

¹⁵ In *Conway v An Bord Pleanála* [2024] IESC 34 at paragraph 25, O'Donnell CJ cited in support of the concept of the rule of law Lord Bingham, *The Rule of Law* (Allen Lane 2010) at page 37, and Joseph Raz, *The Authority of Law* 2nd ed (Oxford University Press 2009) at page 211; and at paragraph 24 of his judgment, Suetonius, *Lives of the Twelve Caesars*, Chapter 4 and para 41. Hogan J also cited (at paragraph 9 of his judgment) Lord Bingham, and also Lon Fuller, *The Morality of Law* 2nd ed (Yale University Press 1969) at pages 39ff, in which Professor Fuller set out his 8 principles of legality, of which promulgation, clarity and non-impossible laws are relevant to accessibility.

¹⁶ I discuss below the strong case in favour of codifying all the general principles of criminal liability, in accordance with the 10 sections on those general principles in the *Draft Criminal Code Bill and Commentary* completed in 2010 by the Criminal Law Codification Advisory

- employment law;
- environmental protection;
- family law;
- immigration and asylum law;
- safety and health at work;
- social welfare;
- taxation.

Not only is legislation the main source of law in Ireland – which is what Article 15.2.1° envisages, that the Oireachtas has the sole authority to make laws – but it is increasingly being enacted in the form of “mini-codes”. You could say that this is a kind of “creeping codification” of law, examples being:

- Non-Fatal Offences Against the Person Act 1997,
- Taxes Consolidation Act 1997,
- Social Welfare Consolidation Act 2005,
- Land and Conveyancing Law Reform Act 2009,
- Companies Act 2014,
- Consumer Insurance Contracts Act 2019,
- Consumer Rights Act 2022,
- Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023,
- Gambling Regulation Act 2024, and
- Planning and Development Act 2024.

Legislation is clearly now the principal “source of law” in common law jurisdictions, just as it has been, and remains, in civil law states. In this context, 45 years ago, in the UK House of Lords decision *Johnson v Moreton*,¹⁷ Lord Hailsham stated:

Committee (CLCAC), and published by the Minister for Justice in 2011; to which would be added 17 other sections drawn from parallel work of the Law Reform Commission.

¹⁷ *Johnson v Moreton* [1980] AC 37. Lord Hailsham expanded on this in his 1983 Hamlyn lecture; see Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Sweet & Maxwell 1984) at page 65, which was in turn quoted in the Law Reform Commission’s

“Approximately nine out of ten appeals which come before your Lordships’ House are concerned with disputes about the correct construction of Acts of Parliament.”¹⁸

It would be safe to say that, 45 years later, the same can be said for most cases litigated in the Irish courts, that the vast majority involve disputes about the interpretation and application of legislation. For example, there were 24 decisions of the Irish courts reported in the 2 volumes of the Irish Law Reports Monthly for 2022.¹⁹ Of these, 23 of the 24 cases involved the interpretation of legislation, some of which also included interpretation of the Constitution. Just one of these 24 cases, *GE v Garda Commissioner*,²⁰ involved the Supreme Court applying primarily case law within the Irish law of torts, namely, the appropriate amount (quantum) of compensation (damages) for unlawful imprisonment (false imprisonment). Even then, the Supreme Court discussed how the common law on damages for false imprisonment was reinforced by constitutional considerations such as Article 5 (emphasising the democratic nature of the State), Article 40.4.1° (the protection of personal liberty) and Article 40.3.1° and 40.3.2° (which require the judicial arm of the State to “vindicate” constitutional rights such as the right to liberty). With that exception, virtually 100% of cases reported in [2022] ILRM involved the interpretation of legislation.

This greatly increased amount of legislation should not come as a surprise. Some of the main factors in this have been:

- The emergence of the welfare state in the 20th century, which greatly accelerated in the second half of the 20th century after World War II (1939 – 1945) with the added impetus of post-1945 human rights-based analysis;
- since 1955, Ireland has been an active member of the United Nations Organization (UNO), which established the International Law Commission with a remit to engage in the gradual codification of international law;

Report on Statutory Drafting and Interpretation; see Law Reform Commission, *Report on Plain Language and the Law* (LRC 61-2000) at page 2.

¹⁸ *Johnson v Moreton* [1980] AC 37

¹⁹ I appreciate that the editors of Byrne and Binchy (eds), *Annual Review of Irish Law 2023* (Round Hall 2024) have pointed out (at page vii) that the Courts Service and Bailii websites contain more than 1,000 written judgments of the Irish courts delivered annually in recent years, and that the 24 cases reported in the two volumes of the ILRM reports for 2022 thus represent a miniscule percentage of those judgments. The 24 cases may not therefore represent a reliable “poll” and it may be that the margin of error is more than plus or minus 3%. I leave for another time what that percentage means for accessibility of the law in Ireland, especially where all the more sophisticated search engine capacity for the “unreported” case law is (quite understandably from a commercial point of view) behind high pay walls.

²⁰ *GE v Garda Commissioner* [2022] IESC 51.

- since 1973, Ireland has been a Member State of the European Union, where most of the Member States are civil law jurisdictions, with an interest in codification;
- in 1975, the Law Reform Commission was established with a statutory remit to engage in law reform, which is defined in the Law Reform Commission Act 1975 to include the “codification” of Irish law.

The Law Reform Commission’s statutory mandate could correctly be described as involving “codification one step at a time”; and, to borrow a phrase, on criminal law codification from Mr Justice Charleton, “by the inch, it’s a cinch.”²¹ Codification is not some kind of “retreat” from the common law where that heritage “disappears” into a civil law system of codification. This is clear from looking at the largest common law jurisdiction on the planet, the United States of America, which has made a huge commitment to codifying its laws, and it is still clearly a common law jurisdiction. Ironically enough, during the mid to late 20th century most civil law jurisdictions experienced “de-codification” and “re-codification”, where parts of the original 19th century codes were replaced by “new codes” to address new areas of law, such as a social security code and a family law code.

And, when it comes to “code talk”, the Social Welfare Consolidation Act 2005 is often referred to – by Irish common law judges – as the “social welfare code”; just as those same judges refer to the Taxes Consolidation Act 1997 as part of the “tax code”, which I think most tax practitioners would describe as in need of re-codification. And, not to be outdone, The Irish Times went so far as elevating the Consumer Rights Act 2022 to the lofty status of a “bill of rights for consumers.”²²

Before I leave this brief sojourn into codification, it is important to note the hard work and commitment involved in enacting any piece of legislation, from those preparing the policy and Heads in Departments, those in the Office of the Attorney General, and TDs and Senators in the Houses of the Oireachtas. Some of the codifying measures are monumental, such as the Companies Act 2014 and the Planning and Development Act 2024. And, I do not wish to become involved in the debate about whether the 2014 Act needed to be all 1,168 pdf pages in length (comprising 1,448 sections), or whether the 2024 Act needed to be all 906 pdf pages long (comprising 637 sections: many fewer sections than the 2014 Act, but some very long sections to take it to 906 pdf pages). I will just say that, when the

²¹ From Mr Justice Charleton’s Foreword to Charleton and McDermott’s *Criminal Law and Evidence*, 2nd ed (Bloomsbury Professional 2020), quoted in Keena, “The life of a Supreme Court judge: ‘The law is above you’” *The Irish Times* (9 November 2020) <<https://www.irishtimes.com/news/crime-and-law/the-life-of-a-supreme-court-judge-the-law-is-above-you-1.4403658>> accessed 17 November 2025.

²² Conor Pope, “Consumer rights: What are the new laws and how will they empower people?” (29 November 2022) <<https://www.irishtimes.com/your-money/2022/11/29/consumer-rights-what-are-the-new-laws-and-how-will-they-empower-people/>> accessed 17 November 2025.

Consumer Insurance Contracts Bill 2017 went through the Oireachtas, some “good law” or “smart regulation” principles were applied to it, in order to trim away detailed provisions that the Commission had included in its draft Bill. These were removed during the Oireachtas debates on the 2017 Bill, because it was considered they were more appropriately located in secondary legislation, and so that detail is now, appropriately, found in Insurance Regulations made under the 2019 Act.

The Current State of Play in Making Ireland’s Legislation More Accessible

Ireland has made some important steps in making more accessible the “Irish Statute Book”; or as the OECD would describe it, our “legislative stock”. As of September 2025, the list of Public Acts in the Irish Statute Book comprises about 3,100 In-Force Acts:

- beginning with the Fairs Act 1204, enacted in the 6th year of the reign of King John (yes, the “Robin Hood” King John), and
- up to the most recent, the Statute Law Revision Act 2025 (Act No.10 of 2025), signed into law by President Higgins on 23rd July 2025.

The Statute Law Revision Programme (SLRP), championed by Mr Justice Richard Humphreys for many years, has been an enormous achievement in removing obsolete legislation from the Irish Statute Book. To take just one element of the SLRP, the Statute Law Revision Act 2007 repealed many thousands of obsolete pre-1922 Acts, and also (uniquely by comparison with comparable Statute Law Revision Acts in the common law world) set out a list of 1,364 pre-1922 Public Acts (mostly 19th Century) that were retained in force in 2007; and, since 2007, over 200 of these “retained” Acts have since been repealed, leaving about 1,100 pre-1922 Public Acts in force as of September 2025. And, of the 3,000+ Acts enacted by the Oireachtas since 1922, there are about 2,000 post-1922 Acts that remain in force.

And, as noted above, there have been a number of Consolidation/Codification Acts enacted: for example, the Taxes Consolidation Act 1997; the Planning and Development Act 2000; the Social Welfare Consolidation Act 2005; the Land and Conveyancing Law Reform Act 2009; the Companies Act 2014; and the Planning and Development Act 2024. Revised Acts, the full text of over 500 Acts, as amended and up-to-date, are available on the electronic Irish Statute Book (“eISB”), linked to www.lawreform.ie (the format of Revised Acts is similar to, for example, those on the UK Legislation Database and other online “eLegislation” databases). And, the Legislation Directory (formerly the Chronological Tables of the Statutes), which is now fully integrated into the eISB, tracks all amendments of all Acts (and all Statutory Instruments since 1972).

The eISB, available at www.irishstatutebook.ie, is an online database of the full text of Acts as enacted, organised in reverse chronological order from 2025. I think it is

true to say that the eISB is how most people access their legislation nowadays. I have no strong objection to the way the eISB is organised, which is in effect, an online version of the pre-digital Hardback Annual Volumes of Acts of the Oireachtas.

There are two major differences between the analogue and digital versions of the Acts of the Oireachtas of 1975:

- the analogue hardback Annual Volume of the Acts of the Oireachtas of 1975 is, apparently, “not searchable” (presumably, only those copies where all the pages are stuck together), whereas the digitised version on the eISB is searchable (presumably, because there is no glue on the internet sticking the digital pages together); and
- in accordance with the Documentary Evidence Act 1925, the analogue hardback Annual Volume of the Acts of the Oireachtas of 1975 contains the presumptively conclusive text of the Acts within its covers (as soon as they become unstuck and we can search through the pages), whereas the digitised version on the eISB (which most of us use) has no such status under the 1925 Act, not even the pdf versions on the eISB (which greatly resemble the Stationery Office printed versions).

I will return later to what might be described as this “analogue by design, not digital by design” issue.

The Law Reform Commission’s Contribution Through its Access to Legislation work

There are 4 elements of the Commission’s current Access to Legislation work: Revised Acts, the Legislation Directory, the Statute Law Revision Programme (SLRP), and the Classified List of In-Force Legislation in Ireland.

The Commission’s Revised Acts work:

- Comprises the full text of over 550 Acts-as-amended (and growing every year from a standing start in 2007 of zero Revised Acts);
- Previously, Revised Acts were published on www.lawreform.ie only;
- Revised Acts are now fully integrated into the eISB (by the “Revised Act” tab for the 550+ Acts where a Revised Act is available) and linked to www.lawreform.ie; and
- The format of Revised Acts is similar to other eLegislation databases (such as the UK Legislation Database, which is now the official UK Stationery Office database of UK Legislation).

The Commission's Legislation Directory work:

- Previously, the Legislation Directory was a separate element on the eISB (reflecting the analogue Chronological Tables of the Statutes, the "Chron Tables", but the pre-1922 element of the Legislation Directory also remains available as a standalone element on the eISB);
- the Legislation Directory is now fully integrated into the eISB (by the "Commencement, Amendments, SIs made under the Act" tab for all 3,000+ Acts of the Oireachtas, including the 1,000 that have been repealed, and an "Amendments" tab for all Statutory Instruments from 1972 onwards).

As to the Commission's Statute Law Revision Programme (SLRP) work:

- In 2019, the Commission, with the support of the Office of Attorney General, agreed to complete the remaining parts of the pre-1922 SLRP, which had been paused in 2016;
- the Statute Law Revision Act 2025 retained 4 pre-1861 secondary instruments, and revoked all others;
- the ongoing SLRP work involves examining all secondary instruments from 1861 to 1922, retaining those that remain relevant and revoking all others; and
- when that element is completed, we will have a complete inventory, for the first time, of Ireland's legislative stock.

I think it could fairly be said that the SLRP work, which began about 25 years ago at the dawn of this century, has been a remarkable achievement: many, many, inches of hard work were involved in delivering the huge results to date.

The Commission's Classified List of In-Force Legislation in Ireland

The Commission's Classified List of In-Force Legislation was first published in 2010.²³ Since 2019, it is a searchable database of over 2,000 Acts and over 15,000 secondary instruments. The format of Classified List is based on the classified, subject-based, approach applied in the 50 Titles of the federal United States Code (USC), and in US state codes. When the Classified List was first published in 2010,

²³ Law Reform Commission, *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62-2010). I had the privilege of being the principal legal researcher for the Consultation Paper. Since 2010, successive Access to Legislation teams in the Commission have worked on converting the original Classified List into a searchable database, and to maintaining it up-to-date along with the other elements of the Commission's Access to Legislation work.

Maryland's State Code of Legislation was regarded as an especially suitable comparator model for major subject headings, because many Titles in the Maryland Code were familiar in terms of comparable subject headings used in Ireland.

The Classified List also, and necessarily, includes Headings/ Titles that are unique to Ireland, such as heading 21, Irish Language and Gaeltacht.

The Classified List also provides a link to the Government Departments for which each Act is linked, which is an important element of accessibility for all. It has also been a useful reference point where Departmental legislative responsibilities are being transferred, which is a standard feature of Government reorganisation after General Elections.

The 36 Subject Headings in the Commission's Classified List include:

- business regulation,
- criminal law,
- employment law,
- environmental law,
- family law,
- Irish language and Gaeltacht,
- land law, succession and trusts,
- natural resources,
- social welfare, and
- taxation.

Here are the 32 headings in the Maryland Code:

- | | | |
|--------------------------|----------------------------|-------------------------|
| 1. Agriculture | 11. Education | 23. Natural Resources |
| 2. Business | 12. Election Law | 24. Public Safety |
| Occupations and | 13. Environment | 25. Public Utility |
| Professions | 14. Estates And Trusts | Companies |
| 3. Business Regulation | 15. Family Law | 26. Real Property |
| 4. Commercial Law | 16. Financial Institutions | 27. State Finance and |
| 5. Corporations and | 17. Health – General | Procurement |
| Associations | 18. Health Occupations | 28. State Government |
| 6. Correctional Services | 19. Housing and | 29. State Personnel and |
| 7. Courts and Judicial | Community | Pensions |
| Proceedings | Development | 30. Tax – General |
| 8. Criminal Law | 20. Human Services | 31. Tax – Property |
| 9. Criminal Procedure | 21. Insurance | 32. Transportation |
| 10. Economic | 22. Labor and Employment | |
| Development | | |

Here are the 36 headings in the Classified List:

- | | | |
|----------------------------|----------------------------|-------------------------------|
| 1. Agriculture and Food | 15. Enterprise, Economic | 28. Oireachtas (National |
| 2. Arts, Culture and Sport | Development and | Parliament) and |
| 3. Business Occupations | Tourism | Legislation |
| and Professions | 16. Environment | 29. Planning, Development |
| 4. Business Regulation, | 17. Family Law | and Housing |
| including Business | 18. Financial Services and | 30. Prisons and Places of |
| Names, Company Law | Credit Institutions | Detention |
| and Partnership | 19. Foreign Affairs and | 31. Public Safety (including |
| 5. Citizenship, Equality | International Relations | Building Standards, Fire |
| and Individual Status | 20. Garda Síochána | Safety and Product |
| 6. Civil Liability | (Police) | Safety) |
| 7. Commercial Law | 21. Health and Health | 32. Social Welfare, Pensions, |
| 8. Communications and | Services | Charities and Religious |
| Energy | 22. Irish Language and | Bodies |
| 9. Courts and Courts | Gaeltacht | 33. State Finance and |
| Service | 23. Land Law, Succession | Procurement |
| 10. Criminal Law | and Trusts | 34. State Personnel and |
| 11. Defence Forces | 24. Licensed Sale of | Superannuation/Pensions |
| 12. Education and Skills | Alcohol | 35. Taxation |
| 13. Election and | 25. Local Government | 36. Transport |
| Referendum Law | 26. National Government | |
| 14. Employment Law | 27. Natural Resources | |

The purpose of organising our legislation in this subject-based way, like in the USA, is to assist in making legislation more accessible for all those affected by the law, whether individuals, businesses or State bodies. In addition, the Classified List has some important benefits of having the law in the form of an online database:

- It is a searchable list of the 2,000+ Acts of the Oireachtas that remain in force (and over 100 pre-1922 Acts), as well as 15,000 Statutory Instruments (SIs) made under those Acts, organised under the 36 subject headings.
- The 36 subject headings have been broken down into over 500 sub-headings, where you can find the full text of the Acts, and the SIs made under them.
- The current search facility allows you to search for either:
 - the name of any Act or statutory instrument, or
 - any of the 36 headings and over 500 sub-headings in the Classified List.
- The full text of the 2,000+ Acts and 15,000+ SIs are linked to their full text on the electronic Irish Statute Book (eISB) or, where available, the 500+ as-amended Revised Acts prepared by the Commission.

As a modern state, it makes sense that we should tidy the collection of our legislation, using good examples of similar exercises around the world. In this digital age, this also means applying a “digital by design” approach, so that we get the most benefit from ICT in the process. And while all the developments discussed up to now are positive, and needed, they should, properly, be regarded as stepping stones to the next phase: using all the resources that are nowadays available to present Ireland’s legislative stock in the most practicable accessible manner. That is the background to the recommendations in the Law Reform Commission’s 2020 Report on Accessibility of Legislation in the Digital Age.²⁴

The Law Reform Commission’s 2020 Report on Accessibility of Legislation and Planned Programmes of Consolidation

I have already referred to the set of guiding fundamental principles and policies in the Commission’s 2020 Report on Accessibility of Legislation in the Digital Age. Building on those guiding principles and policies, the Commission’s 2020 Report set out the following vision for the future of legislation:

²⁴ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

1. Comprehensive legislation: all our legislation should be accessible, which means there is a need for planned programmes of consolidation of our laws (as already mentioned, there are over 1,200 Acts from the pre-1922 era still in force).
2. Current legislation: there should be a statutory duty to publish Revised, as-amended, versions of legislation. From a standing start in 2007 where we had zero Revised Acts, the Law Reform Commission is now publishing, and maintaining, 500+ Revised Acts, in other words in their up-to-date, as-amended, state.
3. Immediately available and making best use of ICT: there should be links between related legislative data that is already available in various data "silos" such as: draft Bills; pre-legislative scrutiny reports (PLS), Act text as amended; Citizens Information Board guidance; and case law. This material should be published under classified subject-headings, such as in the Commission's Classified List Classified List of In-Force Legislation in Ireland.
4. Standards overseen by an Accessibility and Consolidation of Legislation Group: there should be a multi-agency Accessibility and Consolidation of Legislation Group (ACLG) to oversee programmes to consolidate legislation (based on similar approaches in Aotearoa/New Zealand and Wales); and to publish legislative standards including: pre-drafting standards; improvements to pre-legislative and post-legislative parliamentary scrutiny; and developing standards on machine-readability of legislation, such as the European Legislation Identifier (ELI).

The Commission recommended that the first programme of consolidated legislation could include the following 7 areas:

- Road traffic legislation;
- Employment legislation;
- Gambling control legislation;
- Sale of alcohol legislation;
- Monuments and archaeological heritage legislation;
- Consumer protection legislation; and
- Landlord and tenant legislation.

The main recommendations in the 2020 Report have not been implemented (yet, as of September 2025), but of these 7 areas suggested for consolidating legislation, three Consolidation Acts have been enacted and another Scheme of a Bill has been published:

- Consumer Rights Act 2022;

- Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023;
- Gambling Regulation Act 2024; and
- General Scheme of the Sale of Alcohol Bill 2022.

There is a considerable amount of hard work involved in implementing the recommendations in the 2020 Report. Among the most challenging is to modernise the law and make it as clear as possible while retaining the need to ensure that the law remains consistent with the pressing need to ensure that it is capable of being enforced. To take one example, the challenge involved in enacting a modern Act, a modern code, on the sale of alcohol is because some of the legislation goes back to the Licensing (Ireland) Act 1833. When it was decided in 2018 to allow craft breweries and distilleries to sell alcohol, the Intoxicating Liquor (Breweries and Distilleries) Act 2018 amended s.13 of the Licensing (Ireland) Act 1833 by deleting (a) the word “Distiller” and (b) the words “Rectifier or Compounder of Spirits.”

Section 3 of the 1833 Act, as amended by the 2018 Act now reads:

“No... bailiff, gaoler, turnkey, constable, sheriff, sub-sheriff, sheriff’s officer, peace officer, or keeper of any turnpike gate, nor any person not being a householder, shall be capable of receiving or holding a licence to sell beer, cider, or spirits by retail, to be drunk or consumed on the premises.”

The fact that section 13 of the 1833 Act, even as amended by the 2018 Act, mentions fairly anachronistic titles such as “turnkey... or keeper of any turnpike gate” probably underlines the challenge in, but necessity for, the consolidation and reform of the licensing code, which originates in the 1833 Act. And, in 2025, the public health aspects of alcohol and its abuse, which we know contributes not only to illness but also to domestic violence, will no doubt also need to be front and centre in the, eventual, Oireachtas debates on the General Scheme of the Sale of Alcohol Bill 2022.

The Welsh Experience with Rolling Consolidation Programmes Under the Wales (Legislation) Act 2019

In the course of the Commission’s work on accessibility that culminated in the 2020 Report, in May 2018 the Commission hosted a delegation from the Welsh Government, headed by Jeremy Miles AM, then General Counsel to the Welsh Government, the equivalent in the Welsh Government of the Attorney General (Mr

Miles is currently the Welsh Cabinet Secretary for Health and Social Care).²⁵ The delegation's visit had been prompted by the Commission's 2016 Consultative Paper on Accessibility and Online Publication of Legislation, which had suggested that Ireland could follow the approach in the Aotearoa/New Zealand Legislation Act 2012, which had first provided for planned rolling programmes of consolidation with a view to consolidating and updating the statute book.²⁶ The Welsh delegation discussed their intention to consider that Aotearoa/New Zealand model, which formed part of the Welsh Government's response to the 2016 Report of the Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales*.²⁷ That 2016 Law Commission Report is discussed separately below in the context of the economic benefits of planned programmes of consolidation.

With the active support of Mr Miles as General Counsel, the Welsh Assembly – since renamed the Welsh Senned – enacted the Legislation (Wales) Act 2019, which has broadly followed the Aotearoa/New Zealand model, and provides for five-year rolling programmes of consolidation. In 2021, the Welsh Government published its first five-year programme under the 2019 Act, and published an updated version in 2024, *The future of Welsh law: A programme for 2021 to 2026 (revised 2024)*. Under the initial 2019 programme, the Welsh Senned enacted the Historic Environment (Wales) Act 2023 in June 2023, and it is expected that, under the revised programme, a Planning (Wales) Bill will also be enacted, for which the Welsh Government published a Draft Planning (Wales) Bill in 2025. It is worth noting that the Welsh 2023 Act broadly corresponds to the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023, which was signed into law by the President in October 2023. As noted, this was a subject recommended for consolidation by the Commission in the 2020 Report, for reasons that included that a Draft Scheme of a Bill had already been prepared. While it is clear, therefore, that outputs with or without a planned programme can proceed through the Oireachtas in the normal way, the benefit of a planned programme, such as in Wales, is that such consolidation projects have a clearer path to enactment because of the policy commitment to do so, reinforced by a roadmap such as the Welsh Government's version in 2024, *The future of Welsh law: A programme for 2021 to 2026 (revised 2024)*. The revised Welsh programme also identified the following areas for future consolidation:

- a. Allotments;

²⁵ Law Reform Commission, *Annual Report 2018*, at page 12.

²⁶ Law Reform Commission, *Issues Paper on Accessibility, Consolidation and Online Publication of Legislation* (LRC IP 11-2026).

²⁷ Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales* (Law Com No. 366).

- b. Building Regulations;
- c. Hazardous substances planning;
- d. Housing;
- e. Public health.

As with any such rolling programme, some topics will be specific to the jurisdiction in question, but some of these subjects in the Welsh programme also resonate with issues that are to the forefront of policy and legislative debate in Ireland.

Three Reasons for Implementing the Recommendations in the 2020 Report

I suggest that there are at least three important reasons for implementing the recommendations in the 2020 Report, including to establish the proposed multi-agency Accessibility and Consolidation of Legislation Group (ACLG) to oversee programmes to consolidate legislation. This is not simply because Ireland would be following the lead of comparable sized jurisdictions, namely, Aotearoa/New Zealand and Wales, although having the advantage of these very recent initiatives has many benefits, just as the work of the two British Law Commissions on insurance contract law was extremely helpful to the Commission in Ireland in its project on insurance contract law.

The first reason for implementing the 2020 Report is that Ireland rightly prides itself as a State committed to the rule of law, and that includes allowing us all to understand how the law applies to us. If any person wishes to know what the law on a subject, is should, at least, be available in a coherent, accessible, state, independently of the excellent online resources from, for example, the website of the Citizens Information Board.

Second, many of our State bodies are leaders in digital-by-design. In addition to the Citizens Information Board, there are the following non-exhaustive “digital first” or “digital-by-design” resources:

- the Revenue Online Service (ROS);
- Tailte Éireann’s Free Online Geospatial Data Hub, GeoHive;
- INFOMAR’s Real Map of Ireland; and
- the Virtual Record Treasury of Ireland.

These are exemplars of how State bodies can use digitalisation to make services more accessible. And, the Virtual Treasury of Ireland, on which the Commission’s SLRP team are making a digitalisation contribution, is an excellent example of how we can now re-learn our history, if for no other reason than to know that virtually

all the material lost in the terrible Four Courts fire had been copied elsewhere and can be recreated. Our “Irish Statute Book” could also follow those examples, including by providing that the online version of legislation becomes the official version.

The third reason for supporting planned programmes of consolidation is that it makes complete economic sense. As I discuss below, there is good evidence to suggest that, over a ten-year period of implemented consolidation programmes, which involves two completed programmes, the potential savings in legal costs are in the order of at least €260 million, which is discussed below and in detail in the Appendix.

The Strong Case for Codifying the General Principles of Criminal Liability

The Commission’s 2020 Report mentioned another example of a codification project that should be completed, namely, the work of the Criminal Law Codification Advisory Committee (CLCAC), established by the Oireachtas on a statutory basis under the Criminal Justice Act 2006. In 2010 the CLCAC completed its Draft Criminal Code Bill (along with detailed Commentary), which was published by the Minister for Justice in 2011.²⁸ Enacting that Draft Criminal Code Bill would, as the Commission put it:²⁹

“be of significant benefit to the public. Benefits would include codifying areas of the criminal law that are still regulated by common law and providing the public with a single reference point from which to ascertain those principles.”

The Commission added, correctly, that great care would be needed to ensure that the level of expertise reflected in the membership of the CLCAC was available to prepare an updated draft of the Bill that was completed in 2010 and published by the Minister in 2011. Happily, the Chair of the CLCAC, Professor McAuley, has written recently about his continuing interest in codifying the general principles of criminal liability.³⁰

²⁸ The CLCAC’s Draft Criminal Code Bill and Commentary is available at <https://www.gov.ie/en/criminal-law-codification-advisory-committee/publications/draft-criminal-code-and-commentary/>.

²⁹ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020) at page 51.

³⁰ The background to the work of the CLCAC, including the principles applied in developing its draft Criminal Code Bill (largely, though not exclusively, assisted by the many US statutory codes that have been enacted with the benefit of the American Law Institute’s Model Penal Code (MPC)), as well as the aftermath of its publication, is discussed in McAuley,

I suggest that the fate of the CLCAC's Draft Criminal Code Bill, at least as of September 2025, would be as if the work of the Company Law Review Committee, also set up on a statutory basis, under the Company Law Enforcement Act 2001, had been left to sit as a fine piece of research rather than being enacted in the 1,170 Stationery Office pdf pages that comprise the Companies Act 2014.

Perhaps some have assumed that enacting the CLCAC's Draft Criminal Code Bill would involve an enormous amount of Oireachtas time, that a Criminal Code Bill would, perhaps, be as lengthy as a Companies Bill/ Act or a Planning and Development Bill/ Act? Well, no need to be afraid. I have had a look, again, at the Draft Criminal Code Bill, it would not be too daunting at all. There are at least two reasons for this. First, the size of the Bill is not daunting. Second, it is clear that even a child can understand the general principles of criminal liability: to which I return below. As to the size of the CLCAC's Draft Criminal Code Bill, it is, essentially divided into two main pillars, of which I will concentrate in this paper on Pillar 1. This is because Pillar 2, which takes up 100 sections of the 112 sections in the CLCAC's Draft Criminal Code Bill, can be described – without, I hope, any disrespect to the enormous work involved – as the application of a consistent “code template” to 4 Acts of the Oireachtas, the Non-Fatal Offences Against the Person Act 1997, the Criminal Justice (Theft and Fraud Offences) Act 2001, the Criminal Damage Act 1991, and the Criminal Justice (Public Order) Act 1994. Again, the consistent discipline involved in those 100 sections in the CLCAC's Draft Criminal Code Bill should not in any way be underestimated, but in many respects it is the other 10 sections in the CLCAC's Draft Criminal Code Bill that would appear to present some kind of “mental block” to their progression since 2011. I suggest below that there is very little to fear, and rather as the Commission noted in the 2020 Report, much to commend, for the Oireachtas to place the general principles of criminal liability on a legislative basis.

Pillar 1 of the Criminal Code Bill is in Part 1, General Principles, and as already noted it comprises 12 sections (“12 sections” is not a misprint, and I will come back to that). It includes a number of significant general principles of criminal liability, notably:

- the **objective elements**, that is:
 - conduct, such as act, omission, possession, and
 - circumstance, such a condition under which the conduct element occurs, or a result/ consequence of the conduct,

McCutcheon, *Criminal Liability*, 2nd ed (Round Hall 2022) at chapter 2. Professor McAuley was chair of the CLCAC.

- Cicero might have called it the *actus reus*, the “act thing”, but that would have left out omissions;
- the ***fault elements*** for a particular objective element, that is:
 - subjective elements of intention, knowledge, or recklessness,
 - objective elements such as gross negligence or negligence, and,
 - in some instances, there would be no fault element for the objective element, speeding offences being an example,
 - Cicero would have a tough time explaining the wide range of these fault elements, and might have tried something like *mens rea*, the “mental thing”, but obviously “fault elements” is a much clearer, and simpler, explanation, as to which see section 1 of the Law Reform Commission Act 1975.

These are, of course, high level, general, concepts, but that level of generality is an everyday feature of legislation. The general principles in the CLCAC’s Draft Criminal Code Bill are very similar to, for example:

- the general duties of directors in sections 219 to 235 of the Companies Act 2014, where readers must grapple with general concepts such as the meaning of “fiduciary” and “good faith”, as to which Lord Mansfield (and Cicero) could provide some assistance; and
- the general duties of employers in sections 8 to 12 and sections 18 to 24 of the Safety, Health and Welfare at Work Act 2005, which are based on the objective test “so far as is reasonably practicable”, which has, helpfully, been codified in section 2(6) of the 2005 Act (nothing to assist from Lord Mansfield or Cicero).

There is another feature of the CLCAC’s Draft Criminal Code Bill that I should mention: the 12 sections in Part 1, General Principles, of the Criminal Code Bill are what I would describe as the truly innovative element of the Bill. They would, if enacted, put on a statutory footing many of the significant general principles of criminal liability that are currently found in common law (judge-made) case law (if you have access to one, or both, of the leading texts, both currently in their 2nd editions). In fact, the CLCAC expressly stated that its codification exercise was of a conservative type: replicating in statutory form the existing common law (judge-made) case law. If enacted, this would therefore involve a classic type of “law reform” as defined in section 1 of the 1975 Act, the codification, simplification and modernisation of the law. The enormous benefit of this, as the Commission stated in the 2020 Report, would be to allow the democratically elected representatives of the State to set out in writing the fundamental guiding principles that apply to criminal offences.

The CLCAC acknowledged that, in addition to those 12 sections in the Draft Criminal Code Bill, it would be necessary to add about 15 more sections in order to incorporate the work that the Law Reform Commission had been engaged in at the same time as the CLCAC's work programme, namely, the Commission's work on:

- inchoate offences, broadly speaking, "not completed offences", that is, incitement, conspiracy and attempt (8 more sections);³¹ and
- defences, that is, legitimate defence, including self-defence in a dwelling, provocation, duress, and intoxication (but not self-induced intoxication) (7 more sections).³²

So, if you included all those provisions, that would add up to a total of **27 sections** that would set out some of the most significant general principles of criminal liability. In terms of a percentage count of 27 sections, compared to those in the Companies Act 2014 and in the Planning and Development Act 2024:

- the 27 sections in a Criminal Code Bill that would set out some of the most significant general principles of criminal liability represent about **1.86% of the 1,448 sections in the Companies Act 2014**; and
- the 27 sections in a Criminal Code Bill that would set out some of the most significant general principles of criminal liability represent about **4.2% of the 637 sections in the Planning and Development Act 2024**.

I appreciate that these are quite crude comparators to use, but my general point is that, of the combined total of 2,085 sections in the Companies Act 2014 and the Planning and Development Act 2024, there were probably multiples of 27 sections that required deep thought and reflection by all those engaged in enacting those vital pieces of legislation. It is not really conceivable that the Oireachtas would have any real difficulty in understanding the concepts in the 27 sections in such a Criminal Code Bill.

My own sense is that even a child could understand the general principles of criminal, which is the second reason I alluded to earlier for enacting the Criminal Code Bill. This is certainly what University College Dublin's Law Faculty (as it was then known) considered, in the academic year 1976 to 1977, when it timetabled the subject Criminal Law in First Year BCL. A number of the First Year BCL students for that academic year 1976 to 1977 had just turned 17 (this is not based on hearsay evidence), all of them, therefore, still "children" within the meaning of the law,

³¹ That is, the 8 sections in draft Inchoate Offences Bill in the Commission's Report on Inchoate Offences. See Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010).

³² That is, the 7 sections, other than the section on intoxication, in the draft Defences Bill in the Commission's Report on Defences in Criminal Law: see Law Reform Commission, *Report on Defences in Criminal Law* (LRC 95-2009).

including any relevant international law conventions on the rights of the child. Since then, I do not recall reading anything in the 1989 UN Convention on the Rights of the Child (UNCRC) to the effect that those under the age of 18 have the right not to be taught the general principles of criminal liability. Indeed, it would be very useful for those principle to be taught to those well under the age of 18, especially bearing in mind that, in Ireland, in accordance with section 52 of the Children Act 2001, as amended by section 129 of the Criminal Justice Act 2006, a 12 year old may be charged with the most serious criminal offences.

Returning to the CLCAC's Criminal Code Bill, the 27 sections that I have mentioned would take up about 17 pages. If you were to scroll down 17 pdf pages of the Companies Act 2014 from section 1 of the 2014 Act, you would get to section 22 of the 2014 Act; and scrolling down 17 pdf pages of the Planning and Development Act 2024 from section 1 of the 2024 Act would get you to section 6 of the 2024 Act (again, confirming some much longer sections in the 2024 Act compared with the 2014 Act). These are also very crude comparisons, but if the members of the Oireachtas can read through and enact those lengthy Acts, I think that asking them to go through 17 pages of general principles of criminal liability will not impose any significant burden: they are not even children.

Finally, I should mention that the codification issue presented by the general principles of criminal liability is, broadly, the same problem presented with most other areas of law that require codification and/or consolidation, namely, that elements of the general principles are already found scattered in different parts of the "Irish Statute Book". For example:

- section 4 of the Criminal Justice Act 1964 (the only substantive section in the 1964 Act that remains in force) contains aspects of the fault element in murder, namely, an intention to kill or cause serious injury (section 4 carries the marginal/ shoulder note "malice");
- elements of the general principles concerning defences were enacted in sections 18 to 24A of the Non-Fatal Offences against the Person Act 1997 (s.22(1) of the 1997 Act provides: "The provisions of this Act have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission", which is not exactly helpful in terms of detail);
- another important defence, the insanity defence, was codified, and suitably modernised in some detail, in the Criminal law (Insanity) Act 2006; and
- another sub-element of the defence of legitimate defence, self-defence in a dwelling, was enacted in the Criminal Justice (Defence of the Dwelling) Act 2011.

And, really finally, in 2020 the codification of the general principles received the support of Mr Justice Charleton, whose support was fully echoed by Michele O'Boyle, Solr, then President of the Law Society of Ireland.³³

The Online Version of Legislation Should Be the Presumptive Official Version

The Commission's 2020 Report recommended that the online version of legislation on the electronic Irish Statute Book (eISB), which for most of us is the principal source of legislative data in the State, should be given official status. At present, only the printed version of an Act, published under the authority of the Stationery Office, has official status under the Documentary Evidence Act 1925 as the presumed "content" of the law in the Act – the conclusive evidence of the text of an Act being the copy signed by the President and lodged in the Supreme Court under Article 25.4.5° of the Constitution (the Supreme Court being, in effect, the successor to the "keeper of the rolls", most of which are being digitised by the Virtual Record Treasury of Ireland).

In this digital age – perhaps the cusp of the Fourth Industrial Age – this provision in the 1925 Act appears almost as anachronistic as the "turnkey", "constable" and the "keeper of any turnpike" that we still find in the Licensing (Ireland) Act 1833, as amended in 2018. This is especially so when the pdf version of an Act on the eISB is virtually identical to the Stationery Office printed version, the sole difference being that the Stationery Office label required by the Documentary Act 1925 is not present on the pdf version on the eISB. Even more perplexing is that the pdf versions of statutory instruments on the eISB include not only the Stationery Office label, but also the bar code from the print version. And, can I add, to those who manage the eISB, please do not begin removing those Stationery Office labels and bar codes from the pdfs of the statutory instruments.

As the Commission pointed out in the 2020 Report, most other European states already provide that the online published version of their legislation is the "official" version. Indeed, since 2013 the online text of EU legislation, as published in the online Official Journal of the European Union (OJEU) is the official version of the text of such legislation. The printed off copies have no legal status.

³³ See Keena, "The life of a Supreme Court judge: 'The law is above you'" *The Irish Times* (9 November 2020) <<https://www.irishtimes.com/news/crime-and-law/the-life-of-a-supreme-court-judge-the-law-is-above-you-1.4403658>> accessed 17 November 2025; and "Law Society of Ireland supports Supreme Court judge's call for codification of criminal law" (10 November 2020) <<https://www.lawsociety.ie/news/Media/Press-Releases/law-society-of-ireland-supports-supreme-court-judges-call-for-codification-of-criminal-law/>> accessed 17 November 2025.

The 2020 Report also recommended that, naturally, any amendment of the Documentary Act 1925 to provide that the online version of legislation is the presumptively official text must be accompanied by appropriate digital protection. The 2020 Report recommended that the online version would have to be accompanied by a qualified electronic signature that complies with Regulation (EU) No 910/2014, the 2014 EU Regulation on the mutual recognition of electronic identification and signatures (the eIDAS Regulation).

In preparing this paper, Mr Cameron Moss in the Commission raised two important points with me: where and what is the Stationery Office? As to “where”, I am old enough to remember it as a physical office at the back of the GPO building off O’Connell Street, and later in Molesworth Street. No longer, so, unfortunately for me at least, the answer to “where” is the Stationery Office is probably “the cloud”.

So “what” is the Stationery Office, and why is that important? It is important because of sections 1, 2 and 5 of the Documentary Evidence Act 1925, and related provisions in the Ministers and Secretaries Act 1924.

First, the 1925 Act, as amended by the Constitution (Consequential Provisions) Act 1937:

- Section 1 of the 1925 Act: “the Stationery Office” means the Stationery Office established and maintained by the Government of Ireland (and between 1922 and December 1937, established and maintained by the Government of Saorstát Éireann);
- Section 2 of the 1925 Act: prima facie evidence of any Act of the Oireachtas may be given in all courts and in all legal proceedings by the production of a copy of such Act “printed under the superintendence or authority of and published by the Stationery Office”; and
- Section 5 of the 1925 Act: every copy of an Act of the Oireachtas that “purports to be published by the Stationery Office or to be published by the authority of the Stationery Office shall, until the contrary is proved, be presumed to have been printed under the superintendence and authority of and to have been published by the Stationery Office.”

It appears to me that the 1925 Act does not require there to be a physical “where” in which one can find “the Office”; rather the 1925 Act can properly be interpreted as involving “functions”, which are that the Stationery Office has “printed” and “published” Acts, or they have been “printed” and “published” under the “authority” of the Stationery Office.

Next, the Ministers and Secretaries Act 1924, which was, in effect, given a post-1937 Constitution meaning by Article 49.3 of the Constitution, so that the Departments, and their functions, established by the 1924 Act, were given a post-1937 Constitution effect. Part 1 of the Schedule to the 1924 Act expressly conferred on the Minister for Finance:

- the functions of “The Commissioners of Public Works In Ireland”, the formal title of what is often referred to (including in the Appropriation Acts, discussed below) as “the Office of Public Works” (the OPW); and
- the functions of “The Stationery Office.”

Some of the entities that were referred to in Part 1 of the Schedule to the 1924 Act, as enacted, have since been abolished. For example, Part 1 of the Schedule to the 1924 Act, as enacted, referred to “The Ordnance Survey”; and when it was established as a separate State body by the Ordnance Survey Ireland Act 2001, the reference to “The Ordnance Survey” in the 1924 Act was deleted by section 36 of the 2001 Act (OSi has since been integrated into Tailte Éireann). But neither “The Commissioners of Public Works In Ireland” or “The Stationery Office” has been formally abolished since 1924.

Mr Cameron Moss pointed out to me that, for many years, the Appropriation Acts made express references to the annual public funds being expressly allocated, as a separate line item, to what might be described as the “standalone” Stationery Office; that over time these references changed to the “Stationery Office” within (what the Appropriation Acts refer to as) “the Office of Public Works” (rather than the Commissioners of Public Works In Ireland); and in more recent Appropriation Acts, since in or around 2013, the public funds are allocated (see, for example, the Appropriation Act 2024):

“[f]or the salaries and expenses of the Office of Public Works; for services administered by that Office and for payment of certain grants and for the recoument of certain expenditure.”

Was “The Stationery Office” abolished in or around 2013? I think not, because, in accordance with the Ministers and Secretaries Act 1924, it remains under the functional control of the Minister for Finance. One other statutory provision may be relevant here. Section 6 of the Interpretation Act 2005, which was enacted to implement the “updating” recommendations in Chapter 3 of the Commission’s 2000 Report on Statutory Drafting and Interpretation: Plain Language and the Law, provides:

“In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory

instrument, but only in so far as its text, purpose and context permit.”³⁴

If it was needed, section 6 of the 2005 Act could allow a court to conclude, consistently with a survey of the Appropriation Acts, that, over time “The Stationery Office” has been subsumed within the general functions of the OPW, rather than abolished. It is nonetheless less than satisfactory that I have found it impossible to locate any reference on any www.gov.ie website (and I appreciate that almost all of those sites are Beta sites) to “The Stationery Office”.

I think it would be preferable that when – as I, naturally, anticipate – the recommendations in the 2020 Report are fully implemented, the 1925 Act will be amended to address the continuing existence of “The Stationery Office.”

Potential Savings From Planned Programmes of Consolidation

I have already mentioned that the recommendation in the 2020 Report, to have planned programmes of consolidation, was based on similar models in Aotearoa/New Zealand and Wales. As I also mentioned, the Legislation (Wales) Act 2019, was one of the outcomes of the 2016 Report of the Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales*. In parallel with that Report, in 2016 the Law Commission of England and Wales carried out an Impact Assessment (IA),³⁵ of the planned programmes of consolidation of Welsh Legislation, which comprised these elements:

- **potential annual savings in cost of legal services**, taking account of: the total number of Welsh legal practitioners; the average hourly Welsh legal practitioner salary; and an estimated 1-2 hours per week checking unconsolidated legislation for 44 working weeks;
- **potential annual savings for individuals consulting unconsolidated legislation**, taking account of: the total adult Welsh population up to 64; estimate that 0.5% to 1% are likely to engage with a legal issue annually; estimated 1-2 hours of research annually involved; and national minimum wage cost;

³⁴ Law Reform Commission, *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at page 38.

³⁵ Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales Impact Assessment* (LAWCOM0054).

- **other savings that were not quantified** included: the time involved in judges, regulators and public servants consulting unconsolidated legislation.

The Law Commission concluded that its “best estimate” (**excluding** the savings for judges, regulators and public servants that were not quantified) was:

- Savings of £194 million over 10 years in Wales.

The Appendix to this paper is an adaptation of the detailed exercise carried out by the Law Commission of England and Wales in the 2016 Impact Assessment. Adapting the analysis by the Law Commission of England and Wales, and applying it to the planned programmes of consolidation recommended in the Commission’s 2020 Report, this would involve:

- savings of at least €260 million over 10 years in Ireland.

It should also be noted that, as pointed out by the Law Commission for England and Wales, these estimated 10 years costs savings did not take into account any savings to the judiciary, to regulators and to public servants, who currently spend considerable time consulting unconsolidated legislation – with the important exception of the 550+ Revised Acts.

And, in addition, there is the “rule of law bonus”: the law would be clearer and more accessible, so we would all have a better chance of knowing what we are supposed to do (consolidated/ codified conduct acts) and also what not to do (consolidated/ codified conduct omissions).

Concluding Comments

Earlier this month (September 2025), the Government published its Action Plan on Competitiveness and Productivity.³⁶ In the context of reform of the justice system, the Action Plan noted the importance of implementing the 90 recommendations in what it rightly describes as the “landmark” 2020 Report of the Review of the Administration of Civil Justice,³⁷ which had been chaired by Mr Justice Peter Kelly. A significant number of the recommendations in the Kelly Review Group’s involved, in effect, consolidation of recommendations made in a number of Commission Reports, including these: Report on Judicial Review Procedure,³⁸ Report on Multi-

³⁶ Government of Ireland, *Action Plan on Competitiveness and Productivity* (Department of Enterprise, Tourism and Employment 2025).

³⁷ Review Group of the Administration of Civil Justice, *Report of the Review of the Administration of Civil Justice* (October 2020).

³⁸ Law Reform Commission, *Report on Judicial Review Procedure* (LRC 71-2004).

Party Litigation,³⁹ Report on Consolidation and Reform of the Courts Acts,⁴⁰ and Report on Personal Debt Management and Debt Enforcement.⁴¹

The Government's Action Plan also pointed out that noted that, although implementation of the Kelly Review Group's 2020 Report "is underway, the pace needs to be accelerated."⁴² The Action Plan also noted that the Department of Justice is preparing a Civil Reform Bill to bring forward the recommendations in the Kelly Review Group's 2020 Report.⁴³ There is a strong case for implementing all of the 90 carefully considered, and therefore modest, recommendations in the 2020 Review, rather than a selection of them.

Of direct relevance to the Commission's 2020 Report on Accessibility of Legislation in the Digital Age,⁴⁴ the Government's Action Plan on Competitiveness and Productivity also contains this important "Priority Action" commitment for 2026 – 2027:

"Department of the Taoiseach to coordinate a range of actions aimed at regulatory reform across Government Departments."⁴⁵

As it happens, the Department of the Taoiseach, through the Office of the Attorney General, is the "line Department" for the Commission. In light of the cost savings of at least €260 million over 10 years of putting in place planned programmes of consolidation, implementing the Commission's 2020 Report on Accessibility of Legislation in the Digital Age⁴⁶ would, therefore, also make a suitable contribution to the priority of regulatory reform identified in the Government's Action Plan.

³⁹ Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76-2005).

⁴⁰ Law Reform Commission, *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

⁴¹ Law Reform Commission, *Report on Personal Debt Management and Debt Enforcement* (LRC 100-2010).

⁴² Government of Ireland, *Action Plan on Competitiveness and Productivity* (Department of Enterprise, Tourism and Employment 2025) at page 16.

⁴³ Government of Ireland, *Action Plan on Competitiveness and Productivity* (Department of Enterprise, Tourism and Employment 2025) at page 77.

⁴⁴ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

⁴⁵ Government of Ireland, *Action Plan on Competitiveness and Productivity* (Department of Enterprise, Tourism and Employment 2025) at page 17.

⁴⁶ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

And bearing in mind that, also this month (September 2025), the Government identified that Ireland leads the way in EU AI regulation⁴⁷ it would also be entirely fitting that regulatory reform would also include the recommendation in the Commission's 2020 Report on Accessibility of Legislation in the Digital Age that the online version of legislation should become the presumptively official text.⁴⁸ As already noted, the 2020 Report recommended that the online version would have to be accompanied by a qualified electronic signature that complies with Regulation (EU) No 910/2014, the 2014 EU Regulation on the mutual recognition of electronic identification and signatures (the eIDAS Regulation).⁴⁹

Finally, on the 50th anniversary of the Commission, it is appropriate to conclude with a brief comment about the future of law and its reform. Ireland rightly projects its leading role in EU-derived AI regulation, and it is likely that AI will play an important role in the future development, and reform, of our laws. The "Irish Statute Book" should be, and could be, an online "book of laws", clearly stated and fully searchable. It is also likely that legislation will be drafted using all the available digital and AI technologies that are currently emerging. Not drafted by chatbots (although they are already here as online assistants)⁵⁰, but by well-educated lawyers, who use plain language as much as possible, whether in legislation on

⁴⁷ Department of Enterprise, Tourism, and Employment, "Ireland leads the way in EU AI regulation" <<https://enterprise.gov.ie/en/news-and-events/department-news/2025/september/20250916.html>> accessed 19 November 2025

⁴⁸ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020) at recommendation 6.02.

⁴⁹ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020) at recommendation 6.02.

⁵⁰ This month (on 10 September 2025), the Parliamentary Counsel Office (PCO) of New Zealand announced it had completed the development phase of its project to explore how AI and emerging technologies might support the creation of, and access to, New Zealand legislation. The New Zealand PCO is currently reviewing the proof-of-concepts tools developed by each researcher to plan out next steps. The objectives of the project included: identifying new opportunities to support staff in producing, publishing, and making accessible New Zealand legislation; and ensuring that limitations or risks of any AI or emerging technology options be well understood and considered by the New Zealand PCO. The New Zealand PCO investigated five "use cases" aimed at supporting the work of PCO drafters and improving the experience of users of the NZ Legislation website. A key aspect of the project was conducting the research openly to encourage ongoing discussion and collaboration. PCO staff with subject matter expertise in the relevant areas partnered with researchers who brought experience and knowledge of AI technologies. The New Zealand PCO produced reports and brief demonstration videos of the following proof-of-concept tools: creating a chatbot for the New Zealand Legislation website; classifying legislative data in different ways; generating prospective consolidations; generating draft explanatory notes; and generating plain language recommendations for drafters. See Parliamentary Counsel Office, "Can AI be used to support plain language in legislation?" <<https://www.pco.govt.nz/about-us/pco-news/PCO-explores-use-of-AI-technologies-to-support-its-work>> accessed 19 November 2025.

consumer insurance contract law, or in any other legislation in a country that believes strongly in the rule of law.

Appendix A

This Appendix sets out the potential savings in Ireland from the planned programmes of consolidation, as recommended in the Law Reform Commission’s Report on Accessibility of Legislation in the Digital Age.⁵¹ The Tables below are adapted from the Tables in the Impact Assessment (IA) of the Law Commission of England and Wales that was carried out in parallel with its 2016 Report Form and Accessibility of the Law Applicable in Wales.⁵²

The Law Commission of England and Wales, in its 2016 Impact Assessment, and the later 2019 Value of Law Reform Report,⁵³ used a figure of £194 million savings over 10 years, which is £43.5 million lower than the “Best Estimate” figure in its Impact Assessment of £237.50 million (which did not take account of other non-monetised benefits of consolidation). This lower figure appears to arise from a 3.5% “discount rate” it applied to take account of potential implementation costs. The “Low Estimate” savings figure over 10 years in its 2016 Impact Assessment had been £118.40 million. The “converted Low Estimate” for Ireland is €181.80 million, and the “converted Best Estimate” is €551.70 million. The mid-point between these two is €365.60 million, which involves a significant “discount” from the “converted Best Estimate”. If a 3.5% “discount rate” of €12,796,000 is applied to the mid-point estimate, that brings the mid-point estimated saving to €352.80 million over 10 years; and if a 3.5% “discount rate” of €6,363,000 is applied to the low-point estimate of €181.80 million, that brings the low-point estimated saving to €175.43 million over 10 years. The mid-point between those two “discount rate” figures is €264.12 million, so that a 10-year saving of €260 million is defensible.

It should also be noted that, as pointed out by the Law Commission for England and Wales, ***it did not take into account any savings to the judiciary and public servants using consolidated legislation***, or of other non-monetised benefits of consolidation.

For ease of comparison, the Tables below use the Table Numbers 5, 6, and 7 from the Law Commission’s July 2016 Impact Assessment (IA).

⁵¹ Law Reform Commission, *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

⁵² Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales Impact Assessment* (LAWCOM0054).

⁵³ Law Commission of England and Wales, *Value of Law Reform* (September 2019) at page 23.

Table 5: Annual savings from reduced research required by Irish legal practitioners

	Low estimate	Best estimate	High estimate
A. Number of legal practitioners	14,273 ⁵⁴	14,273	14,273
B. Average hourly legal practitioner salary	€28.64 ⁵⁵	€28.64	€28.64
C. @ 44 weeks	1 hour per week	2 hours per week	3 hours per week
A. Total savings [A x B x C]	€17.99m	€35.98m	€53.97m

Assumptions

- Maximum of 8 weeks leave for any one year [annual leave + public holidays] = 52 minus 8 = 44 weeks of work
- Of the 14,273 legal practitioners in Ireland (2024), legal secretaries and executives are excluded because they do not generally research the law
- Additional required research [from questionnaire responses]:
 - Legal practitioners: Low to high estimate – 1 hour per week to 3 hours per week [2 – best estimate]

Legal practitioners are highly likely to have access to some online source courtesy of work/professional arrangements. The savings here are almost entirely due to consolidation and codification.

⁵⁴ This comprises the combined number of: (a) solicitor practising certificates issued by the Law Society of Ireland in 2024 (12,176); and (b) members of the Law Library in 2024 (2,097).

⁵⁵ €28.64 is the euro conversion of the £24.56 average hourly rate for Welsh lawyers used in the 2016 Impact Assessment of the Law Commission of England and Wales. This has not been increased to take account of any inflation in the intervening 9 years, or any difference between Wales and Ireland for hourly average rates.

Table 6: Annual estimate of savings to Irish civil society

	Low estimate	Best estimate	High estimate
A. Irish population aged 25 – 64 (2024) ⁵⁶	2.86m	2.86m	2.86m
B. Percentage likely to engage with an issue	0.5 percent	0.75 percent	1 percent
C. Number [A x B]	14,300	21,450	28,600
D. Hours of research	1 hour	2 hours	3 hours
Minimum wage ⁵⁷	€13.50	€13.50	€13.50
Total savings	€0.19m	€0.58m	€1.2m

⁵⁶ The 2016 Impact Assessment of the Law Commission of England and Wales used the wider age group 16-64.

⁵⁷ This is the national minimum wage in Ireland for persons over 20 since 1 January 2025. In the Impact Assessment of the Law Commission of England and Wales stated: "This is likely to be the most frequently observed youngest age group to look up legislation with a view to pursuing further action."

Table 7: Option 1 – Summary of Annual Benefits

	Low estimate	Best estimate	High estimate
Transitional			
None identified	0	0	0
On-going			
Savings from reduced research – legal practitioners	€17.99m	€35.98m	€53.97m
Savings from improved access-civil society	€0.19m	€0.58m	€1.2m
Total Savings	€18.18m	€36.56m	€55.17m
Total Savings (10 years)	€181.80m	€365.60m	€551.70m

'CHANGING WITH IRELAND': WORKING WITH THE LAW REFORM COMMISSION

Bryan McMahon*

Time is short, so I will try to be brief. My contribution here today relates to the very early years of the Commission, and indeed, to the years that preceded the establishment of the Law Reform Commission fifty years ago.¹

In 1966 a non-statutory Advisory Committee on Law Reform was formed by representatives of the Benchers of the King's Inns, the General Council of the Bar of Ireland, the Law Society of Ireland, and the three law faculties in the country at the time, i.e. Trinity College, UCD and UCC, with the Department of Justice providing secretarial services.

I was approached in 1967 by Professor William Finlay, from the Committee, who had been my Professor at UCD, enquiring of me whether I would be interested in writing a Report on the Law of Occupiers' Liability in Ireland with suggestions for reform. It was a vexed area of the law at the time, and I think the topic had been suggested by the Attorney General. It should be noted that I had already registered for a Ph.D with Professor John Kelly (also a member of the Committee) in UCD on the topic, so when I accepted the invitation, I insisted that my thesis would be my Report to the Committee. The Committee had no difficulty with this. I also pointed out, since I had taken up the position of Lecturer in Law at UCC, I would need some books and this led to a modest grant from The Law Society.

The Report,² with the Committee's own Recommendations, which differed somewhat from my proposals, was eventually sent to the Minister for Justice in 1971 and I was awarded my Ph.D in 1972. Because of the Supreme Court's decision in *McNamara v the ESB*³ in 1974, which had a huge impact in this area of the law, I further amended my section of the Report to take this decision into account, and it was eventually published by the Department in 1974 with my updates.

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¹ This speech was written with the research assistance of Aoife Enright, researcher at the Law Reform Commission.

² Advisory Committee on Law Reform, *Reform of Law of Occupiers' Liability in Ireland incorporating a Study entitled: Occupiers' Liability in Ireland Survey and Proposals for Reform* (Bryan M. E McMahon 1974).

³ *McNamara v Electricity Supply Board* [1975] IR 1.

My arrangement with the Committee was a loose one; I was not employed or in a contractual relationship with the Committee nor was I paid for my efforts. The Committee was not bound in any way to follow my recommendations although it promised to recommend it to the Department for publication, if it was satisfied with the study.

This ended my part in the pre-1975 law reform story, as my task was completed and the Committee was *ex officio*. The Law Reform Commission was established by Statute in the same year.⁴ The prequel, however, does show that reform was in the air immediately before the Commission came into existence. For completeness' sake, I should also mention that I subsequently spent a further year as a Research Counsellor with the Commission in or around 1976/77 when I was seconded from UCC and when Mr. Justice Brian Walsh was President of the Commission. During that time I wrote two Consultation Papers: one on the Civil Liability for Animals,⁵ and a second on Defective Premises.⁶ The subsequent history of these papers is outside my remit here today.

In relation to my thesis on Occupiers' Liability, I worked alone and during this period there was little or no discussion between me and the members of the Committee. Neither was there any public consultation. I did, I believe, state the law as I found it. I did analyse and comment on what I thought were the problems with the existing law and I formulated proposals. I also did a comparative study of the law in other selected jurisdictions. My interaction with the Committee was what I might describe as one of cordial reserve. I may have had a session with the Committee when I presented my Report to it, but I do not remember it as a two-way exchange. On completion of my Report, the Committee thanked me for my work, made its own recommendations (in 1971) to the Minister for Justice and recommended that the Department of Justice should publish the research and its proposals for reform which it eventually did in 1974. I did no field work, nor did I consult extensively with the relevant "stakeholders", a word that was not in much use at the time. I did, however, enquire from some insurance companies whether liability insurance would be available to cover the farmers' risk of being sued by entrants (lawful or unlawful) for injuries incurred while on the farmer's property, and was told by many companies that such extra cover would be readily given as an add-on to the farmers' ordinary house/property policy for a very modest premium, (I believe the sum of £10 p.a. was mentioned) and for the asking, by other companies.

It must be remembered that in those days there was no funding or provision for extensive consultation with other parties or stakeholders. Even later, when I was

⁴ Law Reform Commission Act 1975.

⁵ Law Reform Commission, *Report on Civil Liability for Animals* (LRC 2-1982).

⁶ Law Reform Commission, *Report on Defective Premises* (LRC 3-1982).

preparing a paper for the Law Reform Commission itself in 1977 on Civil Liability for Animals, the only external consultation I engaged in was with the head zookeeper in Dublin Zoo. When I asked him whether he agreed with the distinction the common law made between domestic animals and wild animals, where liability on the owner of the latter was stricter, he replied: "All animals are dangerous." Inferring from this that all animals should be treated as if they were wild, I asked him why this should be so. Laconically, he replied: "Because dogs can't talk." He further elaborated that even the most domesticated animal can have a bad day: it may have a pain in its tooth or a knotted gut, or she may be protecting a litter of pups nearby. Accordingly, since he/she cannot warn you about its pain or its apprehensions on that day, the animal is best left alone. "One must always assume, when approaching a dog, or other domesticated animal, that this is a 'bad dog day'".

Basics of Law Reform Research

My work on Occupiers' Liability over these years led me to conclude that law reform in general involved four stages at least. First, it was necessary to have a basic document setting out clearly the existing law. This is obviously the starting point. Without such a clear exposition of the law it is not possible to appreciate where the shortcomings lie and where reform is required. Further, setting out the existing law, it should be noted, may not always be easy for various reasons. Ignorance or uncertainty of what the law is, may even be one of the reasons why reform is called for in the first place. Clarification of the existing law of itself may, in some cases, lessen the need for reform or reduce the perceived urgency for reform. Secondly, there must be a clear appreciation of what the deficiencies, the shortcomings and the injustices are with the existing law. The law may be ill-defined, too complex, and/or unfair. These issues will clearly have to be identified. Judicial dissatisfaction and academic analysis/criticism, as well as public expressions of dissatisfaction, may assist in this exercise. Thirdly, before the final proposals for reform are formulated and published, a consultation process with the relevant stakeholders is prudent and, nowadays, normal. Such a consultation helps to inform the process, gives credibility and democratic value to the exercise and eases the path for reforming legislation when introduced. In this context, a comparative study of the law in other comparable jurisdictions, if carefully considered, can also yield valuable insights and assist the deliberations. Finally, carefully proposed recommendations, which also identify the policy objectives that underpin the reform measures, should be identified and published. Ideally, a draft of any suggested legislation, or at least the headings of a bill, should accompany such proposals.

Regarding the law in other jurisdictions as inspiration for reform in one's own country, let me tell you a salutary tale. Recently, while walking in an unnamed country town in the west of Ireland, a notice in the window of a jeweller's shop caught my attention. The notice read: "Ears pierced, while you wait." I smiled after

a moment, just like you did now, as I considered the alternative. (You should always consider the alternative!). Continuing with my search for a coffee shop, I spotted the inspiration for the jeweller's advertisement. A handwritten notice in a cobbler's window on the other side of the street, also advertised its services. It read: "Shoes heeled, while you wait." Inspired and impressed by the cobbler's effort to drum up business, the jeweller obviously adopted, without sufficient adjustment, the shoemaker's promotional invite. Unfortunately, the plagiarism was inappropriate. Similarly, with foreign law. One must exercise caution when one is considering adopting foreign laws as appropriate solutions for local problems. Care is required.

The Law on Occupiers' Liability

Since the Occupiers' Liability Report⁷ was the first study in tort law reform in Ireland, it is appropriate that I should state the law as I found it and mention the various suggestions that followed before the Occupiers' Liability Act was finally passed in 1995.

At the outset, however, it is worth emphasising that stating the Irish law on Occupiers' Liability in the 1970s was not an easy task. There was no tradition of legal research in the country and only a few well-stocked law libraries existed in the jurisdiction. There were only a handful of full-time legal academics and there were no Irish textbooks. Not all cases were reported. Many of the older unreported Irish cases remained hidden and unloved, in handwritten form, in the basement of the Four Courts.⁸ For sources and studies, in foreign languages such as those relating to Civil law countries, for example, one had to travel abroad to the bigger libraries in the UK or the USA. Of course, there was no internet at the time.

I emphasise this so that one can appreciate the difficulties of stating what the law was at the time, and here I repeat myself, when there were no law books or texts or journals and few published reports. For those younger than myself (which is most of you in this audience!) this is scarcely credible, when nowadays there are books and texts of high quality published in this jurisdiction on almost every conceivable legal topic.

⁷ As I have already stated my study on Occupiers' Liability in Ireland was published; see Advisory Committee on Law Reform, *Reform of Law of Occupiers' Liability in Ireland incorporating a Study entitled: Occupiers' Liability in Ireland Survey and Proposals for Reform* (Bryan M. E McMahon 1974).

⁸ A notable exception was a small collection of Irish cases entitled, I believe, *Digest of Irish Cases*, compiled and noted by Professor E.F. Ryan B.L., a part-time professor at UCC in the mid-1960s. See Ryan, *Notes of Irish Cases, Reported in the Irish Reports, the Northern Ireland Reports, the Irish Law Times Reports, and the Irish Jurist Reports, 1949-1958* (Cork University Press 1960), and Ryan, *Notes of Irish cases: Reported in the Irish reports, the Northern Ireland Reports, and the Irish law Times Reports 1969-1978* (Cork University Press, 1982).

The common law on Occupiers' Liability, as stated in the seminal case of *Indermaur v Dames*⁹ in 1867 categorised entrants into three categories: invitees, licensees and trespassers. To the invitee, the Occupier owed a duty to prevent injury from unusual dangers of which he knows or ought to know. To the licensees, the Occupier only owed a duty to prevent damage from concealed dangers of which he had actual knowledge. Finally, at the bottom of the list, to trespassers, the Occupier only owed a duty not to intentionally or recklessly injure them. Three categories, three duties of care.

In the period 1867 to 1970, judicial dissatisfaction with the category system manifested itself throughout the common law world. In particular, the judiciary was unhappy, first, that different standards of care extended to invitees and licensees, and second, that "innocent" trespassers, especially child trespassers, were treated so harshly under the law. Over time in its efforts to assist the trespasser the judiciary in different jurisdictions and to various degrees had used several techniques to mitigate the trespassers' lot. Some of these included decisions which held (i) that recklessness was an objective not a subjective standard, as was sometimes argued by the Occupier; (ii) that "frequent" trespassers might be considered to have been permitted by the Occupier and accordingly, were licensees; (iii) that child trespassers had become licensees because they were "lured" onto the property by an "attractive nuisance"; (iv) that, where the entrant (including likely trespassers) was injured by an "activity" rather than by the static condition of the premises, that negligence principles applied and accordingly, that the entrant was entitled to reasonable care; and, (v) finally, that to foreseeable trespassers (especially children) the Occupier might owe a duty to take reasonable care.¹⁰

"The anomaly of this development, however, soon became clear: modern pressures, which, by and large, favoured the plaintiff entrant, were obliged to operate and make their presence felt within an inimical framework determined by 19th century outdated principles. Judicial good will was cramped within an anachronistic structure... with the result that the justice of the entrant's claim was not making its proper impact in the law."¹¹

In these circumstances, it is not surprising that, from the 1950s onwards, reform was called for by commentators and academics and Occupiers' Liability became a hot topic in Law Reform Bodies in many common law jurisdictions. In 1957, The

⁹ *Indermaur v Dames* [1867] LR 1 CP 274.

¹⁰ *McNamara v Electricity Supply Board* [1975] IR 1.

¹¹ See McMahon, "Conclusions on Judicial Behaviour from a Comparative Study of Occupiers' Liability" (1975) 38 *Modern Law Review* 39.

Occupiers' Liability Act¹² was passed in the UK. A similar act was adopted in Northern Ireland¹³ and Scotland passed its own reforming legislation¹⁴ in 1960.

In Ireland the Supreme Court in *McNamara v ESB*,¹⁵ in 1974 in what can only be described as a brave decision, held that the Occupier in such cases not only owed a duty of care to trespassers whose presence on the property was known or should have been reasonably foreseen, but also that the duty in such cases was to take reasonable care in all the circumstances. Clearly, this decision not only greatly improved the lot of trespassers; it also, however, in my view, although not explicitly adverted to in the Court's judgement itself, had significant repercussions for the whole area of Occupiers' Liability including the obligations to invitees and licensees.

My Recommendations to the Committee

Given that backdrop and the fact that the Occupier at common law owed a duty to take reasonable care to contractual invitees and owed a similar duty in respect of injuries caused by his activities on the land, I recommended that the distinction between invitees and licensees should be abolished and that the Occupier's duty to all lawful entrants should be the same, i.e., a duty to take reasonable care. For the reasons already given I also recommended that the same duty of care should be owed to trespassers. I did not fear that undeserving trespassers would unduly benefit from such treatment, as both the proximity and foreseeability concepts would ensure that this was unlikely to happen.¹⁶

The Committee's Recommendation

The response of the Advisory Committee on Law Reform was not too different. It recommended¹⁷ (i) that the three common law categories should be abolished and (ii) that the duty of care owed to all persons coming onto the property, including trespassers, should be the same, i.e. the duty to take reasonable care; (iii) It added, however, that the Occupier should have a defence in the following circumstances: (i) where the entrant was a trespasser and (ii) in the case where the entrant was under 16 years, the defendant had taken reasonable care to ensure that children

¹² Occupiers' Liability Act 1957 (United Kingdom).

¹³ Occupiers' Liability Act (Northern Ireland) 1957.

¹⁴ Occupiers' Liability (Scotland) Act 1960.

¹⁵ *McNamara v Electricity Supply Board* [1975] IR 1.

¹⁶ The fact that a trespasser was a child would be accommodated as a relevant fact to be considered in such cases.

¹⁷ In March 1971, prior to *McNamara v Electricity Supply Board* [1975] IR 1.

did not trespass onto the property; and (iii) the Occupier had not wilfully inflicted the injury or caused it recklessly with knowledge of the trespasser's presence. To escape liability to the trespasser the Occupier had to discharge these proofs. This defence would not be available if the Occupier knew of the presence or probable presence of the trespasser.

My recommendations anticipated *McNamara* and the Committee also indicated that it was also willing to abolish the categories and to apply the reasonable care standard to all entrants. It suggested, however, that the Occupier could have a defence in the circumstances just mentioned. To escape liability the Occupier would have to prove that it did not intentionally or recklessly cause the damage to the trespasser.

Post Script: McNamara v ESB, A Further Word

This was the position when the Supreme Court in 1974, delivered its decision in *McNamara v ESB*,¹⁸ in what can only be described as a bold decision. The Supreme Court, held firstly, that the Occupier in such cases not only owed a duty of care to trespassers whose presence on the property was known or should have been reasonably foreseen, and secondly, that the duty in such cases was to take reasonable care in all the circumstances. Clearly, this decision not only greatly improved the lot of trespassers and particularly child trespassers; it also, in my view, although not explicitly adverted to in the Court's own judgement, significantly altered the whole area of Occupiers' Liability including the duties owed to invitees and licensees. Once it was accepted that, if reasonably foreseeable trespassers were entitled to reasonable care, it must follow that other lawful entrants (e.g., invitees and licensees, etc.) must be entitled at least to the same standard of care from the Occupier. The Court in *McNamara* was a strong court: a four to one majority decision, with three senior judges delivering written judgments. i.e., Walsh, Henchy and Griffin JJ.¹⁹

Despite this, however, there seemed to be a lack of appreciation by both the bar and the judiciary in subsequent cases, that the ramifications of *McNamara* were far-reaching, and that that case in fact had introduced negligence principles to the whole area and that the principles set out in *Donoghue v Stevenson*²⁰ now governed Occupiers' Liability. In the period of hesitation that followed (1974 – 1995) both pleaders and the judiciary continued in many cases to use the old terminology of invitee, licensee, unusual and concealed dangers, etc., perpetuating uncertainty

¹⁸ *McNamara v Electricity Supply Board* [1975] IR 1.

¹⁹ Fitzgerald J dissented. He was of the view that if reform was necessary, it was for the legislature to change the law.

²⁰ *Donoghue v Stevenson* [1932] AC 562.

and suggesting that this was an area that still required reform. What drove the movement for reform during this period was not uncertainty in the law, however, but a view that the trespasser was too well treated after *McNamara* and that the burden on the Occupier was too heavy. The law in fact was clear, but the result did not seem to be acceptable, at least to politicians and to the farming community they represented.

It is not my remit here today to deal with matters after 1974. Suffice to say that politicians eventually requested an examination of the law and the Law Reform Commission finally published a Consultation Paper²¹ in 1993 and a Report²² in 1994 on the topic which eventually led to the Occupiers' Liability Act 1995. This Act in effect, reversed *McNamara* and lowered the trespasser's right again to the lower standard of *Indermaur v Dames*,²³ (i.e., not to intentionally or recklessly cause injury) and introduced a new category of Recreational User, who was also only entitled to a similar duty of care. It is worth noting in this context that the ultimate legislation in 1995 did not reflect fully the recommendations of the Law Reform Commission as suggested by it in their Report²⁴ (1994). The LRC had suggested that there should only be two categories (i) "Visitors" and (ii) Trespassers. Visitors should be entitled to the common duty of care (negligence) while the duty to trespassers should be a duty not to injure them intentionally or through "gross negligence". The LRC's proposal also suggested an exception for child trespassers who should in circumstances like *McNamara* be entitled to reasonable care.

Concluding Remarks

I do not expect you to remember all the details of the above developments. The final point I wish to make is that for a very long time, Occupiers' Liability was a topic that merited serious reform yet, in spite of many suggestions, proposals and draft legislation it represented a branch of the law which proved intractable. One might ask why was it so difficult? Considering the eventual regressive Act passed in 1995,²⁵ which once more created three separate categories of entrants and which reversed *McNamara*, one wonders might we have done better? I hasten to add that I am not challenging the legislature's right to make the laws in this country. The Constitution ordains it thus. What I am asking is how did so many people, academics, judges, commentators, etc., fail to convince the legislature that there was a better way? What caused this disconnect between the many (and in my view

²¹ Law Reform Commission, *Consultation Paper on Occupiers' Liability* (LRC CP 7-1993).

²² Law Reform Commission, *Consultation Paper on Occupiers' Liability* (LRC 46-1994).

²³ *Indermaur v Dames* [1867] LR 1 CP 274.

²⁴ Law Reform Commission, *Consultation Paper on Occupiers' Liability* (LRC 46-1994).

²⁵ Occupiers' Liability Act 1995.

better) law reform proposals and the final legislation? What was it about Occupiers' Liability that made it so difficult to arrive at a legal consensus on this issue?

My conclusion is that there was an unwarranted element of fear among Occupiers, especially among farmers, that many of the suggested reforms were threatening their security and were exposing them to the possibility of losing their farms in litigation to burglars and other trespassers injured while on their land. Reformers were unable to convince them that these fears were exaggerated and politicians, fearing a reaction in the polls, backed off. Of course, we must accept this political dynamic, this reality, and keep trying. It does, however, prompt me to adopt the phrase, common in our school reports long ago: "[It] *Could have done better.*"

WHEN LAW REFORM RUNS UP AGAINST THE CONSTITUTION: A CAUTIONARY TALE

Mr. Justice Maurice Collins*

In his insightful book, *Making Laws That Work: How Laws Fail and How We Can Do Better*,¹ David Goddard – until recently a Judge of the Court of Appeal of New Zealand – identifies, several ways in which legislation fails.² Laws may fail to produce the desired result (what Goddard refers to as “[t]he Damp Squib”), whether because of inherent defects in the legislation itself or because it is not effectively administered. Available resources may not match legislative ambition: a phenomenon which has certainly been observed in this jurisdiction, as parents who have sought assessments of their children under Part 2 of the Disability Act 2005 can attest.³

Some laws deliver more than they were intended to achieve (a problem Goddard refers to as “[t]he Overshoot”). He gives as an example a change to the bail laws made in New Zealand in 2013, in response to concerns about high-profile offences committed by persons on bail, which resulted in the unanticipated incarceration of many persons on remand, at significant *human* and *financial* costs.⁴

Other laws produce unexpected and undesired effects (in Goddard’s language, “*Nasty Surprises*”), a category he illustrates by reference to window tax (an apparently progressive tax calculated by reference to the number of windows in a building) which – as anyone who walks by the former Houses of Parliament in Foster Place can readily attest – resulted in window opes being bricked up, with

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¹ Goddard, *Making Laws That Work: How Laws Fail and How we Can Do Better* (Bloomsbury 2022).

² This speech was prepared with the research assistance of Fiachra Ó Cochláin, senior researcher at the Law Reform Commission.

³ See the comments that I made in *AB v HSE* [2023] IECA 275, at paragraphs 17 – 18.

⁴ Goddard, *Making Laws That Work: How Laws Fail and How we Can Do Better* (Bloomsbury 2022).

the consequence (so he suggests) that “[r]evenue goes down, and people suffer and die.”⁵ That is indeed a heavy burden for any law reformer to bear!

The final category of failure that Goddard identifies is “[t]he *Backfire*”.⁶ As we have just had our lunch, I will refrain from giving the detail of the examples he offers but they involve, amongst other things, swarms of snakes, rats and wild pigs conjured into existence by laws intended instead to incentivise their elimination.

Avoiding these pitfalls (and there are, no doubt, many more than those just referred to) is, of course, the daily challenge of the lawmaker and for law reform bodies tasked with the function of recommending changes to the law.

In this jurisdiction, a further challenge presents itself. Ireland has a written constitution, containing guarantees of fundamental rights and providing expressly for judicial review of legislation by the courts. Laws that are repugnant to any provision of the Constitution – the Constitution’s own language – may be declared invalid.

That means that, in discharging its functions, the Law Reform Commission must not simply steer clear of the *Scylla* of ineffectiveness but must also avoid the *Charybdis* of constitutional invalidity. It is therefore unsurprising that in many of its projects the Commission has had to confront constitutional questions. Thus – and these are merely illustrations – the recent project on compulsory acquisition of land required consideration of constitutional property rights, the project on adult safeguarding involved consideration of (amongst others) the rights to liberty and autonomy, the Commission’s projects on limitation of actions also involved consideration of property rights as well as rights of access to the courts, the project on privilege of court proceedings involved consideration of rights of expression and the right to one’s good name (an express personal right in our Constitution), the project on *mens rea* in rape law involved consideration of the constitutional guarantee of trial in due course of law and the project on regulatory powers and corporate offences necessitated extensive consideration of the constitutional provisions relating to the courts and the extent to which it is constitutionally permissible to confer on administrative bodies a power to impose financial sanctions.

All of these projects – and I emphasise that those just mentioned are merely illustrative – required the Commission to take a view on the limits of constitutionally-permissible law-making and in some cases at least, to express its view in robust terms. For instance, in its Privilege for Reports of Court Proceedings

⁵ Goddard, *Making Laws That Work: How Laws Fail and How we Can Do Better* (Bloomsbury 2022).

⁶ Goddard, *Making Laws That Work: How Laws Fail and How we Can Do Better* (Bloomsbury 2022).

Under the Defamation Act 2009⁷ – notably a project arising from a request made by the then Attorney General under section 4(2)(c) of the Law Reform Commission Act 1975 – the Commission firmly rejected the suggestion that there should be a new qualified privilege defence for reports of court proceedings falling below the existing statutory requirement to be “fair and accurate”. Any such defence would, the Commission considered, involve a failure to appropriately balance the competing constitutional rights – the right to a good name and the right to freedom of expression – which defamation law sought to achieve and would constitute a “disproportionate restriction” on the right to a good name.⁸

But, for the remainder of this paper, I want to focus on a different Commission project, on the subject of capping damages in personal injuries actions. It is a remarkable story, with many twists and turns, the ending of which has yet to be written.

The level of general damages (damages for pain and suffering) awarded by courts has long been a matter of debate and discussion in Ireland, with claims that such awards are significantly more generous here than in other comparable jurisdictions, that the level of awards has adversely affected insurance costs and that, as a result, the Government should take steps to reduce awards. It is important to immediately acknowledge that those claims were, and are, controversial. In any event, in 2016 the Department of Finance established the Cost of Insurance Working Group. Its work led to the establishment of another body, the Personal Injuries Commission in 2017. Both bodies issued reports which favourably considered the introduction of some form of statutory damages capping regime but, recognising the constitutional complexities of any such regime, stopped short of formally recommending any specific regime and instead recommended that the Law Reform Commission be asked to consider the constitutionality of a such a capping regime.

The Capping Project

The capping project was included in the Commission’s Fifth Programme of Law Reform at the request of the Cost of Insurance Working Group (and the Department of Justice and Equality).⁹ The Fifth Programme stated that the Commission would examine

⁷ Law Reform Commission, *Report on Privilege for Reports of Court Proceedings Under the Defamation Act 2009* (LRC 121-2019).

⁸ Law Reform Commission, *Report on Privilege for Reports of Court Proceedings Under the Defamation Act 2009* (LRC 121-2019) at paragraph 3.30.

⁹ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120-2019) at page 11.

“whether it is appropriate to legislate for a cap to be placed on the levels of damages which a court may award in respect of some or all categories of personal injury claims [and would] consider, having regard to the current role of the courts in this area, whether it would be constitutionally permissible or otherwise desirable to provide for a statutory regime that would place a cap on damages in personal injuries cases”.¹⁰

The Fifth Programme was formally approved by Government in March 2019.

Unusually, in July 2019 – while the capping project was underway – the Oireachtas enacted the Judicial Council Act 2019 which, as a result of amendments made relatively late in the legislative process (and modelled on provisions in the Bill for the adoption of sentencing guidelines) provided for the adoption by the newly-to-be-established Judicial Council (comprising all judges in the State) of guidelines on the assessment of damages for personal injuries. The Act did not use the language of “capping” nor did it expressly mandate the *reduction* of personal injury awards but it made it clear that guidelines adopted under the Act could include guidance as to the level of damages for personal injuries generally and the level of damages for a particular injury or a particular category of injury.¹¹

There were drafting complexities about the Act and it was amended more than once before it came into force. For present purposes, I am going to disregard those complexities. In any event, the Act amended the provisions of the Civil Liability and Courts Act 2004 so as to provide that judges should “have regard” to such guidelines when assessing general damages but expressly recognised that judges could depart from the guidelines, albeit that reasons had to be given for doing so. A cognate obligation to “have regard” to the guidelines (again with the facility to depart from them for stated reason) was also imposed on the Personal Injuries Assessment Board (PIAB) (now, the Injuries Resolution Board) by way of amendment to the Personal Injuries Assessment Board Act 2003. Beyond those relatively bare provisions, the Act was effectively silent as to the precise status of such guidelines and the extent to which, and the circumstances in which, they could properly be departed from.

The 2019 Act had been enacted by the time the Commission came to issue its Issues Paper on Capping Damages in Personal Injuries Actions in December 2019¹² but the relevant provisions had not commenced and accordingly no guidelines had been adopted (the 2019 Act provided for an elaborate procedure for the adoption of such guidelines involving, successively, a statutory committee of the Council, the

¹⁰ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120-2019) at page 11.

¹¹ Section 90(1) of the Judicial Council Act 2019.

¹² Law Reform Commission, *Report on Capping Damages in Personal Injuries Actions* (LRC IP 17-2019).

Personal Injuries Guidelines Committee, the Board of the Council and, finally, the full Council). As the Commission noted, the project had an “unusual aspect” in that it specifically required it to examine whether a possible legislative scheme or schemes for capping damages would be constitutionally permissible.¹³ As the Commission went on to observe, it had in the course of many projects examined whether a particular statutory regime would be consistent with the Constitution (and I have already mentioned some of these). To my knowledge, however, the damages capping project is unique in that the constitutionality of a particular legislative policy – the capping of damages for pain and suffering in personal injuries actions – was the gist of the project, rather than an ancillary or consequential aspect of it.

I was not a member of the Commission during the lifetime of the damages capping project but, reading the Issues Paper and the subsequent report¹⁴ – both careful and nuanced documents – it is difficult to avoid a sense of unease at the nature of the task that the Commission had been asked to undertake. As the Commission was careful to emphasise, the Oireachtas had already legislated in this area – in the form of the Judicial Council Act 2019 – and broader Government policy also appeared to favour the introduction of restrictions on awards, and so the policy question of whether there should be some form of capping regime was (or appeared to be) effectively foreclosed.¹⁵ That no doubt explains the focus in both the Issues Paper and the Report on the issue of whether the different capping models considered by the Commission would be constitutionally *permissible*, rather than on any question of whether capping, or any particular form of capping, was *desirable* as a matter of policy.

In any event, the Commission identified and considered 4 models. **Model 1** would involve primary legislation setting out maximum caps for various injuries, in much the same way as legislation fixing maximum sentences. **Model 2** would again involve primary legislation, this time providing for an overall cap for the most serious injuries, with all awards for less serious injuries being expressed as a percentage of that general cap, but with a power to depart from that index in exceptional circumstances. **Model 3** would delegate the details of any cap or caps to a Minister or other body (and as the Commission noted, there was a Private Member’s Bill in such terms then before the Oireachtas)¹⁶ by way of secondary legislation. **Model 4** was, in the Commission’s view, the approach closest to the existing position, with judges continuing to determine awards (by way of

¹³ Law Reform Commission, *Report on Capping Damages in Personal Injuries Actions* (LRC IP 17-2019), at paragraph 1.1.

¹⁴ Law Reform Commission, *Report on Capping Damages in Personal Injuries Actions* (LRC 126-2020).

¹⁵ Law Reform Commission, *Report on Capping Damages in Personal Injuries Actions* (LRC 126-2020) at paragraph 4.149.

¹⁶ Civil Liability (Capping of General Damages) Bill 2019.

determining the maximum damages for the most catastrophic injuries to which awards for lesser injuries should be proportionate) but taking account of the personal injuries guidelines to be adopted under the 2019 Act.

The Commission considered the constitutionality of these various models. It identified a number of issues with Models 1 – 3, not least separation of powers issues if damages were determined other than by judges. As regards Model 4, it (correctly) noted that under the 2019 Act the Judicial Council was entitled to depart from the “going rate” but in principle (and in the absence of any actual guidelines adopted under the Act) considered that Model 4 would be likely to resist any constitutional challenge. As regards the separation of powers issue, the Commission thought that it would be difficult to argue that Model 4 would interfere with the independence of the judiciary as it (the judiciary) would continue to assess general damages, the Personal Injuries Guidelines Committee was made up of judges, and courts would be permitted to depart from the guidelines in any event.¹⁷ As it happens, that is a view that I share.

Adoption of the Personal Injuries Guidelines

By the time that the Commission issued its Report, some parts of the 2019 Act had been commenced and the Judicial Council had been established. In due course the Personal Injuries Guidelines Committee was constituted and it prepared draft Guidelines, which were adopted by the Council on 6 March 2021 (“the Guidelines”). At that point, key provisions of the 2019 Act (including section 99, which proposed the amendment of the Civil Liability and Courts Act 2004 so as to impose on courts the obligation to “have regard” to the guidelines) had not yet commenced. Subsequent to the adoption of the Guidelines by the Council, these provisions were amended by the Oireachtas and then commenced and the Guidelines took effect.

The Guidelines gave detailed guidance as to the appropriate awards for a wide range of injuries, from catastrophic to minor. In most cases, those awards were lower than – and in some cases very significantly lower than – the “going rate” (as reflected in the Book of Quantum to which the courts and PIAB were previously required to have regard). That was particularly the case in relation to soft-tissue (whiplash) injuries.

¹⁷ Law Reform Commission, *Report on Capping Damages in Personal Injuries Actions* (LRC 126-2020) at paragraph 4.145.

***Delaney v Personal Injuries Assessment Board* [2024] IESC 10; [2024] 1 ILRM 189**

Unsurprisingly, the Guidelines, and the provisions of the 2019 Act providing for their adoption and effect, were the subject of immediate challenge. The proceedings – *Delaney v Personal Injuries Assessment Board*¹⁸ – originated from a modest slip and fall but involved constitutional issues of great moment. Some of the grounds of challenge were relatively narrow but others involved a root and branch attack on the constitutionality of the relevant provisions of the 2019 Act. It was said that the Act impermissibly delegated law-making power to the Judicial Council in breach of Article 15.2 of the Constitution and, related to that point, it was said that the Guidelines as adopted went beyond the scope of the power actually delegated by the legislature; that the imposition on courts of an obligation to have regard to the guidelines constituted an impermissible usurpation or invasion of the judicial power; that the Guidelines infringed the personal constitutional rights of the plaintiff (access to court/right to litigate and property rights), including by reason of their application to her despite the fact that her accident pre-dated their coming into force; and that the involvement of the judiciary in the adoption of the Guidelines (and in particular the imposition on the judiciary as a whole of a mandatory statutory duty to adopt such guidelines) infringed judicial independence. Underlying these issues was a fundamental issue as to the status and effect of guidelines adopted by the 2019 Act, whether they were normative or merely advisory in effect and when and in what circumstances they could be departed from.

All of these grounds of challenge failed in the High Court. Ms Delaney was then given leave for a direct appeal to the Supreme Court. I was one of a court of 7 that heard that appeal. A fractured court delivered a number of lengthy judgments (not least the judgment that I gave, recently singled out by a former member of the Commission for its excessive length) expressing many and conflicting views on the different issues. Even if I had an appetite to discuss the details of the decision – and I most certainly do not – a gloomy Friday afternoon in Dublin is not the appropriate time or place for so painful an exercise. But when the dust settled, the Court by a 4 – 3 majority had struck down section 7(2)(g) of the 2019 Act – which imposed on the Judicial Council an obligation to adopt the guidelines – as being an impermissible interference with the institutional independence of the judiciary. I dissented from that finding. However, by a 6 – 1 majority, the Court found that the actual Guidelines adopted by the Council in March 2021 had effectively been ratified by the legislature when it amended the 2019 Act subsequent to their adoption. Those Guidelines therefore survived the striking down of section 7(2)(g).

¹⁸ *Delaney v Personal Injuries Assessment Board* [2024] IESC 10.

Before leaving *Delaney*, it is perhaps worth emphasising that all of the other grounds of challenge to the guidelines and to the 2019 Act failed. The principle of personal injuries guidelines, and the substance of the specific Guidelines adopted by the Council, survived challenge and in particular the Court accepted the utility of such guidelines in promoting consistency and predictability of awards and ensuring that they were proportionate and fair to both parties — interests repeatedly emphasised in the jurisprudence of the appeal courts in recent years.

While the Guidelines survived, the effect of the decision in *Delaney* was that there was no mechanism to revise or update them as the 2019 Act contemplated should regularly occur.

In response, the Oireachtas enacted Part 6 of the Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act 2024, which continued the Guidelines in force and amended the procedure for the adoption of amended guidelines. Under the amended legislative scheme, the Judicial Council retains responsibility for preparing and reviewing amending guidelines through its Personal Injuries Guidelines Committee and Board. However, before any amendments can be adopted by the Council, a draft of those amendments must be laid before both Houses of the Oireachtas and a resolution approving the draft must be passed by each House.

The efficacy of that solution to the constitutional problem identified in *Delaney* may yet be the subject of litigation and I express no view on that question. But it is on any view somewhat curious to see that concerns about judicial independence and the separation of powers have led to a statutory regime in which the adoption of further guidelines by the judiciary (in the form of the Judicial Council) is now subject to the prior approval of the legislature (in the form of the two Houses).

Amended Guidelines

The Personal Injuries Guidelines Committee then concluded its review of the Guidelines (a process that had commenced prior to the decision in *Delaney*), recommending that the awards in the Guidelines be adjusted to reflect the impact of what it described as the “significant global and national inflation” that had occurred since the adoption of the Guidelines in 2021. The Board of the Council accepted that recommendation but adjusted the uplift to reflect changes in the Harmonised Index of Consumer Prices (HICP), resulting in a proposed 16.7% increase in awards. Draft amended guidelines were subsequently approved by the Council and transmitted to the Minister for Justice.

However, in the face of significant opposition from insurance and business groups, the Minister for Justice decided not to seek approval of the draft amended guidelines.

The result of that decision is that the 2021 Guidelines remain in place, unamended. A significant issue arises as to whether, in 2025, and in light of the view taken by the Committee, Board and Council as to the effect of inflation, the level of awards set out in those Guidelines remains appropriate. As the Chief Justice himself recognised, courts hearing personal injuries actions may be invited to depart from the Guidelines and to make higher awards reflecting the effect of inflation.¹⁹ Were that to occur, the Guidelines will inevitably begin to fray. Over time, they will petrify and decay. Given the benefits of the Guidelines in terms of certainty and predictability, it is not easy to understand why that would be allowed to occur. The mechanism provided by the 2019 Act has the signal advantage of having been constitutionally tested (and, in broad measure, having survived that challenge). It was not designed as a one-way ratchet and the amendment of the guidelines from time to time is an inherent and essential feature of the structure. If the 2019 Act mechanism is allowed to atrophy – as now appears to be a real possibility – is it to be replaced by some other form of statutory damages capping or control, which, for the reasons identified by the Commission in its Capping Report, may be more vulnerable to constitutional challenge?

Finally, it might be thought that, in expressing the views it did about the constitutionality of Model 4, the Commission got it wrong. In my view, that would be much too simplistic an assessment. In the first place, it must be remembered that the 2019 Act was not enacted on the recommendation of the Commission. It was, so to speak, the Oireachtas' own work. Secondly, at the time it issued its Report there were no guidelines in place and there was significant uncertainty as to the status and effect of such guidelines when made — an issue that had very important consequences for the Court's ultimate disposition of the appeal in *Delaney*. Thirdly, and importantly, there is an obvious and significant difference between any abstract assessment of the constitutionality of legislative measures, actual or prospective, however expert, and the forensic scrutiny involved in actual constitutional litigation, particularly before the appellate courts. By any measure, the Commission's analysis was appropriately nuanced and qualified (and, if I may be permitted one final indulgence, correct!)

Yet, as an exercise in law reform, the damages capping project, at least as embodied in the 2019 Act, appears to be in peril. It ran the constitutional gauntlet but in large measure came through that crucible. While the Oireachtas has amended the Act for the purpose of addressing the difficulties identified in *Delaney*, it is not at all clear what, if any, happens next. It is, as I have said, a story in search of an ending.

¹⁹ Chief Justice O'Donnell, speaking at a ceremony to mark the opening of the new legal year at the Four Courts in Dublin (6 October 2025).

THE ACADEMIC VALUE OF LAW REFORM

Andrea Mulligan*

Introduction

The purpose of this speech is to consider the academic value of Law Reform Commission reports, beyond their use in law reform.¹ This may seem like a somewhat strange topic to address at a conference designed to reflect on the “Journey of Law Reform”. And indeed, there is no doubt that actual legal change is the core purpose of Law Reform Commission reports. We pride ourselves in the Commission of having a very high rate of implementation of our reports into legislation – in the region of 70%. But that does leave some 30% of reports that are never implemented. There are many reasons why a report would not progress into legislation. However good the recommendations, reports need lawmakers to back them if they are to become law, and that support is not always to be found. So, do the reports that are not implemented have any value? If not, one wonders whether law reform is a kind of all-or-nothing gamble whereby years of work and extensive State resources are devoted to a project which could ultimately yield no results.

From my own perspective, part of the context is that I was the coordinating Commissioner on the Law Reform Commission² Report ‘A Regulatory Framework for Adult Safeguarding’,³ published in 2024. This was a mammoth undertaking. The final report stretched to four volumes, and in its final drafting phase the project absorbed 100% of the Commission’s resources. The recommendations from that report have not yet been implemented, though we are very hopeful that they will be, as there seems to be widespread recognition of the importance of legislation

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¹ I am grateful to James Clarke, researcher at the Law Reform Commission for his research assistance in preparing this speech.

² Hereinafter the “Commission”. Where I refer to “law reform commissions” or “law reform commission reports” this is meant in a generic sense, i.e. any law reform commission in any jurisdiction.

³ A soft copy of all four volumes can be found here: <https://www.lawreform.ie/news/the-law-reform-commission-publishes-report-on-a-regulatory-framework-for-adult-safeguarding.1141.html>

in that field. That said, one cannot help wondering about the value of that almost 1,000-page report, if ultimately it does not form the basis for law.

Arising from all this, I want to use this speech to reflect on the academic value of law reform commission reports outside of the context of law reform. In short, my argument is that law reform commission reports – both in Ireland and abroad – have a distinct, independent academic value, even if they are never implemented in legislation. I will conclude with some reflections on why law reform commissions must be wary of evaluating success by reference to implementation alone.

Law Reform as Scholarship

The Work and Process of Law Reform Commissions

At the outset, it is important to acknowledge that law reform is not just about dry legal concepts, or what is commonly known as “black letter law”. Law reform commissions regularly tackle major questions of ethics, morality and justice. To take an example from the adult safeguarding context, the Commission had to come to a view on the question of the extent to which the State should respect the right of a person to engage in self neglect. This engages profound questions of autonomy, dignity, and the terms of the relationship between the individual and the State. Looking to the Commission’s ongoing work on victims compensation, we examined the question of whether there are any circumstances where a victim of crime should not be entitled to compensation for criminal injury, even if they were in no way culpable in respect of the perpetration of that crime, for example if they themselves had been guilty of appalling (but unrelated) crimes. These engage some of the most profound questions that arise in the fields of ethics and law. The process of law reform involves assembling a group of people to study these questions and offer reasoned answers to be commended to the public at large. Crucially the Commission is independent of Government, and independent of any stakeholder. The importance of that task cannot be underestimated.

A real strength of law reform comes from the process itself, and from the composition of the team that puts together a report. Certain broad features are common across law reform commissions in various jurisdictions. Commissions are typically composed of skilled lawyers at varying levels of seniority and experience. The Commissioners are usually drawn from practice, academia or the judiciary of the superior courts. They bring a range of academic and practical experience. Research within the Commission is organized and directed by a layer of senior lawyers, who bring their own wealth of experience. Supporting these levels is the essential foundation of a law reform commission: the legal researchers. Legal researchers may be qualified lawyers, or they may hold masters or doctoral degrees, but equally they may be freshly-minted law graduates. A common feature of law reform commissions across jurisdictions is that they depend on the brilliance and

enthusiasm of talented young lawyers. While Commissioners make the ultimate decisions on what goes into a report, lawyers at all levels may voice their opinions, and exert significant influence over the ultimate product.

Together, a law reform commission constitutes a large and diverse team, broken down into sub-teams that produce reports. Returning to my theme of legal scholarship, the process and authorship of a law reform commission report is distinctive in the legal world. Law remains a discipline where having multiple authors on a publication is the exception rather than the norm. As such, it is difficult to identify a comparable type of legal scholarship where the authorial team has such a diversity of seniority and experience.

The Scholarly Features of Law Reform Commission Reports

Law reform commission reports have several features that render them a unique and important type of legal scholarship. First, the primary task of a law reform commission report is to describe the law. This may sound straightforward but as all lawyers – and especially those working in common law jurisdictions – will appreciate, it can be quite difficult. A report must begin with the important task of providing an authoritative statement of the law as it is, rather how it should be reformed.

Second, law reform commission reports describe and analyse the law of a particular jurisdiction. This is especially important in a small jurisdiction like Ireland, where the pool of people to write about the law is rather limited. It is important in that context to remember that not very long ago there were no Irish textbooks. Irish law was just a mutant version of English law, and as far as I understand it, Irish law students were just directed to English textbooks supplemented by the lectures notes they took down in class. Since its foundation the Commission was central to the process of defining Irish law as its own unique body of law, separate and distinct from that of our English neighbour.

Third, law reform commission reports engage in extremely detailed comparative research. This is essential to the process of law reform. In my five years on the Commission, perhaps the most commonly asked question was “how is this dealt with everywhere else?”. In making law (and legal policy) we draw on the experiences of other jurisdictions. We often have the opportunity to learn from their mistakes, or emulate their successes. Therefore, the comparative aspect of the Commission’s work is absolutely crucial.

Finally, law reform commissions make normative proposals about how the law should be. As discussed, this encompasses both the highly technical work of crafting law and drafting legislation, but also weighty judgment calls on matters of policy and ethics that underpin the law.

Academic Incentives and the Increasing Importance of Law Reform Commission Reports

There may be some who would look at these features and wonder why they were so valuable. You might think that legal academia is responsible for providing precisely this kind of scholarship. Certainly, there was a time when legal academia was largely concerned with describing, analysing and offering suggestions for reform of the law. In fact, that is no longer the case. Current academic trends strongly disincentivise this kind of research.

First, description and analysis of the law is not rewarded. This is the kind of scholarship that is typically found in a legal textbook. Textbooks are not accorded very much credit or respect in contemporary academia. The reason for this is that contemporary legal academia prizes original, novel ideas above all else. In the UK context this can be seen in the following definition of research from the Research Excellence Framework:

“For the purposes of the REF, research is defined as a process of investigation leading to new insights, effectively shared.”⁴

This language clearly demonstrates the influence of the sciences in academia and the phenomenon of attempting to make all disciplines conform to a scientific model. In Ireland, we do not adopt quite the same rigidity in our characterization of research, but there is little doubt that similar incentives apply in academic promotion and advancement. Applying this metric, textbooks cannot perform well. The role of a textbook is to describe and analyse the law as it is. This is by, definition, not novel. Therefore, textbooks are not generally considered to have very significant academic value. They are often dismissed as being “merely descriptive” or branded with the worst possible slur: “practitioner-focused”.

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⁴ Research Excellence Framework, “Section 4 – Contributions to Knowledge and Understanding (CKU) guidance” <<https://2029.ref.ac.uk/guidance/section-4-contributions-to-knowledge-and-understanding-cku-guidance/>> accessed 19 November 2025.

When I explain this state of affairs to legal practitioners they are typically very shocked. If I were to ask them about the value of legal academia, they would almost certainly point to some of the leading textbooks that are routinely cited in court as providing an invaluable service to practice, and exerting a very significant influence on the law. Textbooks that accurately describe and analyse the law are precisely what a practitioner, and a judge, wants. What they don't particularly want is a highly imaginative article that proposes a whole new way of looking at legal topic or issue. And yet the latter is what is most highly prized in academia. There is therefore a troubling dissonance between legal practice and the academy.

The problem is exacerbated in Ireland where we are very deeply concerned with international publications, i.e. publications in outlets not in Ireland. This requires a focus outside of Ireland, or one which examines Irish law only as a case study among other jurisdictions. There is a certain tragedy to this. Just over a hundred years after independence, it feels as though Irish law has finally carved out its own distinct identity, and yet Irish legal academics are strongly encouraged to look away from Irish law.

Against that background, I argue that reports of the Irish Law Reform Commission now provide one of the few arenas in which very sophisticated description and analysis of Irish law takes place. The Commission's reports – whether or not they are implemented – have significant scholarly value, and that value is only increasing. That value is evident both in citations by the Courts and in academic discourse.

The Value of Law Reform Commission Reports to the Courts

The value of Commission reports is evident in their citation by the Superior Courts. First, Commission reports are an established guide to the interpretation of law, though this most commonly arises where the report has been implemented. In effect, the report is regarded as part of the *travaux préparatoires* of the law. In *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General*,⁵ Murray J, referenced research produced by the Commission⁶ and went on to state:

“[s]ome of the well-established maxims of interpretation – a number of which I refer to in the course of this judgment – envisage consideration of the pre-existing law, or extraneous material such

⁵ *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43.

⁶ *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43, (Murray J), at paragraphs 105, 120-125.

as Law Reform Commission reports or international treaties in seeking to determine or attribute a legislative intent.”⁷

Second, courts routinely cite Commission reports as authoritative statements of law. For example in *Persona Digital Telephony Limited & anor – Minister for Public Enterprise & ors*,⁸ when discussing champerty, Denham CJ in Supreme Court stated that:

“38. [t]here is no doubt that the offence and tort of champerty are extant in Ireland ...

39. The Law Reform Commission, referred to as “the LRC”, has published an Issues Paper on “Contempt of Court and other offences and torts involving the administration of Justice”, (LRC IP 10 – 2016). In its overview it states: ‘The crime, and tort, of maintenance occurs where a third party supports litigation without just cause. Champerty is an “aggravated form” of maintenance where the third party supports litigation without just cause in return for a share of the proceeds ...

40. Thus, while both the tort and offence of champerty are still law in Ireland, the boundaries of the tort and offence are relevant to this appeal”.⁹

Interestingly, litigation funding provides an example of field in which the Courts and the Commission are, in a sense, engaged in conversation. The Commission is currently working on a Report on the Regulation of Third-Party Litigation Funding, having published a consultation paper on the topic in 2023.¹⁰

Another example of citation of a Commission report as a statement of law can be found in *PR & ors v The Minister for Justice and Equality & ors*.¹¹ While discussing whether a court must accept witness evidence, Keane J stated as follows:

⁷ *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43, (Murray J), at paragraph 125.

⁸ *Persona Digital Telephony Limited & anor v Minister for Public Enterprise & ors* [2017] IESC 27.

⁹ *Persona Digital Telephony Limited & anor v Minister for Public Enterprise & ors* [2017] IESC 27, at paragraphs 38 – 40.

¹⁰ Law Reform Commission, *Consultation Paper on Third-Party Litigation Funding* (LRC CP-2023).

¹¹ *PR & ors v The Minister for Justice and Equality & ors* [2018] IEHC 269.

"The Law Reform Commission Consultation Paper on Expert Evidence [LRC CP 52 – 2008] states the relevant principle of law as follows (at para. 2.263):

'It is important to note that the court is not obliged to accept or act on expert evidence and can refuse to admit it or reject it if they so wish. The decision-making function of the court must not be usurped by the expert, and it remains at all times the duty of the court to determine the truth of the matter at hand. The evidence of an expert will therefore only be of persuasive, not binding effect, to be taken into account with all the other evidence in the case.'"¹²

Third, and perhaps most interestingly, there are some examples of courts pointing to normative statements about law reform and policy by the Commission in its reports. This perhaps highlights an alternative channel of implementation. Even if Commission recommendations are not adopted by the legislature, there are occasionally situations where a court has the opportunity to implement a Commission recommendation via its interpretation of the law. An example of a Court endorsing a normative statement can be found in *Kuczak v Treacy Tyres [Portumna] LTD*.¹³ Here, the Court relied on the Commission's Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: *The Deductibility of Collateral Benefits from Awards of Damages*.¹⁴ Twomey J commented at paragraph 1:

"This case is an example of a situation in which insurance companies want the taxpayer 'to foot the bill for what might be regarded as a business expense of the insurance companies', to adopt the language of the Law Reform Commission (referenced below). In unusually explicit language, the Law Reform Commission considers that it is very clear that it is 'wrong' for taxpayers to subsidise insurance companies in this manner. This Court reaches the same conclusion in this case."¹⁵

These examples of citations by the Superior Courts usefully illustrate the value of law reform commission reports as standalone pieces of legal scholarship.

¹² *PR & ors v The Minister for Justice and Equality & ors* [2018] IEHC 269, at paragraph 45.

¹³ *Kuczak v Treacy Tyres [Portumna] LTD* [2022] IEHC 181.

¹⁴ Law Reform Commission, *Report on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68-2002).

¹⁵ *Kuczak v Treacy Tyres [Portumna] LTD* [2022] IEHC 181 at paragraph 1.

The Value of Law Reform Commission Reports in Academic Discourse

The value of law reform commission reports can also be seen in the role they play in academic discourse. Academics routinely rely on LRC reports as authoritative legal sources, in much the same way that the Courts do.¹⁶ Equally importantly, law reform commission reports do become part of an academic conversation, whether or not they are implemented. This, in and of itself, has scholarly value. An interesting example of this can be found in relation to the Commission's Report on Prevention of Benefit from Homicide.¹⁷ This Report was prompted by from the case of *Cawley v Lillis*¹⁸ in which the High Court had to decide the manner in which the ownership of real property held on a joint tenancy devolved in circumstances where one of the joint tenants killed the other. The Report drew criticism from certain academic quarters. The proposals were variously described as evidencing "muddled thinking"¹⁹ and carrying a risk that "the benefits of legislation could well be outweighed by the disadvantages".²⁰

Ultimately the Commission's proposals were never enacted, and there is no way of knowing definitively why that was the case.²¹ In my view, the Commission (or its constituent people) should not be disheartened by such negative academic comment. This Report tackled a complex and sensitive legal issue, as so many Commission reports do. Inevitably, this was a question about which reasonable people may disagree. Regardless of implementation, the Commission played a vital role in conducting this extensive body of research and generating an informed conversation.²²

¹⁶ See for example Prendergast, "Gross Negligence Manslaughter in Irish Law" (2014) Dublin University Law Journal 267. This article states that "Gross negligence manslaughter is a form of involuntary manslaughter", and cites Law Reform Commission, *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) and Law Reform Commission, *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).

¹⁷ Law Reform Commission, *Report on Prevention of Benefit from Homicide* (LRC 114-2015).

¹⁸ *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281.

¹⁹ Maddox, *The Homicidal Joint Tenant* (2019) 3 Conveyancing and Property Law Journal 42-46.

²⁰ Mee "Prevention of Benefit from Homicide: A Critical Analysis of the Law Reform Commission's Proposals" (2016) 39(1) Dublin University Law Journal 203-227.

²¹ They were adopted in a private members bill at one point: Civil Liability (Amendment) (Prevention of Benefits from Homicide) Bill 2017 (Private Member's Bill). This passed Second Stage Dáil Éireann on 4 October 2018, and was referred to Select Committee.

²² In some instances, academic discourse helps refine the Commission's analysis between the consultation and report stages. See for example Coen "Elephants in the room: The Law Reform Commission's Consultation Paper on Jury Service – Part II" (2010) Irish Criminal Law Journal 2010, 20(4), 98-104, and, Coen, 'The False Promise of 'Law Reform': The Law on Juries as a Case Study' (Re-forming Law Reform: Functions, Processes, and Mechanisms, Trinity Long Room Hub, 18 September 2025).

Conclusion: Enactment and Independence

I hope these comments serve to highlight the academic value of law reform commission reports. An unimplemented report is not necessarily a failure. It stands as an independent piece of scholarship, both a resource for the legal community and part of a conversation within that community. Ultimately, law reform commissions should be wary of concerning themselves too much with implementation. Independence is a core value in law reform work. A body who focuses too much on implementation is inevitably deeply concerned with the prevailing political environment, and risks falling into the trap of preferring recommendations that are likely to be implemented over those which are genuinely best.

THE IMPACT OF THE WORK OF THE LAW REFORM COMMISSION'S ON AT- RISK ADULTS

Patricia Rickard Clarke*

Congratulations to the Law Reform Commission on its half Century of Change.¹

My brief is to talk about the impact of the work of the Law Reform Commission on at-risk adults. I propose to speak about some of the research that led to legislative change, particularly in the area of social legislation, but it is not a comprehensive review.

First Programme of Law Reform 1977- 1999

During the First Programme there were a number of relevant reports on this topic:

- Report on the Liability in Tort of Mentally Disabled Persons,²
- Report on Land Law and Conveyancing Law (2) Enduring Powers of Attorney.³

The 1989 Report resulted from a reference from the Attorney General on the issue of "[c]onveyancing law and practice in areas where this could lead to savings for house purchasers"⁴ which led to the Report specifically dealing with Enduring Powers of Attorney (EPA).

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¹ This speech was written with the research assistance of Jenny McDonnell, project manager of Statute Law Revision Programme.

² Law Reform Commission, *Report on the Liability of Mentally Disabled Persons* (LRC 18-1985).

³ Law Reform Commission, *Report on Land Law and Conveyancing Law (2) Enduring Powers of Attorney* (LRC 31-1989). There was provision for a person to appoint an attorney (as agent) under the Conveyancing Act 1881 when he or she had decision-making capacity but such an appointment automatically became void (ceased to have effect) if the person became incapable of making their personal decisions. There was no provision to enable a person to plan for a time when they lacked decision-making capacity.

⁴ Law Reform Commission, *Report on Land Law and Conveyancing: (2) Enduring Powers of Attorney* (LRC 31-1989) at paragraph 1.

A Conveyancing Working Group had been established by the Commission and it was this specialist group who contributed to the work for this Report. The Commission in its Report noted that more and more elderly people are coming into wardship. It stated that Wardship was a complex procedure involving a petition to the President of the High Court. The Commission also noted that other jurisdictions considered this issue and had enacted Enduring Powers of Attorney legislation. The Commission recommended that a system of Enduring Powers of Attorney should be introduced in Ireland.

The Powers of Attorney Act was enacted in 1996. At the time of enactment, the question was raised as to whether an EPA should also provide for health decisions but health decisions were not included in the 1996 legislation.

Up until the enactment of the 1996 Act there was no legislative procedure whereby a person could organise their affairs to provide for a situation where they may lack decision-making capacity in the future. Also, the culture and concerns then, and still remain today, the aim was to preserve the property for those who would inherit.

Sexual Offences

I do not propose to comment on the work of the Commission in the area of criminal law to protect persons who lacked capacity, but the Commission did do a body of work which resulted in a number of legislative changes which included.

- Report on Sexual Offences against the Mentally Handicapped⁵ recommendation enacted in Section 5 of the Criminal Law (Sexual Offences) Act 1993.⁶
- Report on Sexual Offences and Capacity to Consent⁷ recommendation enacted in Part 3 of the Criminal Law (Sexual Offences) Act 2017.

1997 – A New Commission

In 1997 a new Commission was appointed and I was honoured to be appointed.⁸

⁵ Law Reform Commission, Report on Sexual Offences Against the Mentally Handicapped (LRC 33-1990).

⁶ The reforms implemented by section 5 of the Criminal Law (Sexual Offences) Act 1993 was repealed by section 24 of Criminal Law (Sexual Offences) Act 2017.

⁷ Law Reform Commission, Report on Sexual Offences and Capacity to Consent (LRC 109-2013).

⁸ The President was Mr Justice Anthony Hedderman, full time Commissioner Arthur Plunkett (who had been Deputy Head of the Office of the Attorney General), Judge Dr Turlough

Following the Deloitte and Touche Report on the Review of Organisation and Management of the Law Reform Commission in early 1997, the Attorney General Dermot Gleeson suggested to the Commission the formulation of a Second Programme of Law Reform.⁹

Apart from the enactment of the Powers of Attorney Act, in 1996 there were two significant Supreme Court cases in 1996 which recognised the rights of those in vulnerable circumstances and at risk.

*In the Matter of a Ward of Court (Withholding Medical Treatment) (No.2)*¹⁰ this case involved a young person who was on life support for a number of years following a minor medical procedure. She had been made a Ward of Court as she lacked capacity to make any decisions. Supreme Court found that:

- “when a person is made a Ward of Court, the Court is vested with jurisdiction over all matters relating to the person and estate of the Ward, and in the exercise of such jurisdiction is subject to the provisions of the Constitution.”¹¹
- that Wardship proceedings must be fair and in accordance with constitutional justice
- “[t]he loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy including self-determination, and the right to refuse medical treatment. The ward is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity.”¹²
- Continuing treatment would perhaps prolong existence, to no useful purpose, whereas withdrawal would permit a natural, dignified death with palliative care.

*Croke v Smith (No. 2)*¹³ – This was the second Supreme Court decision in 1996. Mr Croke had been involuntarily detained in a psychiatric unit a number of times under

O'Donnell (from Northern Ireland and father of the current Chief Justice), Dr Hilary Delaney Bieher (of Trinity College Dublin).

⁹ Law Reform Commission, *Twentieth Report 1998* (1999) at page 8.

¹⁰ *In the Matter of a Ward of Court (Withholding Medical Treatment) (No.2)* [1996] 2 IR 79

¹¹ *In the Matter of a Ward of Court (Withholding Medical Treatment) (No.2)* [1996] 2 IR 79 at page 106.

¹² *In the Matter of a Ward of Court (Withholding Medical Treatment) (No.2)* [1996] 2 IR 79 at page 126.

¹³ *Croke v Smith (No. 2)* [1998] 1 IR 101.

the provisions of the Mental Treatment Act 1945, with no right to an independent review. He pursued this issue up to the Supreme Court, and the Court found that the liberty guarantee in Article 40.4.2 of the Irish Constitution does not require any automatic independent review of the indefinite detention of a person of unsound mind pursuant to section 172 of the Mental Treatment Act 1945.¹⁴

Mr Croke made an application to the European Court of Human Rights (ECHR)¹⁵ – he raised the issue of the compatibility of Irish legislation with Article 5 of the European Convention of Human Rights and challenged his involuntary detention in a psychiatric institution under the Irish Mental Treatment Act 1945. The ECtHR declared his complaint admissible and later struck it out after a friendly settlement was reached, which included compensation for damages and the government's intention to enact new mental health legislation to address human rights concerns.

In the Mental Health Bill that was being drafted, and which was subsequently enacted as the Mental Health Act 2001, wards of court who also had a “mental disorder” were excluded from the protections provided for in the 2001 Act which included oversight of detention and the right to legal representation for such detention.

It was not until 2014 that limited review of the detention of wards of court commenced.

In 1997, the new Commission in considering the Second Programme of Law Reform were very aware of the then current practice that people whose decision-making capacity or mental capacity was in question were, as Prof Brian Lawlor Old Age Psychiatrist stated recently at a Conference in St James's Hospital (MISA), “were dead in law.”¹⁶

Their Constitutional rights or rights under the European Convention on Human Rights, which Convention came into effect in Ireland in 1953 (but not incorporated into Irish Law until 2003),¹⁷ were not considered, respected or vindicated.

¹⁴ *Croke v Smith (No. 2)* [1998] 1 IR 101, at page 131.

¹⁵ *Croke v Ireland* App no 33267/96 (ECtHR 21 December 2000).

¹⁶ Lawlor, “Changing minds, changing perspectives”, speech delivered at the Advanced Healthcare Planning Day held at St James Hospital and hosted by Mercer's Institute for Successful Ageing (MISA) of St James's Hospital and the Dementia Services Information and Development Centre (DSiDC) (12 September 2025).

¹⁷ European Convention on Human Rights Act 2003.

Human Rights

Procedures for Wardship were set out in the Lunacy Regulations (Ireland) Act 1871¹⁸ which was a system mainly concerned with the protection of property for those who would succeed.

There was no recognition of the human rights of a person 'of unsound mind and unable to manage his affairs' – gaps that were clearly set out by the Supreme Court in 2019.

- No definition of capacity and how capacity should be assessed.¹⁹
- No voice of the person.²⁰
- No participation by the person the subject of the application – in many cases the State made an application to the court without the knowledge of the person.
- No documentation given to the person the subject of wardship proceeding setting out the basis of the application to deny the person of their rights.
- A person being taken into wardship had no right to legal representation.²¹

And there was no review. Wardship was simply a court process that took place with little if any participation by the person the subject of the application.

Second Programme of Law Reform 2000- 2007

The Second Programme of Law Reform 2000 stated that the contents of the Second Programme reflect the rapid pace of social and political change in Ireland and internationally. The Commission recognised the need to move from a medical

¹⁸ Lunacy Regulations (Ireland) Act 1871 (34 & 35 Vict.) c. 22.

¹⁹ *AC v Cork University Hospital & Others* [2019] IESC 73 at paragraph 376, "...lack of clarity in relation to the legal test under the Lunacy Regulation (Ireland) Act 1871 for deciding if the individual is of unsound mind and incapable of managing his or her affairs. It would appear that there is no definitive judicial definition of what 'unsound mind' means."

²⁰ *AC v Cork University Hospital & Others* [2019] IESC 73 at paragraph 326, "...the most striking feature of all of the litigation and all of the court-mandated procedures to date – that it has proceeded to this point on the basis of arguments between third parties, and decisions of courts, as to what Mrs. C. wants and what is in her best interest, without her voice being heard."

²¹ *AC v Cork University Hospital & Others* [2019] IESC 73 at paragraph 367, "...there is no provision for legal aid in the area of wardship."

model of protection to a social understanding of the rights of persons with disabilities in all aspects of their lives.²²

The Second Programme for the reform of the law therefore provided as one of its main topics "Vulnerable Groups and the Law" with two sub heads:

- "Law and the elderly, including the legal protection of older persons transferring assets and 'advance care directives.'" It was noted in the Programme that priority would be given to this topic.
- "Law affecting persons with physical, mental or learning disabilities, including issues of capacity, guardianship and the right to marry."²³

The terminology, such as the use of the term 'elderly' which was in common use 25 years ago is now considered an unacceptable term.²⁴

In 2003 the Commission published a Consultation Paper – Law and the Elderly²⁵ – this was a review of the Wards of Court system and the protection against abuse of older persons. It was launched by the President of Ireland, she stated....

"the fact that there are no special legal remedies in place to protect an older person against abuse is deeply unsatisfactory for it means that solutions designed for other problems are stretched and patched unconvincingly to cope with things they were never designed to deal with."²⁶

The Commission drew attention in this Consultation Paper to the fact that a person, the subject of a wardship application, was not supplied with a copy of the medical report evidencing the capacity status.²⁷ This was a point not taken up by any court

²² Law Reform Commission, *Second programme for examination of certain branches of the law with a view to their reform – 2000 – 2007* (LRC 63 P2) at page 11.

²³ Law Reform Commission, *Second programme for examination of certain branches of the law with a view to their reform - 2000-2007* (LRC 63 P2) at page 11.

²⁴ Falconer & O'Neill, "Out with 'the old,' elderly, and aged" (2007) 334 *British Medical Journal*; Avers, Brown, Chui, Wong, Lusardi, "Use of the Term 'Elderly'" (2011) 34(4) *Journal of Geriatric Physical Therapy* 153.

²⁵ Law Reform Commission, *Law and the Elderly* (LRC CP 23-2003).

²⁶ President.ie, "Remarks by President McAleese at the Launch of the Law Reform Commission Consultation Paper on Law and the Elderly" <[²⁷ Law Reform Commission, *Law and the Elderly* \(LRC CP 23-2003\).](https://www.president.ie/en/media-library/speeches/remarks-by-president-mcaleese-at-the-launch-of-the-law-reform-commission-co#:~:text=The%20fact%20that%20there%20are,never%20designed%20to%20deal%20with.> accessed 16 November 2025.</p></div><div data-bbox=)

until the decision in the Supreme Court in *AC v Cork University Hospital & Others* in 2019²⁸

The Court stated:

“wardship proceedings must be fair and in accordance with constitutional justice. The decision to deprive a person legal capacity cuts at the autonomy of the individual in a fundamental way, and it should not be on the basis of evidence that cannot be challenged by the person concerned. This is particularly so where any challenge to the evidence in question would inevitably require the individual concerned to adduce her own evidence or explanation.”²⁹

In 2004 – in the case of *Dolan v Registrar of Wards of Court* – parents objected to the wardship process. They were concerned not to have their son labelled as an ‘idiot’, ‘lunatic’ or a ‘person of unsound mind’ – terms being outdated and stigmatic. The parents wished to set up a trust for their son rather than have him taken into wardship.³⁰

In 2005 the Commission published a further Consultation Paper on Vulnerable Adults and the Law – Capacity.³¹ It examined in detail the issues of Capacity and Human Rights, the approach to defining capacity in positive terms and the different models of decision-making capacity. In this Consultation Paper, the Commission noted that in January 2004 a draft version of the UN Convention was produced by the Ad Hoc Committee on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

The Commission was acutely aware of the development of the UNCRPD and the implications for Ireland which was still operating under 1871 legislation.

In 2006, the Commission published a Vulnerable Adults and the Law³² recommending the following regarding the law on capacity:

- should promote capacity as enabling
- the enactment of specialist capacity legislation

²⁸ *AC v Cork University Hospital & Others* [2019] IESC 73.

²⁹ *AC v Cork University Hospital & Others* [2019] IESC 73 at paragraph 374.

³⁰ *In the matter of Wards of Court and in the matter of Francis Dolan* [2004] 3 IR 95.

³¹ Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005).

³² Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006).

- adoption of a functional approach to the assessment of capacity
- the repeal of the Marriage of Lunatics Act 1811 and the Lunacy Regulation (Ireland) Act 1871
- the setting up of a rebuttable presumption of capacity,
- obligation to give assistance and support in decision-making
- a tribunal system.

The Marriage of Lunatics Act 1811 was repealed in February 2021 following the decision of the Court of Appeal. The court pointed out that by virtue of the Marriage of Lunatics Act 1811 that if Mr A is made a ward of court he will not be able to marry and any marriage that he might purport to enter into would be void.

The court pointed out that

“A [the appellant] brought proceedings challenging the constitutionality of the statutory wardship regime, as well as its compatibility with the European Convention on Human Rights (ECHR). Those proceedings impugn (inter alia) the 1811 Act. The essential purpose of those proceedings... is to establish that A is entitled to marry or, at least, that he is entitled to have his capacity to marry assessed and determined by a fair and appropriate procedure.”³³

In December 2006 the UN Convention on the Rights of Persons with Disabilities was adopted by the General Assembly.³⁴ Ireland signed the UN Convention in 2007.³⁵ Prior to signing the UNCRPD, Ireland had already enacted a body of law relating to persons with disabilities, as part of its equality legislation.³⁶

³³ *In the matter of A and in the matter of the Lunacy Regulation (Ireland) Act 1871* [2020] IECA 225 at paragraph 6.

³⁴ United Nations, “Convention on Rights of Persons with Disabilities to be Opened for Signature on 30 March” 29 March 2007 <<https://press.un.org/en/2007/hr4914.doc.htm>> accessed 18 November 2025.

³⁵ United Nations, “Ratification Status for CRPD - Convention on the Rights of Persons with Disabilities” <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD> accessed 18 November 2025.

³⁶ An example of Ireland’s ‘equality legislation’ pre-UNCRPD would be the Equal Status Act 2000, as amended by the Equality Act 2004. In 2019, the Department of Children, Equality, Disability, Integration and Youth published the *Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities*. At page 7 they state, “Ireland has robust equality legislation and a significant legal framework to protect human rights. These are detailed in Ireland’s Common Core Document (HRI/CORE/IRL/2019).” Ireland’s equality legislation up to

In 2008 in the *Case of Fitzpatrick* in the High Court, Ms Justice Mary Laffoy applied the functional test to assess decision-making capacity (following the Law Reform Commission's recommendation).³⁷ There was no legislative or judicial definition up to then as to how decision-making capacity should be assessed. In spite of this High Court decision, the functional test to capacity was not generally applied in Wards of Court cases even after the enactment of the Assisted Decision-Making (Capacity) Act 2015.

Third Programme of Law Reform 2008- 2014

Continuing on its previous work to enhance the right of persons whose capacity was at issue the Commission addressed other issues in need of reform. In its 2006 Report on Vulnerable Adults and the Law,³⁸ the Commission acknowledged the public consultation conducted by the Irish Council for Bioethics on the legal and ethical issues surrounding advance care directives – *Is it Time for Advance Healthcare Directives?*³⁹

While verbal advance healthcare directives were common practice, there was no legislative provision where a person could make provision for future medical treatment if they lacked the requisite capacity to make the relevant decision at a future date.

In 2008 the Commission published a Consultation Paper on Bioethics: Advance Healthcare Directives⁴⁰ and in 2009 published a Report on Bioethics: Advance Healthcare Directives.⁴¹

The Commission recommended a statutory framework for advance care directives and that the principles of autonomy, dignity and privacy of the individual should form part of the legislative framework.⁴²

2019 is set out on page 31 to 32 of the Common Core Document which is available to view at <<https://docs.un.org/en/HRI/CORE/IRL/2019>>.

³⁷ *Fitzpatrick v F.K and another* [2009] 2 IR 7.

³⁸ Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 3.36.

³⁹ Irish Council for Bioethics, *Is it time for Advanced Healthcare Directives?* (2007)

⁴⁰ Law Reform Commission, *Consultation Paper on Bioethics: Advance Care Directives* (LRC CP 51-2008).

⁴¹ Law Reform Commission, *Report on Bioethics: Advance Care Directives* (LRC 94-2009).

⁴² Law Reform Commission, *Report on Bioethics: Advance Care Directives* (LRC 94-2009) at paragraph 1.100. The proposed statutory framework is discussed at length in chapter 3.

One of the topics included in the Third Programme was the sub-heading Specific Groups in a Changing Society was the topic Professional Carers.⁴³ The Commission noted in its Report on Vulnerable Adults and the Law that considerable development had occurred concerning the legal regulation and standard setting of residential care in nursing home settings but there was no comparable regulation or standards for those providing professional care in a person's home.⁴⁴

In 2009 the Commission published a Consultation Paper on Legal Aspects of Carers⁴⁵ and in 2011 published a report on Legal Aspects of Professional Home Care⁴⁶ recommending the regulation of professional home care and setting out standards that should apply.

The Commission suggested that the general principles to apply to the provision of home care should include, the principle of independent living, the principle of privacy and dignity, the principle of quality of care and the protection of the adult receiving care. (Legislation is only now in 2025 being prepared on this).⁴⁷

In 2010 – 2013 Pre-legislative scrutiny of the Capacity Bill took place.

In October 2015 the Department of Justice published a Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Ireland was not in a position to ratify the UNCRPD until it put in place appropriate legislation to comply with its obligations under the Convention. The Roadmap identified key legislative areas needing amendment which included the legislation on decision-making capacity.

Article 4 of the UNCRPD prescribed that State Parties undertake:

“[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention

⁴³ Law Reform Commission, *Third Programme of Law Reform 2008-2014* (LRC 86-2007) at page 16.

⁴⁴ Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006).

⁴⁵ Law Reform Commission, *Consultation Paper on Legal Aspects of Carers* (LRC CP 53-2009).

⁴⁶ Law Reform Commission, *Report on Legal Aspects of Professional Home Care* (LRC 105-2011).

⁴⁷ Department of Health, “General Scheme of the Health (Amendment) (Licensing of Professional Home Support Providers) Bill 2024” (12 April 2025) <<https://www.gov.ie/en/department-of-health/publications/general-scheme-of-the-health-amendment-licensing-of-professional-home-support-providers-bill-2024/>> accessed 19 November 2025; Loughnane, “Health (Amendment) (Licensing of Professional Home Support Providers) Bill” House of the Oireachtas Library & Research Service (6 September 2024) <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2025/2025-05-28_general-scheme-briefing-paper-health-amendment-licensing-of-professional-home-support-providers-bill_en.pdf> accessed 19 November 2025.

To take all appropriate measures –

Including legislation, to modify or abolish existing laws, regulations customs and practices that constitute discrimination against persons with disabilities;

To eliminate discrimination on the basis of disability by any person, organisation or private enterprise...”

In 2015 the Assisted Decision-Making (Capacity) Act was enacted in December which included in Part 8 statutory provision for Advance Healthcare Directives based on the Commission’s recommendations in its Report on Bioethics: Advance Healthcare Directives.⁴⁸

The Act also provided for the amendment of the Civil Legal Aid Act 1995 to provide that a person making an application to court under Part 5 (declaration of capacity) or under Part 6 (review of wardship) shall qualify for legal advice. As the High Court stated in the *KK case* -

“As the case of AC showed, that system had its flaws, as it did not provide for a system of legal representation and it did not ensure that the wishes and views of the person were heard by the Court. This is far from an abstract issue”⁴⁹

The enactment of the 2015 Act has been the key legislative measure that enabled Ireland to implement, its human rights obligations under the UN Convention, in particular, Art 12 of the UNCRPD into Irish law – to replace substituted decision-making with supported decision-making.

It was the work of the Commission in its detailed analysis that informed the understanding of the national and international obligations that Ireland was required to put in place to replace archaic 19th century legislation⁵⁰ – a move from a purely procedural process to a human rights-based approach. However, there is still some work to be done to move from 1871 and to change embedded custom and practice.

Ultimately the Government decided in 2018 that it would proceed to ratification of the UNCRPD even though all the legislation envisaged in the Roadmap had not been enacted or amended at that time.⁵¹

⁴⁸ Law Reform Commission, *Report on Bioethics: Advance Care Directives* (LRC 94-2009).

⁴⁹ *In the matter of KK* [2023] IEHC 565 at paragraph 49.

⁵⁰ Lunacy Regulations (Ireland) Act 1871 (34 & 35 Vict.) c. 22.

⁵¹ United Nations, “Ratification Status for CRPD - Convention on the Rights of Persons with Disabilities”

One of the major gaps, in failing to comply with the UNCRPD but also failing to comply with the Constitution and the European Convention on Human Rights, is the lack of a legislative provision in relation to Deprivation of Liberty for at-risk adults.⁵²

In 2018 Ireland ratified the UNCRPD in March 2018⁵³ – I will come back to points of implementation/impact with regard to the Assisted Decision-Making (Capacity) Act 2015.

Fifth Programme of Law Reform 2019 to date

The Commission noted in its Fifth Programme that in a Seanad debate on a Private Member's Bill on the Adult Safeguarding Bill 2017, the Minister for Health stated that the Government agreed that there was a need for an appropriate statutory framework for the safeguarding of vulnerable or at-risk adults. A number of submissions had been received by the Commission to include this matter in the Fifth Programme.⁵⁴

The Assisted Decision-Making (Capacity) Act 2015 was in fact the first piece of adult safeguarding legislation in Ireland. However, there was in 2019 and today still no safeguarding legislation for adults who are the subject of abuse, neglect and exploitation and who need protection.

The Commission included the topic of A Regulatory Framework for Adult Safeguarding in its Fifth Programme. In 2019 the Commission published a detailed Issues Paper on A Regulatory Framework for Adult Safeguarding⁵⁵ and in 2024 the Commission published a Report A Regulatory Framework for Adult Safeguarding to include detailed draft legislation.⁵⁶

<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD>
accessed 19 November 2025.

⁵² The Government Legislation Programme for Autumn 2025 states work is ongoing on the drafting of a Protection of Liberty Safeguards Bill – Department of the Taoiseach, "Government Legislation Programme - Autumn 2025" (17 September 2025) at page 20. <https://assets.gov.ie/static/documents/b6d09237/Government_Legislation_Programme_Autumn_2025.pdf> accessed 19 November 2025.

⁵³ United Nations, "Ratification Status for CRPD - Convention on the Rights of Persons with Disabilities" <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD> accessed 19 November 2025.

⁵⁴ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120-2019) at page 4.

⁵⁵ Law Reform Commission, *Issues Paper on A Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019).

⁵⁶ Law Reform Commission, *Report Series: A Regulatory Framework for Adult Safeguarding* (LRC 128-2024).

The Report is a comprehensive review on what needs to be put in place urgently. It builds not only on the rights-based approach of the Assisted Decision-Making Capacity legislation but also identifies the need to provide a comprehensive, cross-sectoral statutory and regulatory framework including structures, legislation and policies which would strengthen adult safeguarding and set out proposals for new criminal offences.

The Commission in its Report examined in detail the issue of both actual and suspected financial abuse being one of the most prevalent forms of abuse against at-risk adults. It referred to the Central Bank's Consultation Paper on the revision of the Consumer Protection Code and the standards that should be introduced for Regulated Financial Service Providers to take the necessary steps to protect their customers from financial abuse and their obligations to meet the needs of all customers including those deemed to be at risk. The Central Bank's Standards for Business Regulations were updated in 2025.⁵⁷

The Department of Health is due to publish this year (2025) its Nation Policy on adult safeguarding for the health and social care sector and will build on the recommendations of the Commission.⁵⁸

The Government Legislation Programme of Autumn 2025 states that work is ongoing on Health (Adult Safeguarding) Bill.⁵⁹

In 2022 the Assisted Decision-Making (Capacity) (Amendment) Act was enacted in December and the combined Acts 2025 and 2022⁶⁰ were commenced in April 2023.

The purpose of the Amendment Act in 2022 was to give further effect to the UN Convention on the Rights of Persons with Disabilities and for that purpose to amend other pieces of legislation which required to be updated.

⁵⁷ Central Bank Reform Act 2010 (Section 17A) (Standards for Business) Regulations 2025 (SI No 80 of 2025).

⁵⁸ See also the Government Legislation Programme for Autumn 2025 which states that work is ongoing on a Health (Adult Safeguarding) Bill

⁵⁹ Department of the Taoiseach, "Government Legislation Programme - Autumn 2025" (17 September 2025) at page 20.
<https://assets.gov.ie/static/documents/b6d09237/Government_Legislation_Programme_Autumn_2025.pdf> accessed 19 November 2025.

⁶⁰ Assisted Decision-Making (Capacity) Act 2015 and the Assisted Decision-Making (Capacity) (Amendment) Act 2022.

Implementation of the Assisted Decision-Making (Capacity) legislation

Safeguarding Ireland Survey in 2023 indicated that a large number of the population, 83%, either had never heard of the Act or had heard of it but didn't really know what it was about.⁶¹

In spite of the lack of awareness of the public and the lack of awareness, preparation and resistance to change of some agencies and professions, the evidence is that the legislation is being implemented and does have an impact. There has been a substantial shift, thankfully, to ensuring a person is assisted and supported in decision-making.

What made it work? Even before the commencement of the Act, a lot of work had been done by some to ensure that the principles applied in the Act were applied in practice.

There were also some court decisions that greatly assisted.

In 2022, in the High Court case of *JD*, the court noted the new approach to determining capacity under the 2015 Act, although that Act had not yet commenced, was that capacity is assessed in relation to individual areas of decision making and not globally. The court accepted this approach.⁶²

In the *AC* case in the Court of appeal Hogan J stated "[t]he right guaranteed by Article 40.4 could not be abridged by legislation, and could not be "swept away" by Victorian wardship legislation."⁶³

The case of *KK* was heard in both the High Court and Court of Appeal. In the High Court, Hyland J stated,

"[t]he principles that inform the [Assisted Decision-Making (Capacity) Act 2015] may appropriately be taken into account when considering what is required to defend and vindicate a person's constitutional rights."⁶⁴

⁶¹ Safeguarding Ireland, "Public awareness of the Assisted Decision Making (Capacity) Act" (May 2023) at slide 4 <<https://safeguardingireland.org/wp-content/uploads/2023/10/657623-Safeguarding-Ireland-public-awareness-research-FINAL-May-2023.pdf>> accessed 19 November 2025.

⁶² *In the Matter of JD* [2022] IEHC 518 at paragraphs 25 – 30.

⁶³ *AC v Cork University Hospital* [2018] IECA 217 at paragraph 45. This case was later heard in the Supreme Court, see *AC v Cork University Hospital & Others* [2019] IESC 73.

⁶⁴ *In the matter of KK* [2023] 565 at paragraph 54. See also *In the matter of KK* [2023] IEHC 306; *In the matter of KK (A Ward of Court)* [2024] IECA 242.

To give further examples:

Sage Advocacy – an independent advocacy service mainly for older persons operated under the provisions of the 2015 Act well before its commencement.⁶⁵ 83% of clients are over the age of 70 years.⁶⁶

In 2024 it supported 12,148 people in relation to cases and queries.⁶⁷

The figures for 2024 Sage Advocacy experienced a large increase in the year by those seeking information and support 9,062, with over 900 cases with a legal issue which of course included issues arising under the Assisted Decision-Making (Capacity) Act 2015.⁶⁸

From the commencement of the Act in 2023 to September Sage Advocacy received 1,226 referrals for court applications to reflect the court's requirement to hear the voice of the person. It has documented its experience and perspectives on "The Operation of the Assisted Decision-Making Acts" in Voice Matters.⁶⁹

Courts Service – Figures from the Court Service indicate that from Quarter 2 2023 to 26 August 2025 there were 2,084 incoming cases with 1,462 Decision-Making Representatives appointed.

In 2023 there were 82 Wardship Discharges applications with 304 discharge applications received in 2024.⁷⁰

⁶⁵ Sage Advocacy, "Nothing about you / without you – Quality Standards for Support and Advocacy Work with Older People" (October 2015) <<https://sageadvocacy.ie/wp-content/uploads/2023/12/quality-standards-for-support-and-advocacy-work-with-older-people-final-061015.pdf>> accessed 20 November 2025.

⁶⁶ Sage Advocacy, "Annual Report & Financial Statements 2024" at page 16 <<https://sageadvocacy.ie/wp-content/uploads/2025/09/Sage-Advocacy-Annual-Report-2024-for-web.pdf>> accessed 20 November 2025.

⁶⁷ Sage Advocacy, "Annual Report & Financial Statements 2024" at page 7 <<https://sageadvocacy.ie/wp-content/uploads/2025/09/Sage-Advocacy-Annual-Report-2024-for-web.pdf>> accessed 20 November 2025.

⁶⁸ Sage Advocacy, "Annual Report & Financial Statements 2024" <<https://sageadvocacy.ie/wp-content/uploads/2025/09/Sage-Advocacy-Annual-Report-2024-for-web.pdf>> accessed 20 November 2025.

⁶⁹ Sage Advocacy, "Voice Matters – The Operation of the Assisted Decision-Making Acts" (April 2025) <<https://sageadvocacy.ie/wp-content/uploads/2025/05/Voice-Matters-MAY-2025.pdf>> accessed 20 November 2025.

⁷⁰ Courts Service, *Courts Service Annual Report 2024* (17 August 2025) at page 96.

Decision Support Service – In relation to the Decision Support Service there have been, up to August 2025, a total of 5,651 different arrangement registered.⁷¹ Those arrangements were classed as follows:

Enduring Powers of Attorney	3722
Decision-Making Assistant Agreement	160
Co-Decision-Making Agreement	139
Decision-Making Representation Orders	1628

Legal Aid Board – Number of applicants for legal aid and advice for the period April 2023 to 31st August 2025 is 3,652. 1,267 of these related to applications to the court under Part 5 of the Assisted Decision-Making Capacity Act.

Outstanding Issues From the ADMC Legislation and Other Legislation

Deprivation of Liberty

In 2017, the Department of Health published a Consultation Paper and Draft Bill on Protection of Liberty Safeguards (AC case).⁷²

Work is ongoing in the Department of Health, and a Consultation Paper and Draft Heads are due to be published in 2025. The Government Legislation Programme of Autumn 2025 states that work is ongoing on a Protection of Liberty Safeguards Bill.⁷³

⁷¹ Decision Support Service, “Decision Support Arrangement Statistics” <<https://www.decisionsupportservice.ie/decision-support-arrangement-statistics>> accessed 20 November 2025.

⁷² “On 5th December 2017 the Government approved the publication for public consultation purposes of preliminary draft Heads of Bill to form Part 13 of the Assisted Decision-Making (Capacity) (ADMC) Act, 2015.1 On 8th December 2017 the Department of Health launched a public consultation on this draft legislation, which was published along with a consultation paper, ‘Deprivation of Liberty: Safeguard Proposals’, on the Department’s website.” Department of Health, *The Deprivation of Liberty Safeguard Proposals: Report on the Public Consultation* (July 2019) at page 4.

⁷³ Department of the Taoiseach, “Government Legislation Programme - Autumn 2025” (17 September 2025) at page 20 <https://assets.gov.ie/static/documents/b6d09237/Government_Legislation_Programme_Autumn_2025.pdf> accessed 20 November 2025.

Advance Healthcare Directives

Section 84(12) of the *Assisted Decision-Making (Capacity) Act* provides for the making of regulations by the Minister for Health, requiring the directive-maker to give notice to the Director of the making or revoking of an advance healthcare directive and the establishment by the Director of a Register for advance healthcare directives. A Register has already been set up by the Decision Support Service, and a regulation is required to bring it into operation.

Disclosure of Data by the Decision Support Service

The making of a Regulation by the Minister for Children Disability and Equality in relation to the disclosure of certain data to protect and safeguard the vital interests of a 'relevant person' or another person. Such regulation is required by Section 95A of the Act.

Data Sharing

Regulations are required under the *Data Protection Act 2018* to share data for reasons of public interest and substantial public interest.⁷⁴

Department of Social Protection

To comply with the UNCRPD and the ADMC Act. The Law Reform Commission had noted in its Report on A Regulatory Framework for Adult Safeguarding that

“[Certain provisions] of the Social Welfare Consolidation Act 2005 and the Social Welfare (Consolidated Claims, Payments and Control Provisions) Regulations 2007 should be amended to ensure consistency with the Assisted Decision-Making (Capacity) Act 2015, the United Nations Convention on the Rights of Persons with Disabilities, and the Council of Europe Recommendation (CM/Rec(2014)2) of the Committee of Ministers to Member States on the promotion of human rights of older persons.”⁷⁵

⁷⁴ Data Protection Commission, “Adult Safeguarding Toolkit” (July 2025) <https://www.dataprotection.ie/sites/default/files/uploads/2025-07/Adult_Safeguarding_July2025_EN_ac.pdf> accessed 20 November 2025.

⁷⁵ Law Reform Commission, *Report Series: A Regulatory Framework for Adult Safeguarding* vol 2 (LRC 128-2024) at rec 14.7.

The 2007 Regulations referred to were amended in September 2025 to bring them in line with the Act.⁷⁶ More needs to be done.

Proposals for Action

In *Voice Matters*, a number of proposals were set out to enhance the implementation of the *Assisted Decision-Making (Capacity) Act* which include the need for a stronger focus in the ADMC practice on safeguarding at-risk (vulnerable) adults.⁷⁷ A number of issues identified include, language in the Rules of Court, the need to triage documents for court applications, efficient process for *ex parte* applications, court locations and timing of court sittings, legal representation and the making of application to court, regulations for the execution of enduring power of attorneys and the need for a National Stakeholder Forum.

Conclusion

In conclusion I will end with the very apt quote from Ms Justice Niamh Hyland in *the matter of KK*:

“Turning now to the impact of the commencement of the ADMCA...As previously identified, the aim of the ADMCA is to end wardship and to replace it with a system that not only emphasises the rights of persons lacking capacity and gives them a greater role in decision-making, but also removes the Wardship Court from the decision-making process insofar as persons lacking capacity are concerned, and replaces it, inter alia, with decision making representatives where persons require assistance with making decisions... This is a seminal shift... The position of the [Child and Family Agency] and the HSE may be summarised as being, insofar as this application is concerned, that the ADMCA changes nothing. The position of the General Solicitor may be summarised as being that the ADMCA changes everything. I tend towards the latter view.”⁷⁸

⁷⁶ Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 6) (Persons Unable to Manage Financial Affairs and Bereaved Partner’s Pension) Regulations 2025 (S.I. No. 424 of 2025).

⁷⁷ Sage Advocacy, “Voice Matters – The Operation of the Assisted Decision-Making Acts” (April 2025) <<https://sageadvocacy.ie/wp-content/uploads/2025/05/Voice-Matters-MAY-2025.pdf>> accessed 20 November 2025.

⁷⁸ *In the matter of KK* [2023] IEHC 306 at paragraph 89.

The ADMC Act has been *a seminal shift*. The Act has greatly impacted on people's lives by respecting their rights. The Law Reform Commission has been a significant contributor in bringing this about.

THE IMPACT OF THE LAW REFORM COMMISSION'S WORK ON CRIMINAL TRIALS

Liz Heffernan*

One of the striking aspects of the Law Reform Commission's work over the past fifty years is the breadth of its engagement with criminal law and justice.¹ In quantitative terms, the Commission has produced over forty reports in this field, each typically preceded by a consultation paper or an issues paper. This translates to an average output rate of one-to-two publications each year in the area of criminal law and justice alone. It is a remarkable feat for a relatively small organisation, entrusted with exploring reform of many different areas of Irish law.

Collectively the Commission's publications, and its recommendations relating to reform, span four extensive aspects of the subject: criminal liability (offences, participation and defences), evidence and procedure (pre-trial, trial and appellate phases), sentencing (fines and imprisonment), and the consolidation of legislation. It might be said that consolidation of legislation is an implicit aspect of the Commission's work in so far as draft legislation tends to be the method of choice for the implementation of its recommendations. Nevertheless, exploring the possible codification of common law rules and the consolidation of legislation has been a central objective of its work in areas such as the Law Relating to Dishonesty,² Inchoate Offences,³ and the Law of Evidence.⁴

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¹ This speech was written with the research assistance of Saoirse Hyland, researcher at the Law Reform Commission.

² Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

³ Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010).

⁴ Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

For sake of completeness, I will add that some subject matter defies any neat categorisation, the current project on Compensating Victims of Crime⁵ providing an apt example. The Commission is analysing the existing Criminal Injuries Compensation Scheme with a view to evaluating whether it should be reformed and placed on a statutory footing, having regard in particular to Ireland's obligations under EU Law.⁶

Most of this substantial body of work represents proactive policy initiatives grounded in the Commission's programmes. Notable examples include its recommendations on Confiscation of the Proceeds of Crime,⁷ Defences in Criminal Law,⁸ and its proposals relating to Regulatory Powers and Corporate Offences.⁹ Other work has been more reactive in the sense that it has focused on specific issues or concerns, referred by Attorneys General, such as the Establishment of a DNA Database,¹⁰ Mandatory Sentences,¹¹ Preventing Benefit from Homicide.¹²

It is interesting to trace certain cycles in the trajectory of law reform personified in recurrent subjects. While each of the Commission's reports is the culmination of a standalone project, some topics have been reviewed on more than one occasion, often with a different focus or perspective in mind. The Commission's work on sexual offences aptly illustrates this dimension to the journey of law reform.¹³ The practice of building on previous work has strengthened the mission/objective of law reform. It enables us to locate individual reports within a body of work which has evolved in tandem with the law itself. The Commission's work has helped to make reform of the criminal law a topical issue across the legal community, within government, in research and in higher education.

Another striking feature of the Commission's contribution to the reform of criminal law and justice is its depth. This has led to numerous examples of concrete reforms which have been shaped to a greater or lesser extent by the Commission's

⁵ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120-2019).

⁶ Directive 2004/80/EC of 29 April 2004.

⁷ Law Reform Commission, *Report on Proceeds of Crime* (LRC 35-1991).

⁸ Law Reform Commission, *Report on Defences in Criminal Law* (LRC 95-2009).

⁹ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018).

¹⁰ Law Reform Commission, *Report on Establishment of a DNA Database* (LRC 78-2005).

¹¹ Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013).

¹² Law Reform Commission, *Report on Prevention of Benefit from Homicide* (LRC 114-2015).

¹³ Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24-1988); Law Reform Commission, *Child Sexual Abuse* (LRC 32-1990); Law Reform Commission, *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990); Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013); Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019).

recommendations. To provide a fuller picture of this measurement of impact, I would like to discuss two examples, one relating to substantive law and the other to procedure and evidence. Each in its own distinct way, illustrates the Commission's contribution to the development of criminal law, procedure and practice in the Irish courts.

Harassment and Related Offences

As noted above, one means by which the law can be dramatically reformed is through the enactment of a substantial piece of codifying and consolidating legislation. An obvious example in Ireland is the Non-Fatal Offences Against the Person Act 1997 which was shaped to an appreciable degree by the Law Reform Commission's lengthy report on the subject published in 1994.¹⁴ The reform of the common law and repeal of most of the Offences Against the Person Act 1861 has dramatically affected law and practice. The three statutory assault offences (assault under section 2, assault causing harm under section 3, and causing serious harm under section 4) are a legal bedrock and frequently the basis of prosecutions in the criminal courts. Similarly, the defence of justifiable use of force (pursuant to sections 18 to 20) features prominently in the context of both non-fatal offences and fatal offences.

One of the less prominent aspects of the non-fatal reforms in the 1990s was the introduction of a statutory offence of harassment. There had been some ambivalence on the issue, partly owing to fears of over-criminalisation and the possible intrusion on individual rights and freedoms. The concept of 'harassment' is both broad and vague with the consequence that views differ about the type of activity that should be proscribed, and indeed the nature and extent of conduct that is sanctioned in legal practice. This may explain the emphasis in the Commission's 1994 recommendation on *acts* of harassment, specifically, 'following, watching, pestering, besetting or communicating', and the need for such acts to be *persistent*.¹⁵ At the same time, the Commission took the view that the liability should not be limited to acts instilling a fear of violence but should extend more widely to conduct which seriously interferes with a person's right to a peaceful and private life.¹⁶ The Oireachtas adopted the essence of these recommendations in section 10 of the 1997 Act.

¹⁴ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994).

¹⁵ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994) at paragraph 9.78. As originally enacted, section 10 of the 1997 Act employed the fuller formula of 'following, watching, pestering, besetting or communicating with'.

¹⁶ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994) at paragraphs 9.75-9.82.

Almost 30 years later, the law has been modernised to reflect changing attitudes in relation to harassment and the ubiquity of digital or online means of expression and communication in contemporary society. The 1997 Act has been supplemented by the Harassment, Harmful Communications and Related Offences Act 2020 which was influenced in part by the Commission's 2016 Report on Harmful Communications and Digital Safety.¹⁷ The 2020 Act created new offences such as distributing, publishing or threatening to distribute or publish an intimate image without consent and with intent to cause harm or being reckless as to whether harm is caused (section 2). Also proscribed is the non-consensual recording or publishing of an intimate image *simpliciter* (section 3) and the sending of threatening or grossly offensive communications (section 4).¹⁸

Turning to section 10 of the 1997 Act, arguably harassment by digital or online means was implicit in the section's original wording which referred to the carrying out of acts of harassment 'by any means including the use of the telephone'. The Commission argued persuasively that updated statutory wording would underscore society's condemnation of this form of misconduct and enhance levels of reporting and prosecutions.¹⁹ Indeed, I would add that if digital or online platforms and tools are the primary means of expression and communication for most of the population, the law should reflect this reality.

The Criminal Justice (Miscellaneous Provisions) Act 2023 recast section 10 of the 1997 Act with the result that it now contains a more expansive, non-exhaustive list of acts that constitute harassment. This is an advance in itself on the more limited definition of harassment as 'following, watching, pestering, besetting or communicating'.²⁰ The reference to 'any means including the use of the telephone' has been replaced by a reference to 'the generality' of the offence, which prefaces the indicative list of harassing acts. That the acts may be performed by any means is implicit in the newly worded section 10.²¹ Finally, in relation to communication

¹⁷ Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016).

¹⁸ The Act is often referred to as 'CoCo's law' in recognition of Nicole 'CoCo' Fox, who died by suicide having been a victim of relentless online bullying and abuse.

¹⁹ Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016), at paragraph 2.21.

²⁰ Section 10(3) of the Non-Fatal Offences Against the Person Act 1997, substituted by section 23 of the Criminal Justice (Miscellaneous Provisions) Act 2023. In addition to the original listed forms of harassment, the new non-exhaustive list includes: 'monitoring, tracking or spying upon a person' (section 10(3)(a)), 'impersonating a person' (section 10(3)(c)), 'purporting to act or communicate on behalf of a person' (section 10(3)(e)), and 'disclosing to other persons private information in respect of a person' (section 10(3)(f)).

²¹ The substituted section also includes a specific reference to the act of 'causing, without the consent of the person, an electronic communication or information system operated by a person to function in a particular way'.

as a form of harassment, section 10 originally referred only to ‘communicating *with*’ the victim; this phrase has been replaced with ‘communicating *with or about*’ the victim.²² Thus, the new statutory language reflects the present-day reality that harassment is often conducted indirectly through digital or online communications directed at third parties or the public at large.

In a separate development, the 2023 Act inserted into section 10 a distinct, parallel offence of stalking. The Commission’s initial view, expressed in 1994 and again in 2013, was that stalking came within the ambit of section 10, obviating the need for a separate offence.²³ Mindful of changes in social conduct and expectations, the Commission changed course in its 2016 Report.²⁴ Stalking, the Commission opined, is often seen as ‘an aggravated form of harassment’ because it involves ‘an intense obsession or fixation on the part of the perpetrator’ and a sense of ‘unwanted intimacy between the stalker and victim’.²⁵ Experience in other jurisdictions suggested that a standalone offence would likely increase prosecutions and raise awareness of the distinct and insidious nature of the offending.²⁶ Section 10 now expressly criminalises stalking and while the ingredients of the offence are broadly similar to that of harassment, the threshold for liability is somewhat higher, reflecting the aggravated nature of the offending.

Special Measures for Vulnerable Witnesses

The statutory regime of special measures designed to enable certain vulnerable witnesses to give evidence in various criminal proceedings, can be traced back to the Commission’s groundbreaking work on *Child Sexual Abuse* and *Sexual Offences Against the Mentally Handicapped* published in its 1990 reports.²⁷ That body of work resulted in a wide range of changes to law and procedure including the enactment in Part III of the Criminal Evidence Act 1992 of special measures to

²² Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016), at paragraph 2.34.

²³ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994) at paragraph 9.77; Law Reform Commission, *Report on Aspects of Domestic Violence* (LRC 111-2013) at paragraphs 2.91 – 2.92.

²⁴ Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016), at paragraph 2.76.

²⁵ Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016), at paragraph 2.57.

²⁶ Law Reform Commission, *Report on Harassment, Harmful Communications and Related Offences* (LRC 116-2016), at paragraph 2.71.

²⁷ Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990); Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990).

support children and persons with intellectual disabilities in giving evidence in trials for violent offences and/or certain sexual offences.

What started as essentially a legal foundation for children testifying via video-link,²⁸ eventually extended, albeit through slow and gradual implementation, to the use of intermediaries²⁹ and pre-trial recorded statements.³⁰ Today, Part III houses a plethora of measures, including the use of screens³¹ and a prohibition on personal cross-examination.³² Furthermore, various amendments have effected a salutary broadening of the eligibility criteria. Indeed, following the transposition of the EU Victims' Rights Directive³³ through the Criminal Justice (Victims of Crime) Act 2017, some measures are available to crime victims with special protection needs. In a distinct recent reform, enacted in Part 2 of the Criminal Procedure Act 2021, the Oireachtas formalised the convening of preliminary trial hearings, which can assist the planning and implementation of special measures. The potential benefits of this development had been flagged by the Commission in 2006 and again in 2014.³⁴

One of the characteristics of the special measures regime, as an example of law reform, is its transformative effect on legal culture. Putting aside the primary legal change (i.e. the enactment of legislation and the consequent evolution of a body of case law), we have seen a softening of the adversarial and confrontational style of traditional courtroom practice. Moreover, there has been a move away from categorised assumptions about victims, witnesses and vulnerable persons towards a more individual-centred approach. In terms of rights, these changes have included a recognition by the courts that the criminal trial is not just about the binary relationship between the State and the accused but also the rights of others, notably victims and witnesses.³⁵

As a result of these groundbreaking developments, the practice of vulnerable witnesses and victims being heard in criminal proceedings is on the increase. Of

²⁸ Sections 13 and 19 of the Criminal Evidence Act 1992.

²⁹ Sections 14 and 19 of the Criminal Evidence Act 1992.

³⁰ Sections 16(1)(b) and 19 of the Criminal Evidence Act 1992.

³¹ Sections 14A of the Criminal Evidence Act 1992.

³² Section 14C of the Criminal Evidence Act 1992, (first introduced via section 36 of the Criminal Law (Sexual Offences) Act 2017).

³³ Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.

³⁴ Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006); Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

³⁵ See *DPP v VE* [2021] IECA 122; *DPP v MT* [2023] IECA 65; *DPP v PB* [2025] IESC 12; *DPP v AM* [2025] IESC 16.

course, substantial challenges remain in terms of ongoing reform. Aside from the imperative of appropriate resources and supports, research and debate are needed so that valuable lessons can be learned from the current transformative stage and used to inform the future direction of law and practice.

Challenges and Opportunities for Future Reform

The developments in the field of law reform outlined in this paper are generally perceived to be both positive and insightful but it is salient to recognise that maintaining and improving the law in a common law system remains an enormous challenge, all the more so given the heightened demands of 21st century society. To take just one example, the engine of law reform might be said to be a victim of its own success in so far as legislation has become more extensive, complicated and inaccessible. It has become increasingly difficult to navigate the criminal statute books, to identify changes, and to understand the implications of reforms. This is particularly troubling because informing individuals about rights and responsibilities is a central function of the criminal law.

Similarly, while my focus has been on recommendations for change and their implementation, it is pertinent to acknowledge that the Commission has on occasion issued recommendations against change or, to put it another way, in favour of retaining the status quo. This eventuality can be controversial in that views may differ about the wisdom of any particular recommendation in this vein. I would highlight the importance of providing reasons for recommendations against change (something which the Commission, to its credit, has generally done) so as to diminish the risk that longer term debate, and potentially reform, is foreclosed. A decision not to recommend a change in the law should be read and assessed in its full context; and it should be revisited where warranted by subsequent developments or the passage of time.

Finally, there are some key areas relating to criminal trials which have not been considered by the Commission or have featured only to a limited degree. Examples include the law relating to confessions, offences against the State, and juvenile justice, to name just a few. There are of course limits to what any one body or agency can and should do. More than this, it is beneficial that policy makers and lawmakers draw on a range of voices, perspectives and approaches to law reform.

In relation to research methodology, a deficit in Ireland in empirical research in criminal justice is being remedied gradually through the exceptional work of researchers, often in concert with European and international partners, and sometimes with funding from the State. These and other research initiatives operate in parallel with the Commission's work, each reinforcing the other. Collectively the variety of voices enriches conversations about the state of the law

and its future development which is undoubtedly a healthy attribute of our democracy.

THE IMPACT OF THE LAW REFORM COMMISSION'S WORK ON CRIMINAL JUSTICE

Siobhán Ní Chúlacháin*

Speech delivered at ODPP/LRC 50th Anniversary Lecture, 16th October 2025

Thank you for inviting me to speak here today. It is lovely to see so many familiar faces in the audience. This event was organised as a joint celebration of 50 years of LRC work reforming the Irish criminal justice system and 50 years of the work of the DPP as an independent prosecution service.¹ Both organisations are part of a suite of reforms of public law structures introduced by Declan Costello when he was Attorney General. As independent public law bodies, we have participated in a veritable transformation of criminal justice since our inception 50 years ago.

It is the role of the Law Reform Commission to keep “keep the law under review” and conduct research with a view to formulating proposals for law reform. Overall, the implementation levels are good but even when recommendations are not implemented, they inform and contribute to public debate. Most of our work has been based on programmes of work which are agreed with the Government. In addition to that, over the years, requests have been received from various Attorney's General to address areas of the law in need of reform. The Commission's work is careful, non-partisan and comprehensive – when coupled with an Attorney's request, it has usually been implemented quickly.

At our recent 50th anniversary conference² – Half a Century of Change: The Journey of Law Reform – I had the benefit of a masterclass by Dr Liz Heffernan about the impact of the work of the LRC on criminal trials, which left me with a very hard act to follow. Her paper will be published as part of a commemorative volume of materials to mark our 50th anniversary and I highly commend it to you all.³ Luckily

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¹ This speech was delivered at a joint seminar to celebrate 50 years of the work of the LRC and DPP held in the CCJ on the 16th October, 2025. The views expressed herein are purely personal.

² Law Reform Commission, “Law Reform Commission - 50th Anniversary Conference” <<https://www.lawreform.ie/news/law-reform-commission-50th-anniversary-conference.1164.html>> accessed 19 November 2025.

³ Available on the LRC website at www.lawreform.ie

for me, the work of the LRC on criminal law has been very extensive, with over 80 publications discussing reforms to the criminal law so there is scope to discuss areas touched on only briefly or not at all, by Dr Heffernan.

Some of the LRC's earlier contributions are, happily, of historical interest only, such as the repeal of the Law Relating to Criminal Conversation and the Enticement and Harbours of a Spouse. Other topics never grow old – in our Report on Vagrancy⁴ in 1985, the Commission was not prepared to recommend the creation of a new offence of 'sleeping rough', which remains a feature of life in Ireland 40 years later.

Rules of Procedure, Evidence and Law Reform

In fact, there are many reforms inspired by the Law Reform Commission's work that are used without practitioners knowing where they originated - for example, the rules about the Competence and Compellability of spousal witnesses⁵ which were given effect to in the 1992 Criminal Evidence Act and which clarified the obligations of spouses both with respect to the prosecution and the defence. Now the spouse of an accused person is both competent and compellable by the defence and although competent, is not compellable on behalf of the prosecution.

The Commission's work was also the origin of the witnesses' right to affirm and of courts hearing the evidence of child witnesses without requiring them to give evidence on oath or affirm, where the court is satisfied that the children are competent to give evidence.⁶ It is rewarding to discover that our colleagues in Australia have adopted and adapted the model suggested in order to develop a system of truth telling for indigenous people.

This impact of this work should be considered in conjunction with the Commission's groundbreaking work on Child Sexual Abuse⁷ and Sexual Offences Against the Mentally Handicapped⁸ which resulted in a wide range of changes, including the enactment of special measures to support children and persons with intellectual disabilities in giving evidence in trials for violent offences and/or certain sexual offences.⁹ Over time, this has been expanded and developed into a whole

⁴ Law Reform Commission, *Report on Vagrancy and related Offences* (LRC 11-1985).

⁵ Law Reform Commission, *Report on The Competence and Compellability of Spouses as Witnesses* (LRC 13-1985).

⁶ Law Reform Commission, *Report on Oaths and Affirmations* (LRC 34-1990). These latter recommendations were implemented in part in the Criminal Evidence Act 1992, the Children Act 1997 and later in the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

⁷ Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990).

⁸ Law Reform Commission, *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990).

⁹ Part III of the Criminal Evidence Act 1992.

suite of measures for vulnerable witnesses which has in turn contributed to a change in the culture of how witnesses, and particularly, victims, are treated in court proceedings. This demonstrates how the work of the Commission on this particular reform went beyond mere legislation and changed the culture of the courtroom and the whole landscape for participants in criminal trials.

It is impressive to see the scope of the research carried out and the care taken to ensure the LRC recommendations take into account all relevant factors. For example, in 2015, the Commission's Report on Search Warrants and Bench Warrants¹⁰ made 70 recommendations for reform, having scrutinised over 300 separate legislative provisions¹¹ authorising An Garda Síochána and various regulators (such as the Central Bank, ComReg and the Environmental Protection Agency) to apply to the District Court for search warrants. The lack of standardised rules about applying for, issuing and executing search warrants, gives rise to a serious risk of confusion and inefficiency. The Supreme Court's decision in the *Mr Moonlight* case¹² demonstrates the importance of keeping the law on search warrants up to date and relevant. Although some of the suggested reforms made it into the Garda Síochána (Powers) Bill 2021, that Bill fell with the dissolution of the last Oireachtas.

This event provides an opportunity to connect our work to that of Forensic Science Ireland – also celebrating 50 years in existence in one guise or another. In 2005, the Commission published its Report on the Establishment of a DNA Database,¹³ which considered the broad and complex constitutional and human rights issues that arose about the establishment of a DNA database. It recommended the establishment of a limited DNA Database, to retain the DNA profiles of those reasonably suspected of, or convicted of, serious crimes.¹⁴ The Report also recommended the establishment of an independent Forensic Science Agency to regulate and maintain the DNA Database. These very significant reforms were effected by the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.

The LRC's Report on Disclosure and Discovery in Criminal Cases¹⁵ recommended legislation to clarify how the prosecution duty of disclosure should operate to ensure fair trials. The accompanying draft legislation set out the scope of

¹⁰ Law Reform Commission, *Report on Search Warrants and Bench Warrants* (LRC 115-2015).

¹¹ Law Reform Commission, *Report on Search Warrants and Bench Warrants* (LRC 115-2015) at page 1, and Appendix A.

¹² *DPP v Patrick Quirke* [2025] IESC 5.

¹³ Law Reform Commission, *Report on the Establishment of a DNA Database* (LRC 78-2005).

¹⁴ Including homicides, most offences against the person and burglary.

¹⁵ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

prosecution duty of disclosure in indictable and summary prosecutions and steps for pre-trial judicial resolution of claims of privilege made by prosecution or third parties.¹⁶ This resulted in section 19A of the Criminal Evidence Act, which was recently the subject of consideration and clarification by the Supreme Court.¹⁷

In 2016, the Commission published a Report on Consolidation and Reform of Aspects of the Law of Evidence¹⁸ which recommended pre-trial hearings with the intention of improving trial processes for sexual offences, white-collar crimes, organised crime, and other complex offences with the aim of reducing delays for complainants and interruptions for jurors. Such hearings were introduced in the Criminal Procedure Act 2021 and when they work, they seem to work well although it is a weakness in the system that there is no trigger mechanism or mandatory requirement to hold a pretrial in a case. This could possibly be dealt with by a practice direction, requiring the parties to confirm in writing to the court that pre-trial issues have been considered & no hearing is necessary.

Another successful reform which followed from the 2016 Report on the Consolidation and Reform of Aspects of the Law of Evidence¹⁹ related to the admissibility of electronic and paper business records²⁰ in both civil and criminal cases (subject to procedural requirements to ensure that the records are reliable). In my own experience, once we got the hang of it, that reform greatly simplified the running of criminal trials and the organisation of witnesses.

The Commission's Report on Jury Service²¹ made 56 recommendations, including a recommendation that a court should be allowed to empanel up to 3 additional jurors where the judge estimates that the trial will extend beyond two months.²² Other recommendations such as the introduction of a "modest flat rate daily payment" to jurors to cover transport and other expenses did not make the cut, nor did the introduction of tax credits and insurance to alleviate the financial burden of jury service for small businesses and self-employed people. The report also said that the "demographic transformation" of the State meant the jury pool was no longer "representative of contemporary Irish society" and called for it to be widened to include non-citizens who have been ordinarily resident in the State for

¹⁶ Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

¹⁷ *DPP v AM* [2025] IESC 16.

¹⁸ Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016). This was preceded by a *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

¹⁹ Law Reform Commission, *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

²⁰ Whether electronic or paper records, such as emails or letters.

²¹ Law Reform Commission, *Report on Jury Service* (LRC 107-2013).

²² As provided by the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

five years. These recommendations remain relevant in a time when cost of living is rising and demographic change is continuing

From the above, it is clear that the impact of the LRC's work on the rules of procedure and evidence has been extensive and profound. That is also true of its work on substantive reforms of the criminal law.

Substantive Law Reforms

Many Law Reform Reports have helped transform substantive areas of law over the years but the Commission's influence is perhaps best illustrated by the reform of the law relating to sexual offences over the years. For example, in its first report about rape offences, in 1988, the *Report on Rape and Allied Offences*²³ the Commission recommended widening the definition of rape beyond its traditional scope to include non-consensual sexual penetration of the major orifices of the body – now known as section 4 rape. It recommended the removal of the exemption of rape in marital relationships and the creation of the new offence of sexual assault to replace the older offence of indecent assault and a new offence of aggravated sexual assault. That report also recommended reducing the age of capacity to 10 for boys in prosecutions for rape or aggravated sexual assault. The report recommended that corroboration warnings should no longer be mandatory but be at the discretion of the trial judge and that leave of the court should be required in advance of a trial to ask about a complainant's previous sexual history. It is difficult to articulate the impact those ground-breaking recommendations must have had.

One aspect of that report that merits highlighting is that it dealt with the rules about anonymity in prosecutions for sexual offences. The report recommended that the rules as to the anonymity of the complainant should be retained but should be extended to prosecutions for all sexual offences and that the protection of anonymity should not be removed from defendants. The report recommended that prosecutions for rape and aggravated sexual assault should be tried exclusively in the Central Criminal Court and not be heard in public although it nominated five categories of person who could be admitted to court, including a limited number of family members and friends of the complainant and accused, legal practitioners, the media, law reporters, and researchers. This remains a live topic in modern times given the changes in the nature of 'media' and 'reporters' and the phenomenon of the so-called 'citizen journalists'.

Finally, the report recommended that there should be an express statutory provision enabling a judge to order the accused on conviction to pay compensation to the victim of a sexual offence in addition to any other penalty

²³ Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24-1988).

imposed. This reform was introduced in section 6 of the 1993 Criminal Law Act but has not been widely taken up and consideration is given to reforms to that section in an upcoming LRC Report on Compensating Victims of Crime.²⁴

A short while later, in 1990 the Commission published its Report on Sexual Offences against the Mentally Handicapped²⁵ which made provision for sexual offences with persons with limited capacity but it reviewed those recommendations in its Report on Sexual Offences and Capacity to Consent²⁶ and those offences were repealed. New offences were introduced in the Sexual Offences Act of 2017,²⁷ protecting people with limited capacity to consent but recognising their right to consent – the Commission’s very nuanced consideration of this sensitive topic holds up well to modern scrutiny.

More recent reforms to rape law recommended by the Commission are making their way slowly through the legislative processes. The Commission’s report on Knowledge or Belief Concerning Consent in Rape Law²⁸ proposed three main reforms about the *mens rea* in rape cases, which involve moving from the current primarily subjective test to a mixed but primarily objective test, having regard to certain subjective elements. The three recommended reforms involved the following: First, the fault or mental element of the rape offence in section 2 of the 1981 Act would be reformed by adding that the accused man commits rape if, at the time of the sexual intercourse, he “does not reasonably believe” that the woman was consenting. This is an objective test and would be in addition to the current two situations under the 1981 Act, that is, where the accused man knows that the woman is not consenting or is subjectively reckless as to whether she is consenting.

The Commission’s second proposed reform is that, where the question of reasonable belief arises in a rape trial, the jury is to have regard to a specific list of circumstances related to the accused’s personal capacity, and only those circumstances. These include the man’s physical, mental or intellectual ability, any mental illness of his, and his age and maturity. These factors are only to be considered relevant where any of them are such that the man lacked the capacity to understand whether the woman was consenting. Requiring the consideration of these circumstances introduces a subjective element to the test.

²⁴ Law Reform Commission, *Report on Compensating Victims of Crime* (to be published).

²⁵ Law Reform Commission, *Report on Sexual Offences against the Mentally Handicapped* (LRC 33-1990).

²⁶ Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013).

²⁷ The reforms are reflected in the Sexual Offences Act 2017.

²⁸ Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019).

The Commission's third proposed reform is that, where the question of reasonable belief arises, the jury is also to have regard to the steps, if any, taken by the accused man to ascertain whether the woman consented to the intercourse.

The Commission also recommended the retention of the current law on self-induced intoxication, in other words that it is not a defence to a charge of rape where the intoxication means that the man lacked the capacity to know whether the woman was consenting.

Although a Bill containing these changes was published,²⁹ the relevant sections were withdrawn by the Minister when it became apparent that there could be unintended consequences for other sexual offences that share the same *mens rea* as rape and which could be charged as alternative offences on an indictment or result in an alternative verdict by a jury. This difficulty was flagged in the LRC report and the input of the DPP's office was central to the decision to stall the change to allow consideration be given to implementing the same changes for those offences and we hope to see those reforms introduced soon.

Returning to other substantive areas of criminal law which were the focus of the Commission's work, in September 1992, the Commission published a Report on the Law Relating to Dishonesty.³⁰ It recommended the creation of one offence of theft and that the Gardaí be given a power of arrest without warrant for all dishonesty offences. Many (though not all) of these changes were enacted in the Criminal Justice (Theft and Fraud Offences) Act 2001. For example, the then very futuristic 'offence of dishonest use of a computer' has not made it onto the statute books to the best of my knowledge though many of the component parts envisaged by the Commission have done so.

That particular Report did not deal with business ethics, or insider dealing, or similar company law matters that touch on criminal law but it has, comparatively recently, published a Report on Regulatory Powers and Corporate Offences³¹ which recommended the establishment of a statutory multidisciplinary Corporate Crime Agency with power to investigate corporate offences, modelled on the Criminal Assets Bureau with a dedicated unit in the Office of the DPP, to liaise closely with the proposed Corporate Crime Agency. And of course, the Report recommended proper resourcing of both.

Another very significant reform occurred on foot of a further request from the then Attorney General, John Rogers SC. The Commission published a Report on Non-

²⁹ Criminal Law (Sexual Offences and Human Trafficking) Bill 2023.

³⁰ Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

³¹ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018).

Fatal Offences Against the Person³² in 1994, recommending the repeal of most of the Offences Against the Person Act 1861, to be replaced by a number of new statutory offences with clear statutory penalties. This included the abolition of the offences of assault and battery at common law to be replaced by the statutory offences of assault, assault causing harm and assault causing serious harm; the introduction of new offences of threats to kill, harassment, endangerment, affray, and false imprisonment. These reforms informed the Non-Fatal Offences against the Person Act of 1997.

Another Law Reform report which helped transform a substantive area of law is our 2016 report on Harmful communications and digital safety³³ which recommended reform and consolidation of criminal law offences concerning harmful communications, including the creation of a new offence of online posting of intimate images without consent. The report recommended the establishment of a Digital Safety Commissioner to oversee national digital safety standards and to ensure the efficient and effective take-down procedure for harmful digital communications. Some of these reforms made their way into the 2020 Harassment, Harmful Communications and Related Offences Act and into the Online Safety and Media Regulation Act 2022. The take-down procedure, anecdotally at least, still leaves some room for improvement.

I would also like to mention the LRC's landmark 1,000-page report on A Regulatory Framework for Adult Safeguarding³⁴ which addresses the need for an overarching safeguarding framework for at-risk adults in Ireland. Statutory bodies currently have limited ability to intervene where an adult is at risk of abuse or neglect, as highlighted by a number of incidents over the past twenty years, including failures of care at Leas Cross, Áras Attracta, and in the 'Grace' case, the 'Brandon' case and 'Emily' case. As part of this body of work, the Commission prepared a draft Criminal Law (Adult Safeguarding) Bill 2024 and proposed the introduction of four new criminal offences: (1) an offence of intentional or reckless abuse, neglect or ill-treatment; (2) an offence of exposure to a risk of serious harm or sexual abuse; (3) an offence of coercive control; and (4) an offence of coercive exploitation – all of these in relation to a relevant person. This last offence would criminalise a range of coercive and exploitative behaviours such as "cuckooing" where a person befriends an at-risk adult and takes over their home to conduct illegal activities or engage in anti-social behaviour. Everyone who works in the criminal courts is aware of such activities and of the difficulties in identifying appropriate or feasible

³² Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994).

³³ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

³⁴ Law Reform Commission, *Report on A Regulatory Framework for Adult Safeguarding* (LRC 128-2024).

charges to prosecute such behaviour. This is a gap the Commission hopes will be closed by the introduction of these offences but that reform is in the earliest stages.

Sentencing Law Reform

The third category of the Commission's work concerns itself with reforming sentencing law in Ireland. When preparing this talk, I was again struck by the progressive and humane approach adopted by the Commission in its Report on Sentencing³⁵ from July 1996, which recommended that imprisonment should be a sanction of last resort and the abolition of penal servitude and imprisonment with hard labour. In that report, the Commission also recommended the abolition of mandatory and minimum sentences of imprisonment for indictable offenses and the review of all maximum penalties as well as the introduction of non-statutory guidelines on sentencing. Greater use of community service orders and statutory provision for suspended sentences was recommended and it suggested that the Probation Service should be the primary target for additional resources.³⁶ I think all practitioners and judges would recognise the value of the Probation Services and endorse this recommendation on an on-going basis. Interestingly, the LRC also recommended that courts should not impose reviewable sentences – a practice that was common when I was called to the Bar in 1999 and that was a short time later impugned by the superior courts.³⁷ Finally, that report recommended the creation of a criminal justice database for the compilation and dissemination of statistics relevant to sentencing – what a valuable tool that would be for criminologists, sociologists and lawyers!

In 2007, the Commission published a Report on Spent Convictions³⁸ in which it recommended the introduction of a 'spent conviction' law, under which minor and old convictions could be removed from the record for some purposes, though they could be disclosed for other purposes, including sentencing for other offences and for vetting purposes especially involving sensitive jobs. It took some time for the Act to be passed but the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 eventually made its way onto our statute books.

In 2013, the Commission returned to the topic of sentencing, publishing a Report on Mandatory Sentences,³⁹ which recommended the establishment of a Judicial Council to develop and publish suitable guidance or guidelines on sentencing

³⁵ Law Reform Commission, *Report on Sentencing* (LRC 53-1996).

³⁶ This recommendation was reiterated by a Report on Penalties for Minor Offences (LRC 69-2003).

³⁷ See *DPP v Finn* [2001] 2 IR 25.

³⁸ Law Reform Commission, *Report on Spent Convictions* (LRC 84-2007).

³⁹ Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013).

having regard to decisions of the Superior Courts, the sentencing principles discussed in the Report, and to information in databases such as the Court Service's Irish Sentencing Information System (ISIS). The Commission recommended that the presumptive sentencing regime that applies to certain drugs and firearms offences and mandatory sentences for second and subsequent offences should also be repealed and should not be extended to any other offences.

It recommended the retention of the mandatory life sentence for murder and legislative provision for judges to recommend a minimum term to be served by the offender (which has not been introduced but is a feature of the law in the UK and in Northern Ireland). It also recommended that the Parole Board should be established on an independent statutory basis which has been done.⁴⁰

In another example of the Commission's careful, thorough and nuanced approach, the Report noted that the mandatory drugs offences regime had had the following results: the adaptation of the illegal drugs trade to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the illegal drugs trade, were being apprehended and dealt with; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent increase in the prison system comprising low-level drugs offenders. The Report considered that law enforcement efforts may be beneficially supplemented by other social and health initiatives and proposed a more structured, guidance-based sentencing system as an alternative.

Most recently, the Commission's Report on Suspended Sentences⁴¹ from 2020 examines the legislation and the principles that underpin the operation of the suspended sentence and makes a number of practical proposals as to how the suspended sentence might be used more effectively in Ireland. The Commission had the advantage of the extensive knowledge of Commissioner Tom O'Malley when writing this report, which explores where in the hierarchy of criminal penalties the suspended sentence should rank and how it could advance the various purposes of punishment recognised in Irish law. It looks at the avoidance of prison as a sentencing rationale and general principles including proportionality and the principle of imprisonment as a last resort. Most importantly, it looks at the use of suspended sentence in the context of sentencing child offenders and at procedural and practical issues associated with suspended sentences. These reforms are badly needed but have not yet been implemented to my knowledge.

No discussion of the LRC's contribution to reform of the criminal law would be complete without mention of its Report on Confiscation of the Proceeds of Crime.⁴²

⁴⁰ The Parole Act 2019 was commenced in 2021; see Parole Act 2019 (Establishment Day) Order 2021 (SI No 406 of 2021).

⁴¹ Law Reform Commission, *Report on Suspended Sentences* (LRC 123-2020).

⁴² Law Reform Commission, *Report on Confiscation of the Proceeds of Crime* (LRC 35-1991).

The report recommended various powers to ensure that the courts could order the confiscation of assets which were the proceeds of crime and recommended that provision be made for the enforcement of the confiscation orders of other countries. Although the report restricted itself to conviction-based confiscation of assets, it informed the discussion of the issue and ultimately, the lawmakers went further, introducing ground-breaking changes to the law in the Criminal Justice Act 1994, in the Proceeds of Crime Act 1996. Emboldened by the result in the Gilligan case⁴³ further legislation followed in Proceeds of Crime (Amendment) Acts 2005 and 2016 and, as a testament to the enduring value of that work, I note that there is a Bill currently before the Oireachtas – the Proceeds of Crime and Related Matters Bill, 2025.

Delivering Influential Recommendations for Reform

It is one thing to make recommendations for reform and quite another to ensure that they are useful, practical and realistic. To fulfil this part of the LRC's mandate on all the above projects and indeed, on all our successful projects, stakeholder consultation has been key. In the context of the criminal law, the relationship between the LRC and the ODPP – and indeed the AGO – is crucial. The importance of continued cooperation and consultation between our organisations and other relevant stakeholders cannot be understated. To understand the operation of the current law, its effective and ineffective aspects and its impact is absolutely key to understanding the need for reform.

An understanding of how a law operates in practice should identify the problems to be solved and perhaps also suggest some solutions. Those solutions are reviewed in light of other similar areas of law and practices in other jurisdictions. The existence of any EU or ECHR guidance or imperative also informs the solutions.

The Commission does not lobby for changes to the law or for its reforms to be implemented - such activity would undermine its independence. Therefore it relies heavily on stakeholders, governmental or otherwise, to see its work through. Not all reforms are implemented but even those that are not, contribute to informed public discourse and understanding about the law.

It is difficult to summarise the contribution of the work of the Law Reform Commission to the reform of the criminal law over the last 50 years. I have highlighted those reforms that most commended themselves to me because of their depth, their continued relevance, their innovation, and their contribution to improving and modernising criminal justice in Ireland. I am proud to work for an organisation that has informed so many improvements in the criminal justice

⁴³ *Gilligan v Criminal Assets Bureau* [1997] IEHC 106, [1998] 3 IR 185.

system and it is my ambition, that under my direction, the research of the Law Reform Commission will continue to contribute to that work.

THE ROLE OF THE LAW REFORM COMMISSION SINCE ITS CREATION IN 1975

Ms. Justice Mary Laffoy^{*}

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.

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 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.

^{*} Ms. Justice Mary Laffoy is a former Supreme Court judge and former President of the Law Reform Commission.

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, 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."¹

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

¹ Haughey, "Law Reform in Ireland" (1964) 13 *International and Comparative Law Quarterly* 1300, at page 1300.

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...”²

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”³

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.

² Keane, “Law Reform in Ireland – The European Perspective” (1987) 22 Irish Jurist 1, at page 4.

³ Succession Act 1965.

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* 1974.⁴ 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".⁵

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".⁶

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:

⁴ O'Connor, "The Law Reform Commission and the Codification of Irish Law" *The Irish Jurist* (1974) 14.

⁵ O'Connor, "The Law Reform Commission and the Codification of Irish Law" *The Irish Jurist* (1974) 14, at page 15.

⁶ Section 3(7) of the Law Reform Commission Act 1975.

- 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”.⁷

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...”.⁸ 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...”.⁹

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.¹⁰ 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.¹¹ 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,

⁷ Section 4(1) of the Law Reform Commission Act 1975.

⁸ Section 1 of the Law Reform Commission Act 1975.

⁹ Section 1 of the Law Reform Commission Act 1975.

¹⁰ Section 4(2) of the Law Reform Commission Act 1975.

¹¹ Section 5 of the Law Reform Commission Act 1975.

if so requested, formulate and submit to the Attorney General proposals for its reform.¹²

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.¹³ 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

¹² Section 4(2)(c) of the Law Reform Commission Act 1975.

¹³ Section 4(3) of the Law Reform Commission Act 1975.

Offences.¹⁴ 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*,¹⁵ 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*,¹⁶ 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",¹⁷ 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*,¹⁸ 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

¹⁴ Law Reform Commission, *Report on Vagrancy and Related Offences* (LRC 11-1985).

¹⁵ Law Reform Commission, *Working Paper on Judicial Review of Administrative Action: The Problems of Remedies* (Working Paper 8-1979).

¹⁶ Law Reform Commission, *Report on Occupiers' Liability* (LRC 46-1994).

¹⁷ Keane 'Thirty Years of Law Reform 1975-2005' (Speech delivered at Farnleigh House to mark the Thirtieth Anniversary of the Law Reform Commission, 23 June 2005).

¹⁸ Law Reform Commission, *Report on Occupiers' Liability* (LRC 46-1994).

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.¹⁹ That report had been preceded by two consultation papers. The earliest was published in June 2003 and was entitled *Law and the Elderly*.²⁰ The later consultation paper was published in 2005 and was entitled *Vulnerable Adults and the Law: Capacity*.²¹ As is noted in the Report,²² 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 Conveyancing²³ and a consultative process, the Commission published its report on Reform and Modernisation of

¹⁹ Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006).

²⁰ Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC CP 23-2003).

²¹ Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005).

²² Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 1.02.

²³ Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004).

Land Law and Conveyancing Law.²⁴ 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 2009.²⁵

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,²⁶ 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.²⁷ 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

²⁴ Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

²⁵ Land and Conveyancing Law Reform Act 2009 (Commencement) Order 2009 (S.I. No. 356 of 2009).

²⁶ Law Reform Commission, *Report on eConveyancing: Modelling of the Irish Conveyancing System in Ireland* (LRC 79-2006).

²⁷ Wylie, "An Overview of the Development of the Irish Conveyancing System" in Murphy and Kenna (eds), *eConveyancing and Title Registration in Ireland*, (Clarus Press 2019) at page 20.

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 – 2014.²⁸ 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.

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

²⁸ Law Reform Commission, *Third Programme of Law Reform 2008 – 2014* (LRC 86-2007).

projects. The first resulted in the Commission publishing a report in 2010: Report on Alternative Dispute Resolution: Mediation and Conciliation.²⁹ 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,³⁰ 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.³¹

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.³² 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".³³ 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 –

²⁹ Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010).

³⁰ Law Reform Commission, *Report on Bioethics: Advance Care Directives* (LRC 94-2009).

³¹ Assisted Decision-Making (Capacity) Act 2015.

³² Government of Ireland, *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (Special Group on Public Service Numbers and Expenditure Programmes 2009).

³³ Government of Ireland, *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (Special Group on Public Service Numbers and Expenditure Programmes 2009) at volume 1, page 71, and at volume 2, page 207.

2016 to “prioritise a programme of law reform arising out of the recommendations made by the Law Reform Commission”.³⁴

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 2013³⁵ 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 2014.³⁶ Eleven projects were selected for the Fourth Programme and, in outlining the criteria used to select those projects, it was stated at page 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”.³⁷

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.³⁸ 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

³⁴ Government of Ireland, *Programme for Government 2011 – 2016* (Department of An Taoiseach) at page 51.

³⁵ Law Reform Commission, *Fourth Programme of Law Reform* (LRC 110-2013).

³⁶ Law Reform Commission, *Fourth Programme of Law Reform* (LRC 110-2013) at paragraph 2.06.

³⁷ Law Reform Commission, *Fourth Programme of Law Reform* (LRC 110-2013) at page 10.

³⁸ Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018).

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 Court³⁹ referred to earlier, which was never implemented, is still under consideration. In 2016 the Commission produced an Issues Paper⁴⁰ on it, 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,⁴¹ 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.

³⁹ Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994).

⁴⁰ Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (IP 10-2016).

⁴¹ Law Reform Commission, *Report on Prevention of Benefits from Homicide* (LRC 114-2015).

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.⁴² 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 2017.⁴³
- Project 8: Compulsory acquisition of land, which was the subject of an Issues Paper published in 2017.⁴⁴
- 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 State⁴⁵ 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 was published in 2016.⁴⁶

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 2009.⁴⁷
- Issues Paper on Knowledge or Belief Concerning consent in Rape Law.⁴⁸

⁴² Law Reform Commission, *Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children* (LRC 118-2017).

⁴³ Law Reform Commission, *Issues Paper on Suspended Sentences* (LRC IP 12-2017).

⁴⁴ Law Reform Commission, *Issues Paper on Compulsory Acquisition of Land* (LRC IP 13-2017).

⁴⁵ Law Reform Commission, *Draft Inventory of International Agreements entered into by the State* (LRC IP 14-2018).

⁴⁶ Law Reform Commission, *Issues Paper on Accessibility, Consolidation and Online Publication of legislation* (LRC IP 11-2016).

⁴⁷ Law Reform Commission, *Issues Paper on Privilege for Reports of Court proceedings under the Defamation Act 2009* (LRC IP 16-2018).

⁴⁸ Law Reform Commission, *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, 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.

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*.⁴⁹ 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*,⁵⁰ specifically the observation in my judgment 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.⁵¹ 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

⁴⁹ *J. A. Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45.

⁵⁰ *Dunne v Iarnród Éireann* [2016] 3 IR 167.

⁵¹ *Dunne v Iarnród Éireann* [2016] 3 IR 167, at paragraph 23.

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.⁵² 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".⁵³ 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

⁵² Law Reform Commission, *Harmful Communications and Digital Safety* (LRC 116-2016).

⁵³ Lenihan, 'Speech given on the occasion of the Law Reform Commission's final public consultation on its Third Programme of Law Reform' (Dublin Castle 2007) <https://www.lawreform.ie/fileupload/Speeches/MinisterLenihanSpeech3rdProg.pdf> accessed 19 November 2025.

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”.⁵⁴ 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”.⁵⁵ 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*.⁵⁶

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

⁵⁴ Lenihan, ‘Speech given on the occasion of the Law Reform Commission’s final public consultation on its Third Programme of Law Reform’ (Dublin Castle 2007) <https://www.lawreform.ie/fileupload/Speeches/MinisterLenihanSpeech3rdProg.pdf> accessed 19 November 2025.

⁵⁵ Lenihan, ‘Speech given on the occasion of the Law Reform Commission’s final public consultation on its Third Programme of Law Reform’ (Dublin Castle 2007) <https://www.lawreform.ie/fileupload/Speeches/MinisterLenihanSpeech3rdProg.pdf> accessed 19 November 2025.

⁵⁶ *AB v Clinical Director of St. Loman’s Hospital & Others* [2018] IECA 123.

– and to the public representatives in Government and the Oireachtas.”⁵⁷

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.

⁵⁷ Law Reform Commission, *Third Programme of Law Reform* (LRC 86-2007) at page 21.

THIRTY YEARS OF LAW REFORM 1975 – 2005

Mr. Justice Ronan Keane*

Speech delivered on the occasion of the 30th anniversary of the Law Reform Commission at Farmleigh House, 23rd June 2005.

Introduction: of the Code Civil and Law Commissions

Two years ago in a great amphitheatre in the Sorbonne the two hundredth anniversary of the Code Civil, the instrument embodying the civil law of France, was celebrated with characteristic Gallic style and elegance. The heroes of the occasion were the great jurists - led by Portalis - who were associated with the birth and development of the code, but those present were of course reminded that its creation is also forever linked with Napoleon, then the First Consul and after whom it is frequently called. He would surely have been surprised by this glowing tribute to his greatness as a law reformer paid by Lord Brougham in the House of Lords a mere thirteen years after he had been defeated at Waterloo:

“You saw the greatest warrior of the age – the conqueror of Italy – the humbler of Germany – the terror of the North – account all his matchless victories poor compared with the triumph you are now in a condition to win – saw him condemn the fickleness of fortune while, in despite of her, he could pronounce his memorable boast, ‘I shall go down to posterity with the Code in my hand.’ You have vanquished him in the field; strive now to rival him in the sacred arts of peace! Outstrip him as a lawgiver, whom in arms you overcame!”¹

This rhetorical tour de force came towards the end of an oration which even by the standards of the time must have sorely taxed its audience, lasting as it did for over six hours. That of itself was impressive testimony to the passionate commitment of Brougham to the cause of law reform. The rigidities and anomalies of the common law had given rise to the equitable jurisdiction which in turn had become as

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¹ Lord Brougham of Vaux, House of Commons Debates (7 February 1828) vol 18 col 246 <<https://hansard.parliament.uk/Commons/1828-02-07/debates/ea35061b-544e-45cf-8b5f-b4cad6694458/StateOfTheCourtsOfCommonLaw>> accessed 19 November 2025.

fossilised as the system which at one stage it was leavening with justice and fairness. The interventions of the legislature were sporadic. The time had come, he urged, for parliament to establish a body charged with examining the whole body of law governing Britain and Ireland and bringing forward proposals for its modernisation. This was his frequently quoted peroration:

“It was the boast of Augustus... that he found Rome of brick and left it of marble... But how much nobler will be our Sovereign’s boast, when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter – found it the patrimony of the rich – left it the inheritance of the poor; found it the two edged sword of craft and oppression – left it the staff of honesty and the shield of innocence.”²

But for all Brougham’s eloquence, the common law world waited until the middle of the following century before establishing the independent law reform bodies which he had in mind. In the interval, of course, the problems which had exercised him had grown far more acute. The volume of precedents which constituted the common law had increased enormously and statute law consisted of a huge range of acts and instruments stretching over the centuries. Not only was the law disfigured by unjust and anomalous rules: its complexity and obscurity had grown so much that Brougham’s hope that it could be made simple, clear and easily accessible seemed a distant dream. The magnitude of the task facing such bodies, including our own, cannot be overestimated.

The Role of the Courts and the Legislature in Law Reform

In Ireland, as elsewhere, the primary role in law reform must be played by the legislature. While the development of the common law by the courts continues to be an important feature of our law, in a modern democracy it is the role of parliament to take the lead in ensuring that our law is just and fair, that anomalies and anachronisms are eliminated and that it is available to everyone in a simple and accessible form. Judges can only decide cases which come before them and, in such cases as do, are bound by the principle of the separation of powers enshrined in the Constitution not to usurp the roles of the legislature and the executive. This is not to underestimate the role played by the courts in the development of the law. The theory that judges simply pronounced what the law was and never themselves effected changes in the law has long been recognised as having no basis in reality: in cases for which the legislature had made no

² Lord Brougham of Vaux, House of Commons Debates (7 February 1828) vol 18 col 247 <<https://hansard.parliament.uk/Commons/1828-02-07/debates/ea35061b-544e-45cf-8b5f-b4cad6694458/StateOfTheCourtsOfCommonLaw>> accessed 19 November 2025.

provision and there was no existing precedent to guide the court, judges were bound to formulate principles of law which ruled not only the case before them but other cases with similar facts. That was as much a form of law making as the enactment of a statute but as an instrument of law reform it was of its nature haphazard and lacked a democratic mandate. But it was also ultimately accepted that leaving the reform of the law to the operation of normal political processes frequently resulted in no change, in areas where there seemed no prospective dividend from the electorate, and ill-considered and incoherent changes, in areas in which the voters were seen to be interested. Thus the case for the establishment of a permanent independent body composed of experts in the law charged with keeping it under review and bringing forward proposals for its reform was eventually seen as unanswerable.

The Nature and Functions of Successful Law Reform Bodies

The experience of law reform agencies in the various common law jurisdictions where they have been in operation suggests that two elements must be present if they are to be successful.

Independence

First, they must be independent of the government. A body which is simply another branch of the executive will inevitably be perceived as being concerned with implementing whatever may be government policy at any particular time rather than bringing forward proposals for law reform which, viewed objectively, can be seen as being in the interest of society as a whole. That independence is facilitated in Ireland as elsewhere by giving the Commission a statutory basis and by requiring the commissioners to be appointed for a fixed term. That independence is not, however, absolute: the Commission is not left entirely free to decide what subjects it will tackle. I shall return to that topic shortly, but in general it has to be recognised that even a statutory body such as the Law Reform Commission may have its existence terminated by the legislature which brought it into being. Moreover, a government which is sceptical as to the value of a law reform agency may leave it to perish from lack of support as indeed seemed likely to happen at an early stage in the history of the Irish Commission when the government of the day simply left vacancies in the position of commissioners unfilled. Ultimately, there was an acceptance of the need for a body such as the Commission and there seems no serious support now for the view which some ministers apparently had at one stage that it is an expensive and irrelevant luxury.

Reform Proposals that are Relevant to Society's Needs

The second precondition for a successful law reform agency is that the body must bring forward proposals for changes in the law which have a reasonable prospect of making our laws fair, relevant to society's needs, easily understood and accessible to everyone. At one time, the view was frequently expressed that law reform agencies should confine themselves to what is sometimes referred to as "lawyers' law," by which was meant the elimination by statute of absurdities and anomalies in the law the removal of which would create no controversy. Advocates of that view also urged that the agencies should avoid becoming engaged in areas of policy since that would inevitably involve the making of what might be called in a broad sense political judgements which, it was said, should be left to the executive and the legislature.

Law Reform in a Changing Society

I think that most people who have worked in the law reform area would agree that this is an unduly narrow view of the proper functions of such bodies. Laws, to be fair and relevant, must take account of changes in society and advances in human knowledge and understanding in various areas. Experience suggests that leaving the necessary alterations to the vicissitudes of the political process is not a sensible option: governments are inevitably preoccupied for much of the time with responding to the pressure of events and law reform bodies can perform a vital function in drawing the attention of both politicians and the public to changes in the law which are plainly desirable but which for a variety of reasons are unlikely to figure prominently in the election manifestoes of the political parties. Clearly there are areas of intense social controversy in which it would not be appropriate for the Commission to become involved: thus, while family law has been one of the areas in which the Commission has always been particularly active, it was obviously no part of its function in the era before the Constitution was amended to make any proposals for or against the introduction of divorce. It can indeed be said that the Commission has not, in general, seen the advocacy of constitutional change as within its remit, although it has of necessity drawn attention to any constitutional inhibitions which may affect otherwise desirable proposals.

A law reform agency can undoubtedly within these constraints make a major contribution to the workings of democracy. As I have noted, establishing them as independent agencies is a necessary precondition: so too is a clear delineation by statute of their functions and the allocation to them by the legislature of sufficient resources in the form of staff and premises to carry out those functions.

The Law Reform Commission Act 1975

When the Law Reform Commission was established in 1975, on the initiative of the then Attorney General (and subsequent President of the High Court), Declan Costello, it was understandable that its structure would closely resemble those of the similar bodies already in existence in other common law countries. In particular, the legislation establishing Law Commissions in England and Wales and Scotland clearly influenced our own Law Reform Commission Act 1975, as did the models in use in Canada and Australia, where there were, in addition to federal commissions, commissions in the individual states and provinces. The Irish Commission was to consist of five members appointed for a fixed term each of five years, one of whom at least was to be full time and one of whom was to be the President. Although the legislation does not require the President to be a serving or retired judge, so far only judges, serving or retired, have been appointed to the office. Where, however, he or she is a serving judge, he or she cannot be required to sit during his or her term of office. In practice, serving judges who have acted as President have been happy to sit as judges on occasions, thus ensuring that they keep in touch with what is going on in the courts.

The British Commissions were charged with the task of keeping under review all the law:

“with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.”³

Our Act is somewhat differently worded. The Commission is required by section 4 to:

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

“Reform” is defined in section 1 as including:

“[the] codification [of the law] (including in particular its simplification and modernisation) and the revision and consolidation of statute law.”⁴

³ Section 3(1) of the Law Commissions Act 1965 (United Kingdom).

⁴ Section 1 of the Law Reform Commission Act 1975.

Consolidation and Codification

The fact that our Commission is not expressly required to embark on what may be fairly described as the mammoth task of making statute law simpler and more accessible by repealing obsolete and unnecessary statutes and reducing the number of individual statutes does not mean that they were precluded from making such proposals and in fact the Commission has done much work in this area. At present, for example, they are engaged in the monumental task of modernising our land law and conveyancing law, which involves, among other things, the repeal, replacement or amendment of more than 157 statutes dating from before 1922. They have also responded to the reference in the Act to the simplification and modernisation of the law with a report on Statutory Drafting and Interpretation called *Plain Language and the Law*.⁵ The requirement as to codification of the law is, however, more problematic.

The codification process should be distinguished from that of consolidation. The latter seeks to bring together in one statute measures in particular areas of the law which are to be found in a number of different statutes sometimes stretching over centuries which are frequently interlocked with each other by a complex process of amendment, repeal and substitution. In Ireland this is pre-eminently the province of the Statute Law Revision Unit of the Attorney General's office. Codification by contrast involves the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or in common law. Although in the age of the computer consolidation is not an operation which should present major difficulties, there remain large areas of Irish law which should be but have not yet been consolidated.

Codification, which on the whole has been more associated with the civil law jurisdictions, may take two forms. The authors may confine themselves to setting out in the code all the principles of the law whether they are to be found in statute or in the common law in the form of court decisions. Or in addition they may not merely restate the principles of the law but may reform the law in specific areas.

The idea of codification has always had its attractions for those concerned with law reform; as we have seen, it was his part in the creation of the Code Civil which for Brougham justified Napoleon's place in the pantheon of law reformers. Brougham himself in his famous speech looked forward to the codification of the criminal law by a Law Commission. That ambition remained frustrated, principally because in common law countries, codification has also been frequently seen as at odds with the tradition in our jurisdictions of preferring detailed legislation to broad statements of legal principle. The latter, it has been often suggested, leaves too much room for differences in judicial approach and deprives the law of what should

⁵ Law Reform Commission, *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000).

be its characteristics of certainty and precision. Yet in such Victorian statutes, still with us, as the Bills of Exchange Act 1882 and the Partnership Act 1890, important aspects of commercial law were codified without any great lack of certainty and precision.

Codifying the Criminal Law

However, although the Commission is expressly charged with the codification of the law, it has understandably approached this complex and daunting task with circumspection. In relation to specific categories of crime, the Commission has produced reports on Criminal Damage,⁶ Non-Fatal Offences against the Person⁷ and Dishonesty⁸ which have been implemented to a significant degree by the Criminal Damage Act 1991, the Non-Fatal Offences against the Person Act 1997 and the Criminal Justice (Theft and Fraud Offences) Act 2001. Thus, in these areas the law has been effectively codified and more recently the Commission has turned its attention to the whole area of homicide, defences such as provocation, duress and necessity and the question of inchoate offences.

More recently, a Report has been published by an expert group appointed by the Minister for Justice, Equality and Law Reform and chaired by Professor Finbarr McAuley, a member of the Law Reform Commission, on Codifying the Criminal Law. This Report acknowledges the substantial progress that has been made in codification of parts of the criminal law in the statutes to which I have referred but makes important recommendations for the establishment on a statutory basis of an Advisory Committee charged with ultimately producing a single codifying instrument setting out the entire criminal law.

Codifying Land Law

So far as the civil law is concerned, I have already referred to the major project undertaken by the Commission in the area of land law and conveyancing law. This, it is hoped, will result in the codification of the law in this area and will not merely make the law simpler, clearer and more accessible but will also introduce substantive reforms, such as the removal from the law of the whole concept of feudal tenure on which our law of real property is still based. Work on the project began at the end of 2002 and a draft Report is due for publication next month.

⁶ Law Reform Commission, *Report on Malicious Damage* (LRC 26-1987).

⁷ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45-1994).

⁸ Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

The Courts Acts

Another codification project of great value on which the Commission is about to embark is the codification and modernisation of the Courts Acts, which will be carried out in consultation with the Department of Justice, Equality and Law Reform and the Courts Service.

Is Law Reform too Important to Leave to the Lawyers?

Returning to the statutory framework of the Commission, the qualifications required for members of the Commission should be noted. In one respect, our Commission differs from the English and Scottish models. The latter require the members of the Commission to have legal qualifications and to be either serving or retired judges, barristers, solicitors or teachers of law. Our Act, while providing for the appointment of persons so qualified, in addition facilitates the appointment of persons who in the opinion of the government have other special experience, qualifications or training. That freedom to appoint commissioners without legal qualifications has been availed of on only two occasions: one of the members of the first Commission, presided over by the late Mr Justice Brian Walsh, Dr Helen Burke (now Professor Burke), was a social scientist. In the next Commission, of which I was President, one of our members was a psychologist, Dr Maureen Gaffney. That Commission dealt with three topics to which Dr Gaffney brought a particular degree of expertise, child sexual abuse, rape and family law.

Dr Gaffney, I am happy to recall, contributed very significantly to the work of the Commission in those areas and her input was by no means confined to them. She was indeed an outstandingly active and committed Commissioner. However, I would not have thought that a law reform body composed exclusively of lawyers, such as the present Commission, need shrink from examining particular topics simply because it might be difficult to reach conclusions and make proposals for changes in the law without obtaining expert and informed views from non-lawyers. The working methods of the Commission have developed enormously since its establishment in 1975 and it has become standard practice to consult with a wide range of groups and individuals with a special interest or expertise in the relevant topic before the Commission's preliminary proposals are published or circulated in the form of a consultation paper. A similar process will normally take place before the Commission's final proposals are published in the form of a Report. In addition, seminars are regularly held which provide an invaluable means of clarifying, refining and assessing the Commission's preliminary proposals.

An excellent example of the value of the wide-ranging consultation process is the project on which the Commission is at present engaged of examining the law in relation to the elderly and affecting persons with physical, mental or learning disabilities and making proposals for its reform. Consultation papers have already

been published on the law and the elderly and more recently on the legal capacity of persons affected by mental disability. It would be unthinkable that a body of lawyers would proceed to make proposals for reform in such areas without the widest practicable consultation with all those who have specific knowledge of or a special interest in the relevant field.

Some of the other law reform agencies, for example, the Canadian and Australian Commissions, also allow for the appointment of non-lawyers and the question whether the membership of such bodies should be confined to lawyers has been the subject of some debate elsewhere in the common law world. While there has been support from such distinguished judges as Mr Justice Cardozo and Lord Wilberforce for the view that, as it has been perhaps over simplistically put, "law reform is too important to be left to the Lawyers," I think that the greatly enhanced procedures of consultation employed today suggest that, in a relatively small Commission, such as ours, the case for non-lawyers being involved in the decision making process itself is less convincing.

The Commission's Programmes of Law Reform

The selection of the topics which are seen as in need of reform is, of course, a matter of prime importance in the work of a law reform agency. Under our Act, the Commission must, 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. Such programmes are subject to approval by the Government. In addition, the Attorney General may request the Commission to examine specific topics, whether included in the programme or not, and to make proposals for their reform and such a request must be complied with by the Commission.

The Commission's first programme of law reform was approved in January 1977 and was extremely wide in its scope. Thus virtually every aspect of the criminal law was embraced and the Commission also envisaged wide ranging examinations of administrative law and family law. The limited resources available to the Commission, particularly in the early years of its existence, inevitably resulted in work on the programme taking a long time and by the time the Commission's second programme was approved in December 2000 parts of the earlier programme remained uncompleted. In the decades that had elapsed, however, since the approval of the first programme, changes in society pointed to the desirability of the Commission's embarking on new fields of reform. The second programme reflects concerns as to shortcomings in the legal system which affects the ability of citizens to have access to the law, with topics such as class and representative actions and alternative dispute resolution singled out for attention. In the area of administrative law, the topic of tribunals of inquiry, which have become such a feature of the legal and political scene in recent times, is given priority - and the electronic revolution has led to the selection of law and the

information society as a specific area for consideration. The increased awareness of the problems of vulnerable groups, particularly the disabled and the elderly, is also reflected in the programme and in the family law area issues affecting non-married cohabitants are given special emphasis.

The Commission, as I have noted, has for long been engaged in a review of our conveyancing and land law and this has been continued under the Second Programme in the form of a joint project with the Department of Justice, Equality and Law Reform which, it is hoped, will eventually lead to, among other changes, on-line paperless conveyancing transactions.

The implementation of these programmes and compliance with requests from Attorneys General have resulted in the production by the Commission of over seventy Reports and a large number of consultation papers. The range of legal topics covered by these Reports and papers is truly impressive. Thus, to take the criminal law alone, they embrace the entire law on offences against the person (other than homicide), dishonesty, receiving stolen property, sentencing, indexation of fines and penalties for minor offences. In the civil law, defamation and contempt of court, occupiers' liability, privacy and various aspects of personal injuries law are only some of the subjects which have received exhaustive attention. Moreover, it is only right to recall on an occasion such as this that in the early stages of its existence a steady stream of reports and papers was produced by the Commission at a time when it was grossly under-resourced particularly in terms of staff.

Implementation of the Commission's Recommendations

Since it is an almost invariable feature of the Commission's reports and consultation papers that they contain a detailed statement of the law on the topic under consideration, not simply in Ireland, but in other jurisdictions as well, they have been of great value to students and practitioners of the law and are frequently cited in court for that reason. However, the Commission was not established for that purpose, although it is undoubtedly an invaluable by-product of its work. While there are exceptional occasions on which the Commission will conclude that no reform in the law is called for, its reports normally include detailed recommendations for changes in the law. Unless a significant number of those recommendations find their way in some form into the statute book, the work of the Commission will inevitably be seen as an expensive irrelevance.

Judged by that standard, the Commission has some cause for satisfaction: to-date approximately sixty per cent of their recommendations have been implemented, a proportion which can stand comparison with that achieved in other common law jurisdictions. Undoubtedly, this reflects a degree of co-operation between the Commission and the government departments which can be regarded as having an interest in the topic under examination by the Commission, usually but not

exclusively the Department of Justice, Equality and Law Reform as, for example, in the land law and conveyancing project to which I have already referred. Moreover, the Commission has not regarded their remit as necessarily at an end when they report; not merely have they carefully monitored in their annual reports the extent of any implementation of their proposals, but they have also taken interesting initiatives, such as meeting the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights to discuss their work programme.

An examination of the areas in which the Commission's proposals have been implemented leads one to the not particularly surprising conclusion that they are more likely to reach the statute book where they deal with issues that have provoked widespread debate and, in particular, comment from the political parties and the media. The partial codification of the criminal law to which I have already referred was unquestionably a most welcome development but the reports of the Commission which preceded it were dealing with a topic which has become of enormous public interest and concern over the last few decades during which Ireland made its transition from being a society in which large scale crime was rare to one confronted with the same problems as other developed societies. The vast number of Acts dealing with criminal justice which have reached the statute book since the early 1990s tell their own story. In another field of law, the enactment by the Oireachtas of the Commissions of Investigation Act 2004 was influenced by the Commission's provisional recommendations in its Consultation Paper for the establishment of low-key inquiries: one would not have expected such rapid action were it not for the public reaction to the length and expense of some tribunals of inquiry. In contrast, the Commission's Report on an area as patently in need of reform as Contempt of Court, now over ten years old, has never been implemented.⁹

In fairness, however, it has to be said that the Commission's proposals to reform the law on the Statute of Limitations as it affected latent personal injuries¹⁰ and to enable the creation of enduring powers of attorney,¹¹ both of which have been implemented, were hardly of wide popular interest and one could point to other examples of proposals which could not be said to set the pulses racing and yet have either reached the statute book or have a fair prospect of doing so in the near future. I will, I hope, be forgiven for citing instances with which I am particularly familiar as they were dealt with by the Commission while I was President.

On any view, accordingly, the Law Reform Commission would have to be regarded as having discharged its role over the three decades of its existence with

⁹ Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994).

¹⁰ Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987).

¹¹ Law Reform Commission, *Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney* (LRC 31-1989).

considerable distinction. But a critical assessment would also, I think, conclude that in some areas changes might be beneficial. Thus, it was a noticeable feature of the Commission's Reports in its early stages that only rarely did they include a bill to give effect to the recommendations in the Report. As I know from my own experience, the Commission has long been aware of the fact that the incorporation of a draft bill in a report significantly improves its prospects of speedy implementation or at all events should do so. But the difficulty of recruiting qualified draughtsmen- and when recruiting them retaining them - is well known. More recently, matters have improved significantly and the last 13 reports have all incorporated draft bills or, in one case, rules of court. It is to be hoped that this will prove to be a permanent feature of the Commission's work.

Approval of the Commission's Programmes of Law Reform

Law reform agencies in common law countries have, on the whole, been their own masters so far as determining what subjects they should tackle. That is as it should be: if the function of such bodies is to ensure that a country's laws keep pace with changes in society, that is more likely to be achieved if the body itself has the responsibility of determining the areas of law which are most obviously in need of reform. But in Ireland, as elsewhere, they are not left wholly free from control and hence the requirement that their programmes be approved by the government of the day. In Ireland, the Attorney General, as I have noted, is given a particular role so far as the Law Reform Commission are concerned: they must consult with him when they are preparing their programme and he is also entitled to request them to deal with specific topics, a request that they must comply with.

Given the pivotal role of the Attorney General under the statute creating the Commission, it might be as well to remind ourselves of his legal and constitutional role. Apart from being the adviser of the government in matters of law and legal opinion and having certain residual functions in relation to the prosecution of crime, he also occupies a quasi-judicial position in the upholding of the Constitution which entitles him to invoke the assistance of the courts where necessary and he is also entitled to represent the public in cases where their rights, as distinct from the rights of individuals, are or may be affected. This quasi-judicial role is not spelled out in the Constitution but has been made clear in a number of decisions and, in explaining its dimensions, the judges have drawn particular attention to the fact that the Constitution expressly provides that the attorney is not to be a member of the government.

The Attorney General remains, however, in a broad sense a political figure. The Constitution contains no prohibition on his being a member of either House of the Oireachtas. The fact that his political sympathies are invariably with the government in power does not in any way preclude him from exercising his role as

its legal adviser in a scrupulously detached manner. Nor does his support of a party in power prevent him from exercising his role as the upholder of the Constitution or the defender of the rights of the public in a wholly impartial manner without any regard to the interests of that party or its wishes.

I have found it necessary to stress this political aspect of the Attorney General's role because the quasi-judicial role which he enjoys as a guardian of the Constitution might at first sight lead to the conclusion that in exercising his functions in relation to the Commission, he must leave out political considerations. That is clearly not the case. The Commission might indeed, in drawing up their programme, have been required to consult with a Minister (rather than the attorney), who would have unarguably been free to take political considerations into account: the choice of the attorney for the role rather than a Minister may well have been because in his position as legal adviser to the government he is likely to have an overview of law reform issues arising in different departments which would be denied to an individual Minister.

To the extent that the Commission's programme of reform is subject to the approval of the government and that they must consult with the attorney in drawing up the programme, the independence of the Commission, on which I have laid emphasis, is qualified. Circumstances may arise in which governments may withhold their approval of items in the programme or, conversely, may insist on items being included in the programme. These could be properly characterised as decisions in the political sphere although they might not be particularly contentious. In the case of the two programmes so far adopted, the government of the day has given its approval without, so far as I am aware, requiring any changes to be made.

Requests from the Attorney General

The preparation of a law reform programme is thus in a sense the joint responsibility of the Commission and the government and this is also the case in other law reform agencies in the common law world. This is perhaps what one should expect in a democracy. It is not so obvious that it was necessary to give the Attorney General power to compel the Commission, in effect, to devote their energies to the examination of a particular topic, irrespective of what their own views might be as to its suitability in that context and despite the fact that it has not been found appropriate for inclusion in the programme of law reform by the Commission or the government. The attorney, in making such a request, cannot be said to be bound by the considerations which would constrain his exercise of the quasi-judicial role which he enjoys under the Constitution, and he can quite legitimately take purely political factors into account. While a similar power is conferred on attorneys in other jurisdictions - the Australian Commission are indeed restricted to dealing with topics referred to them by the Attorney General

- I do not think that it can be regarded as an essential feature of the statutory scheme established in this country under the 1975 Act.

That Act was piloted through both houses of the Oireachtas by the Attorney General, Declan Costello, who, unusually in recent times, was a Dáil Deputy at the time of his appointment. He gave two examples at the Second Reading stage in the Dáil of circumstances which might render the invocation of this power appropriate: a decision by the Supreme Court revealing a legal state of affairs which required urgent amendment and a development in EEC law which also required legislative action. However, although successive attorneys have made use of the power on 16 occasions, only one of them could be said to have been prompted by such circumstances. Following dicta by Walsh J in a case in the Supreme Court which indicated doubts as to the constitutionality of the doctrine of the dependent domicile of a wife, that topic was referred to the Commission.

On occasions, references by the Attorney General could be regarded as bringing within the remit of the Commission important topics which, for whatever reason, were not included in its own programme, such as Conveyancing and Land Law, Defamation and Contempt of Court. But it is hard to avoid the conclusion that there have also been occasions when the reference procedure has been used for reasons which had more to do with political considerations than the objectives which should normally dictate the programme of a law reform agency. A government under pressure to reach a decision on a particular problem to which different solutions are being urged by various interest groups - and on which they themselves as a government may be divided - may wish to buy time and a reference of the topic to the Commission by the Attorney General may provide that breathing space. While the power to refer is no doubt desirable for the reasons given at the time the Act was being introduced, it might be possible to amend the legislation so as to confine the exercise of the power to those or similar circumstances.

Concluding Comments

Finally, while the rate of implementation of the Commission's reports gives cause for at least some satisfaction, the fact remains that a large body of its work has failed to achieve legislative form. This is a problem common to law reform agencies the world over and many suggestions have been made for remedying the situation. One in particular which has much to commend it in Irish circumstances is the establishment of a Joint Committee of the Oireachtas charged with examining the reports of the Commission and making its own recommendations as to the form of legislative action which should be taken in the light of the reports. This might help to fill the lacuna that at present exists when a particular department which would normally be responsible for legislation in the area concerned is overburdened with other projects to which priority is being given or is lacking in enthusiasm for the projected reforms.

Ultimately, however, the greatest guarantee of success by a law reform agency in having its proposals implemented is the choice of areas for action which can be seen as relevant to the concerns of society in general. Just as important, of course, is the quality of the reports it produces and here, I think, our Commission has nothing to fear from comparisons with other law reform agencies. So far as the choice of topics for consideration is concerned, the Commission is, as we have seen, not wholly its own master, but within its statutory constraints it has shown a determination to ensure that its work contributes to a body of law which is fair, accessible and relevant to the needs of Irish society today. Armed with that determination and the dedication of its Commissioners and staff, it can look forward to the next three decades of its existence with justified confidence.

LAW REFORM: A NEW DEPARTURE

Declan Costello*

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Effectively to carry out a comprehensive law reform programme requires more than a polite obeisance towards the concept of law reform. Two things, in particular, are necessary: an allocation of sufficient resources to perform the task, and secondly the proper procedures to implement it. In the past, in this country, few would be heard to deny that law reform was a good thing. But in truth, the amount of law reform undertaken has been far from adequate. And so, a new departure has, hopefully, been undertaken by the enactment of the Law Reform Commission Act, 1975, and by the establishment in October last of the Commission provided for by the Act.

Law reform requires research, and research calls for skills which are only acquired by training and experience. This country cannot hope to emulate countries richer in resources than ours (the Law Reform Commission in England, for example, has a full-time staff which includes five draftsmen and twenty-one lawyers), but a start is being made by providing that two of the Law Reform Commissioners will be full-time members and by enabling the Commission to recruit a full-time professional staff. The sources of the legal profession (both academic and practising), will be required to assist in the Commission's tasks and the 1975 Act, accordingly, envisages that Working Parties may be established whose membership would comprise legal experts who would assist in the formulation of the Commission's proposals. Recognising the limitations of our situation we can, however, look forward to the creation of a strong (albeit small) nucleus of full-time experts engaged exclusively on law reform whose work, it is to be hoped, would be augmented by voluntary assistance outside its own staff.

The new approach, outlined in the 1975 Act, accordingly involves important new techniques. In the past, a systematic approach has been lacking. Legislation depended largely on the implementation of *ad hoc* decisions, and the creation from time to time of specialised Commissions whose remit was limited to a specialised subject. The new techniques will involve a systematic approach by the

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preparation of comprehensive programmes of law reform by the Law Reform Commission from time to time; the formulation of proposals on a basis of complete independence after research and consultation (including, where appropriate, the publication of preliminary working papers for discussion); and the formulation of proposals by means of a Report which would include (when considered advisable by the Commission to do so) the draft of a Bill for presentation to the Oireachtas.

Experience elsewhere has shown the value of detailed consultation before final proposals are formulated. Such consultation, can, it will be readily understood assist in overcoming objections and foster the widest possible agreement. Proposals which are generally welcomed should then be assured of an easy passage through Parliament. The speedy transformation of law reform proposals into legislative reality is further assisted by their formulation in a draft Bill. The drafting process is a useful discipline and helps to uncover problems as well as assisting in their solution. More importantly, however, the provision of a draft Bill will, in most instances, allow its presentation without delay to the parliamentary process. The procedures to be adopted by the Law Reform Commission in Ireland are, of course, matters within its complete discretion. Care has been taken to underline its independent status. It is however likely that to be encouraged by the success which the procedures outlined above have had elsewhere (notably in England and Canada), and its statute gives it the flexibility which will be needed to adapt these procedures to Irish conditions.

It may, of course, happen that from time to time the assistance of the Commission would be required in relation to matters not included in its programme. For this reason the Act gives power to the Attorney General to request the Commission to undertake an examination and conduct research in relation to any particular branch or matter of law whether or not it has been included in a programme. In fact, these provisions of the Act (subsection 4(2)(c)) have already been operated and the Commission has been asked to consider the law in relation to the domicile of married women and the laws relating to majority. It is to be anticipated however that as the Commission develops its programme, recourse to the provisions of this section will be the exception rather than the rule.

It is not envisaged that, in the future, all law reform activities will be undertaken by the Law Reform Commission itself. The Act specifically provides that in the preparation of its programme the Commission may recommend the agency by which an examination of the law should be made, and the relevant agency could be itself or another body. The purpose of this provision is to enable the Commission to propose a systematic coherent programme of how our resources can best be utilised towards reforming the law as speedily as possible. As quite clearly the Commission may not, itself, be able to do all that is now necessary, it may suggest, if it thought fit, that other agencies, for example the Committee on Court Practice and Procedure, should undertake certain studies. Or it may recommend that research be undertaken by a Government Department or by a specially selected Commission.

The important role which non-lawyers can play in the field of law reform has been underlined by the fact that one of the Commissioners of the new Commission is a Social Scientist. Law reform does, of course, call for lawyers' skills. But it requires more to achieve the widest possible significance. It would be a mistake to consider law reform as a subject of interest only to a small group of academic specialists. It is a subject which in the Irish context, covers many of the most important inter-personal relationships. Lawyers, have of course a crucial role in the process of law reform – but not an exclusive one. In keeping up-to-date our laws and improving the legal framework in which our lives are passed, knowledge and insights from many disciplines will be of assistance. A Law Reform Commission will not of course be a substitute for good Government, and it would be an error to consider that the answer to our social problems has been found by the establishment of the new Commission. Undoubtedly, this in turn requires the assistance of the institutions and procedures established by the 1975 Act. To do its work effectively the Commission will require time for research and consultation. In the light of many years of neglect its task must be considered an arduous one. These facts, however, being accepted, it must nonetheless be appreciated that the role of the Law Reform Commission in shaping the future of Irish Society can be a most significant one.