Law Reform Commission

Fifth Programme of Law Reform

Draft Prepared for the Attorney General

Following Meeting of Consultative Committee

30 August 2018

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About the Law Reform Commission

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

The Commission's role is carried out primarily under a Programme of Law Reform. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. The *Fourth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion and, in accordance with the 1975 Act, it was approved by Government in October 2013 and placed before both Houses of the Oireachtas. This draft *Fifth Programme of Law Reform* was also prepared by the Commission following broad consultation and discussion.

The Commission's Access to Legislation work makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in 3 main outputs: the Legislation Directory, Revised Acts and the Classified List of In-Force Legislation. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. The Commission provides online access to over 330 Revised Acts, including all textually amended Acts since 2006 (other than Finance and Social Welfare Acts) and over 100 much-used pre-2006 Acts. The Classified List is a separate list of all in-force Acts of the Oireachtas and statutory instruments organised under 36 major subject-matter headings.

Commission Members

The Law Reform Commission consists of 5 Commissioners, the President and 4 Commissioners.

The Commissioners at present are:

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Mr Justice John Quirke, former judge of the High Court

Commissioner:

Raymond Byrne, Barrister-at-Law

Commissioner:

Donncha O'Connell, Professor of Law, School of Law, NUI Galway

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OVERVIEW OF PROJECTS AND SELECTION CRITERIA USED

The Commission sets out below an abstract for each of the 15 Projects proposed for inclusion in the *Fifth Programme of Law Reform*, organised under 6 general subject headings. These abstracts will form the basis for the scoping and development of each project. These abstracts have been revised in light of the meeting of the Attorney General's Consultative Committee. The 15 projects and the 6 general subject headings are:

A. COURTS, PUBLIC LAW AND THE DIGITAL ERA

1. Reform of Non-Court Adjudicative Bodies and Appeals to Courts
2. Regulation and Oversight of Vulnerable or At-Risk Adults
3. Privacy and technology in the Digital Era

B. CRIMINAL LAW AND CRIMINAL PROCEDURE

4. Structured Sentencing
5. Review and Consolidation of the Law on Sexual Offences
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In deciding to include these 15 projects in the proposed *Fifth Programme*, the Commission applied the following 4 selection criteria:

(a) ***Importance***

Projects must meet a real community need by providing a remedy for a deficiency or gap in the law, including the need to modernise an outdated law.

(b) ***Suitability***

Projects should be suitable for analysis by the legal expertise available in the Commission, supplemented by appropriate consultation with other professionals and interested parties. The demands and dimensions of a project and its projected duration and the desirability of any other agency undertaking the project should also be taken into account under this criterion.

(c) ***Resources and timeframe***

Projects should be suitable for analysis in light of the human and financial resources, current and projected, at the Commission's disposal; and should be capable of being substantially completed by 2021.

(d) Avoid duplication

Projects should not overlap with the work of other bodies engaged in law reform activities, but should complement such work where appropriate.

A. COURTS, PUBLIC LAW AND THE DIGITAL ERA

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

As with most jurisdictions, Ireland now has a great array of quasi-judicial bodies empowered, usually by legislation, to adjudicate issues and disputes in particular areas. They include An Bord Pleanála, the International Protection Appeals Tribunal, the Residential Tenancies Board and the Social Welfare Appeals Office.

The profusion of such adjudicative bodies is inevitable in the modern administrative state, but they have grown up over many decades on a case-by-case basis, without any standard approach to procedural matters or their relationship with the courts, including by way of appeal or review.

The Commission noted in its 2016 report on the law of evidence the varying procedures and rules of evidence among quasi-judicial bodies.[1] A number of submissions received during the consultation process for this Fifth Programme have drawn attention to the great multiplicity of avenues of appeal from these bodies, and the confusion that this generates. Questions pertaining to related issues, such as the standard of proof to be applied, and access to legal representation, may also be examined.

This project will therefore examine the case for a reformed system, including the approach to evidential matters and simplifying the avenues of appeal to the courts from such bodies. The Commission notes that significant reforms have been enacted in the UK in the *Tribunals, Courts and Enforcement Act 2007*, which implemented the majority of the recommendations in the 2001 Leggatt Report.[2] The 2007 Act lays down a single basis for appeals from the quasi-judicial bodies within its scope, and the project will examine to what extent this may be a useful reform model for this jurisdiction. The Commission is conscious that other aspects of the reforms in the UK 2007 Act, notably the consolidation of the various bodies into a single tribunal structure with uniform powers and procedures, may present constitutional questions in Ireland under Article 34 and 37. The Commission will have regard to these important questions in developing the project, and will also review relevant reforms in jurisdictions other than the UK.

[1] *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC-117 2016), Appendix A.
[2] Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001).

2. Regulation and Oversight of Vulnerable or At-Risk Adults

In a Seanad debate on a Private Member's Bill, the *Adult Safeguarding Bill 2017*, the Minister for Health stated that the Government agreed that there was a need for an appropriate statutory framework for the safeguarding of vulnerable or at-risk adults. The Department of Health and a number of other bodies also made detailed submissions requesting the Commission to include this matter in the Fifth Programme.

The Commission has previously completed work in this general area, including the 2006 report[3] which recommended the replacement of the adult wardship system with legislation on adult capacity based on a functional test of capacity, largely reflected in the *Assisted Decision-Making (Capacity) Act 2015.*

In developing this project, the Commission will (taking account of any parallel work in this area) consider a range of matters, including:

(a) co-ordination of any new proposed powers of existing or new bodies with other regulatory and oversight bodies, such as the Health Information and Quality Authority on health matters, the Central Bank on financial matters and the Department of Employment Affairs and Social Protection on social welfare matters;

(b) powers of entry and inspection, in particular the question of being able to gain access not only to commercial premises but also to a private dwelling;

(c) other powers, such as those being considered by the Commission in its Fourth Programme project on Regulatory Enforcement and Corporate Offences (on which the Commission will publish its Report in 2018); and

(d) access to sensitive data, including financial information.

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

3. Privacy and Technology in the Digital Era

This project will consider aspects of the impact of the digital era on the law.

The Commission will give priority to examining how technology in the digital era has affected traditional views of privacy. In particular, it will explore to what extent the Commission's previous work in this area in the late 1990s, concerning privacy and surveillance,[4] needs to be reconsidered in the context of the internet era, and to what extent this area (where the state and, increasingly, private sector actors are involved) has evolved in the interim. The project will also take into account the impact of recent EU and ECHR law, which the Commission examined under its Fourth Programme in its project on harmful communications and digital safety.[5]

The project may also explore other aspects of the impact of technology on substantive and procedural law.

In terms of substantive law, the project may (taking account of any parallel work in this area, nationally and internationally) examine a discrete area concerning the future impact of interconnected digital devices – the "Internet of Things" (IoT). For example, the development of autonomous vehicles and vessels is likely to have significant effects on the interaction between road traffic law or maritime regulations on the one hand, and product liability law on the other, and such a discrete project could therefore identify reforms that would be required in this developing area of law.

As to procedural law, the project might also examine the possible use of online dispute resolution (ODR).[6] While ODR has the potential to give greater effect to the right of access to the courts and the right to an effective remedy, there are concerns that an excessive reliance on it could have consequences for the right of access to independent legal advice and the quality of legal adjudication generally.

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

[5] *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

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

B. CRIMINAL LAW AND CRIMINAL PROCEDURE

4. Structured Sentencing

Ireland, by contrast with many other common law jurisdictions, has a largely unstructured sentencing system in which sentencing judges enjoy a wide measure of discretion in individual cases.[7] In recent years, however, the appellate courts have delivered a series of judgments that have provided significant sentencing guidance for a number of offences.[8] In addition, the *Judicial Council Bill 2017* proposes that the Judicial Council would include a Sentencing Information Committee empowered to collate information on sentencing, to conduct research on sentencing and to publish sentencing decisions of the courts.

A number of submissions suggested that the Commission should examine this area. While the developments already mentioned indicate that other bodies have provided important guidance in this respect and will continue to do so, the Commission nonetheless considers that it could provide useful complementary analysis, building on its previous work in this area. This work has included its 1996 report on sentencing in general,[9] its 2013 report on mandatory sentences,[10] and its project on suspended sentences under its current 4th Programme.[11]

This project will therefore consider to what extent the general principles of sentencing, combined with a suitable sentencing information database, could provide the basis for a structured sentencing system. The objective of such a system might be to achieve uniformity or consistency of approach rather than uniformity of outcomes, which could involve a combination of guidance from appellate courts and the information from the Sentencing Information Committee of the Judicial Council. The Commission will examine a number of models in this respect, including the Sentencing Council of England and Wales and the development of sentencing guidance in Northern Ireland under the auspices of the Lord Chief Justice.

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

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

[9] *Report on Sentencing* (LRC 53-1996).

[10] *Report on Mandatory Sentences* (LRC 108-2013).

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

5. Review and Consolidation of the Law on Sexual Offences

During the public consultation process, the Commission received a large number of submissions concerning the need to review specific aspects of sexual offences law and for the consolidation of the law.

As to the specific aspects of the law, the project will examine:

(a) the definition of rape;
(b) sexual history evidence;
(c) whether the doctrine of recent complaint ought to be abolished;
(d) the discretionary corroboration warning;
(e) the anonymity of accused persons in sexual assault cases;
(f) whether trials for sexual assault should be heard otherwise than in public;
(g) the high attrition rate in sexual offences cases, and whether procedural and other reforms could have an impact on this; and
(h) separate legal representation for complainants.

As to consolidation, while the enactment of the *Criminal Law (Sexual Offences) Act 2017* has provided for significant reform, it did not involve complete consolidation of the law, and it remains the case that some sexual offences on the statute book date back to the 19th century.

Both aspects of this project will take due account of relevant work by the Department of Justice and Equality in relation to sexual offences.

6. Perjury

The law of perjury is at present a common law offence subject to various ancillary matters provided for in a number of ancient statutes, such as the *Perjury Act 1586* and the *Perjury Act 1729*. More recent legislation has also provided for context-specific offences, such as section 25 of the *Civil Liability and Courts Act 2004*, which provides for an offence of giving false or misleading evidence in personal injury cases.

The Commission previously referred to the law of perjury in its 1990 report on oaths and affirmations,[12] and while it did not make any recommendations for reform having regard to the scope of that report it acknowledged that it might be desirable to restate the law in modern language and with suitably updated penalties.

A number of submissions to the Commission suggested the need for a review of the law of perjury. A modern statement of the law of perjury, including a clear definition and updated penalties, would bring important clarification to the law. The Commission is conscious that this area of law has been subject to review and reform in a number of other common law jurisdictions, and will have regard to these developments in developing this project.

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

7. Compensating Victims of Crime

The Criminal Injuries Compensation Scheme was established on a non-statutory basis in 1974, primarily to address the needs of victims of crime who would otherwise be unable to obtain compensation in a civil claim against the offender. It was amended in 1986 in a significant respect by confining its scope to compensation for special damages (quantifiable loss, such as loss of wages) and excluding compensation for general damages (damages for the pain and suffering involved).

This project will examine whether the Scheme is in need of reform, particularly having regard to Ireland's obligations to compensate victims of crime under Directive 2004/80/EC relating to compensation to crime victims. The project will examine whether the Scheme should be amended to include claims for general damages experienced by the victim, and any other aspects that may require reform.

A number of submissions received by the Commission raised concerns about the operation of the Scheme in the context of sexual crimes. For example, the Scheme provides that a victim is not entitled to compensation where he or she is cohabiting with the offender, which is likely to exclude many victims of sexual violence. It also provides that no compensation is payable where the victim was in some way responsible for the crime, including by way of provocation, which may exclude victims of domestic violence. Submissions have also raised concerns about the interaction between the Scheme and section 6 of the *Criminal Justice Act 1993*, which provides a procedure whereby a criminal court may order an offender to pay compensation to the victim in respect of any personal injury or loss resulting from the offence.

8. Regulation of Detention in Garda Custody

At present, detention in Garda custody is principally regulated by the *Criminal Justice Act 1984* and relevant Regulations made under the 1984 Act, such as the *Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987*, the *Electronic Recording of Interviews Regulations 1997* and the *Suspension of Detention under section 4(3A)) Regulations 2011.*

Submissions to the Commission have suggested that the current legislation may not be compliant with emerging constitutional requirements or those under the European Convention on Human Rights (ECHR). This has the potential to hinder the effective operation of the criminal justice system, including the criminal trial process, and thus presents significant risks to the rights of detainees and of victims of crime, and to the public interest in the effective operation of the criminal justice system.

This project will therefore examine a number of legal issues concerning persons who have been arrested in relation to a criminal offence and who are detained in Garda custody. The issues will include: the scope of the right of access to a lawyer; the provision of information; the provision of medical assistance; the question of consular assistance for foreign detainees; and the provision of a translator or interpreter. The project will examine these issues having regard to the relevant provisions of the Constitution and the ECHR. The project will also take account of relevant EU Directives, namely those which the State has exercised its option to adopt, as well as those which the State may choose to adopt in the future. The project will also take account of the work of the Commission on the Future of Policing.

This project will also consider the present statutory arrangements in relation to other forms of detention, and will evaluate whether consolidation, or an effort to make the powers relating to the various forms of detention more uniform, should be considered.

C. CIVIL LIABILITY AND CIVIL PROCEDURE

9. Caps on Damages in Personal Injuries Litigation

A number of submissions suggested that the Commission examine aspects of civil liability in personal injuries claims, including the level of damages in such cases. The Cost of Insurance Working Group[13] and the Personal Injuries Commission[14] have been examining a wide range of issues concerning the cost of motor, employer and public liability insurance, and this has included aspects of the award of damages in such cases. Having regard to the general submissions received, and to a request from the Working Group and the Department of Justice and Equality, the Commission will examine whether it is appropriate to legislate for a cap to be placed on the levels of damages which a court may award in respect of some or all categories of personal injury claims.

The Commission has previously examined this area, including in its 2000 report[15] which recommended that the law on damages should be developed primarily by case law.[16] The courts have, in a series of cases, including *Sinnott v Quinnsworth Ltd*,[17] *Yun v Motor Insurers Bureau of Ireland*[18] and *Shannon v O'Sullivan*,[19] laid down what have been described as "caps" or "tariffs" on general damages (damages for pain and suffering), which take account of the injuries suffered by a plaintiff and in some instances the level of special damages awarded (for example, for loss of earnings and medical care costs). These caps or tariffs have been adjusted by the courts over the years, taking account of general economic conditions and medical costs inflation. The current project will consider, having regard to the current role of the courts in this area, whether it would be constitutionally permissible or otherwise desirable to provide for a statutory regime that would place a cap on damages in personal injuries cases. The project will also have regard to developments in related aspects of the law on damages, such as the provision for Periodic Payment Orders under the *Civil Liability (Amendment) Act 2017*, and to developments in other comparable jurisdictions.

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[13] See http://www.finance.gov.ie/what-we-do/insurance/the-cost-of-insurance-working-group/.
[14] See https://dbei.gov.ie/en/Who-We-Are/Department-Structure/Commerce-Consumer-and-Competition-Division/Personal-Injuries-Commission/Personal-Injuries-Commission.html.
[15] *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000).
[16] A similar view was taken by the Law Commission for England and Wales in its 1998 Report *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No. 257).
[17] [1984] ILRM 253.
[18] [2009] IEHC 318.
[19] [2016] IECA 93.

10. Protective Costs Orders

A number of submissions have suggested that access to justice through the courts in the context of civil litigation (other than the limited range covered by the *Civil Legal Act 1995*) has become increasingly difficult for many individuals owing to the prohibitive costs involved, and that a general system of Protective Costs Orders (PCOs) may assist in alleviating this. The usual rule in civil litigation in Ireland is that "costs follow the event", that is, that the unsuccessful party must pay the successful party's costs (and their own costs); but this rule does not apply until the case has been decided in court, or settled. Individuals are therefore usually required to fund a claim from their own resources, with the added risk that if they are unsuccessful they will be required to pay the other party's legal costs also. It has therefore been suggested that the costs involved in civil litigation deter many individuals from initiating, or defending, proceedings.

PCO systems can take a variety of forms, but usually act to protect one party from bearing another party's costs in the event that they are unsuccessful, a reversal of the usual rule that costs follow the event. Some PCO schemes prohibit a party from claiming their costs even if they are successful, others are silent on this issue, while still others allow the party to recover their costs in the event that they are successful. A form of PCO was put on a statutory footing in Ireland under the *Environment (Miscellaneous Provisions) Act 2011* in respect of a limited number of cases that fall within the UNECE Convention on Access to Information on the Environment (the Aarhus Convention), as implemented in Directive 2003/35/EC (the amending EIA Directive). This project will examine the case for the introduction of a wider statutory scheme for PCOs, taking account of the development of such arrangements in other jurisdictions.

11. Liability of Hotels and Related Establishments

The *Hotel Proprietors Act 1963* replaced the common law duties of hotel proprietors with a statutory code, and also implemented the 1962 Council of Europe Convention on the Liability of Hotel-keepers concerning the Property of their Guests.

The 1963 Act provides that, subject to certain exclusions (such as for motor vehicles parked in the hotel property by staying guests), the hotel is strictly liable for the damage, loss or destruction of a guest's property. Liability under this strict liability rule is limited to €127 (£100), which has not been altered since 1963.

The 1963 Act also replaced the common law duty of hotelkeepers to charge only "reasonable" prices with a duty to provide accommodation, food and drink "at the charges for the time being current at the hotel." This provision does not appear to reflect the reality of hotel prices in the second decade of the 21st century, where the vast majority of hotel rooms are booked online, with algorithms and specific factors such as the occurrence of a major sporting or other public event playing a prominent role in determining the price to be charged.

The project will examine to what extent the 1963 Act is in need of reform having regard to developments since its enactment. This includes: the effect of inflation since the financial limit of €125 on the strict liability regime was set in 1963; the impact of online booking on the duty concerning charges; whether the 1963 Act should be extended to guesthouses, hostels, traditional bed and breakfast establishments and comparable online-era short-term letting arrangements; and the effect of general civil liability legislation enacted since 1963, including the *Occupiers' Liability Act 1995* and the *Equal Status Act 2000.*

12. Liability of Unincorporated Associations

The 2017 decision of the Supreme Court in *Hickey v McGowan*[20] has identified the need for a review of the civil liability of unincorporated associations. The plaintiff alleged that he had been sexually abused between 1968 and 1972 by a member of the Marist Order of Religious Brothers, an unincorporated body. The Court held that, while the plaintiff was entitled to seek and obtain judgment against individuals who were members of the Order between 1968 and 1972 on the grounds of their vicarious liability as a group, he could not obtain judgment against the Order as such. The likely effect of this was that the plaintiff would not obtain judgment against the current assets of the Order.

The decision in the *Hickey* case reflects the long-established common law view that an unincorporated body, which also includes many sporting clubs, has no separate legal character distinct from its members. Thus, in *Murphy v Roche and Ors*,[21] the High Court held that the plaintiff, a member of a GAA club who fell and injured himself at a dance on the club's premises, could not sue the club because he would, in effect, be suing himself. It has been suggested that this exclusion from civil liability of unincorporated associations is difficult to reconcile with the right to equal treatment under Article 40.1 of the Constitution and the right of access to the courts under Article 40.3 and under Article 6 of the European Convention on Human Rights.[22] By contrast, criminal liability may be imposed on an unincorporated club, at least in respect of statutory offences. Thus, in *Director of Public Prosecutions v Wexford Farmers Club*,[23] the High Court held that the defendant club could be convicted for an offence under the *Intoxicating Liquor Act 1988*, which applies to a "person" and which was defined in the *Interpretation Act 1937* (and now in the *Interpretation Act 2005*) as meaning both a corporate body and an unincorporated body of persons.

The project will therefore address: whether and when separate legal personality may be ascribed to unincorporated associations; and whether members should be able to sue their own unincorporated associations, including sports clubs. The project may also address whether there is a need for greater clarity as to the criminal liability of unincorporated bodies.

[20] [2017] IESC 6, [2017] 2 IR 196.
[21] [1987] IR 656.
[22] See McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury, 2013) at para 39.25.
[23] [1994] 2 ILRM 295.

D. LAW OF EVIDENCE

13. Aspects of the Law of Evidence

The Commission's 2016 *Report on Consolidation and Reform of Aspects of the Law of Evidence*[24] made wide-ranging recommendations for reform of 3 major areas of the law of evidence (hearsay, documentary evidence and expert evidence) as well as for the consolidation of all existing pre-1922 and post-1922 *Evidence Acts* (18 in total). A number of submissions received by the Commission argued the need to continue to review other aspects of the law of evidence, and this project will examine 2 areas, bad character evidence and the law of privilege.

The law concerning bad character evidence, also termed "misconduct evidence," "background evidence" or "similar fact evidence", refers to the introduction of evidence, notably by the prosecution in a criminal trial, of some previous dishonourable or disreputable conduct on the part of the accused, be it criminal or otherwise. The traditional common law rule is that such evidence is not admissible where it is introduced for the purpose merely of demonstrating that the accused is a person of general ill-repute and is therefore more disposed towards criminality. The rule was addressed by the Supreme Court in 2011 in *The People (DPP) v McNeill*[25] and while the Court clarified its application to the extent that it concerned the introduction of "background evidence" it was also noted that the law would benefit from a comprehensive review, which could take account of the case law on the area that has been built up in Ireland and in other jurisdictions, and also of relevant contemporary learning in the field of psychology and sociology.[26]

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

[24] *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).
[25] [2011] IESC 12, [2011] 2 IR 669.
[26] [2011] IESC 12, [2011] 2 IR 669, at para 169 (O'Donnell J).

E. FAMILY LAW

14. Aspects of Family Law

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

Article 41 of the Constitution provides that, in a divorce case, a court must determine whether proper provision has been made for the spouses involved, and this requirement is also reflected in the *Family Law (Divorce) Act 1996*. Considerable case law has arisen on this issue, and while the 1996 Act provides for certain matters to be taken into account, the determination of "proper provision" remains primarily a matter for judicial discretion. Among the issues that have given rise to debate in the case law is the extent to which ongoing payments or lump sum awards may be made: see, for example, the Supreme Court decision in *T v T*.[27] The project will consider to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of this judicial discretion, in particular to assist spouses to reach settlements and resolve disputes more efficiently and at lower financial or cost.

Several submissions to the Commission raised concerns about the uncertainty surrounding the basis for the recognition of foreign divorces. In *H v H*,[28] the Supreme Court held that the current test was based on whether one of the spouses was domiciled in the foreign jurisdiction, as opposed to one of the spouses being habitually resident in that jurisdiction. The determination of "domicile" includes an assessment of the intention of the person to remain in the foreign jurisdiction, which has proved complex to determine in some instances, whereas a test of habitual residence can be determined by factual circumstances alone, which may be less complex. The Supreme Court considered that the test could be changed by legislation, and this project will therefore consider whether the current test should be reformed.[29] In addition, the project may also examine issues relating to the recognition of foreign polygamous and proxy marriages, which the Supreme Court in *HAH v SAA & Ors*[30] also suggested would benefit from further review.

[27] [2002] IESC 68, [2002] 3 IR 334, at 364.
[28] [2015] IESC 7, [2015] 4 IR 560.
[29] In its 1985 *Report on Recognition of Foreign Divorces and Legal Separations* (LRC 10-1985), the Commission recommended the introduction of a residency-based requirement, rather than one of domicile.
[30] [2017] IESC 40.

F. LAND AND CONVEYANCING LAW

15. Aspects of Land and Conveyancing Law

The Commission's 2005 report on reform and modernisation of land and conveyancing law,[31] which included a detailed draft Bill, led to the enactment of the *Land and Conveyancing Law Reform Act 2009.* A number of submissions received indicated the need to review some matters not addressed in the 2009 Act or which require further examination. This project will examine 2 aspects of this area of law, adverse possession (not addressed in the 2009 Act) and prescriptive easements (addressed in the 2009 Act).

The Commission's 2005 report and draft Bill had addressed adverse possession but the 2009 Act did not include these provisions on the basis that they required further consideration in light of the decision of the Grand Chamber of the European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom.*[32] The project will re-examine this area, talking account of the analysis in the 2005 report and also developments since the decision in the *Pye* case.[33]

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

[31] *Report on Reform and Modernisation of Land Law and Conveyancing* (LRC 74-2005).
[32] (2007) 46 EHRR 1083.
[33] See, for example, *Dunne v Iarnród Éireann-Irish Rail* [2016] IESC 47, [2016] 3 IR 167, at para. 23 (Laffoy J) and Wylie, "Adverse Possession – Still an Ailing Concept?" (2017) 58 *Ir Jur* 1.