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COMPILED BY
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A. England and Wales

Report on Conspiracy and Attempts
Law Com No. 318
December 2009
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This Report deals with an aspect of what it terms the "general part" of the criminal law; namely, the law that supports the more specific criminal prohibitions, for example on murder, rape and assault. This Report is linked to the Law Commission's Report on *Incohate Liability for Assisting and Encouraging Crime* and the Report on *Participation in Crime*. There are nine chapters in this Report. The Report contains a very detailed and technical discussion of the proposed recommendations, and it is not possible to set them out in any level of detail in this brief outline.

Part 1 provides an overview of the content and structure of the Report.

Part 2 analyses the fault element of conspiracy. The recommendations are based on those set out in the Consultation Paper on the issue. The chapter goes through the submissions made to the Law Commission in detail, and sets out the Law Commission's response where appropriate. The chapter also contains examples of how the proposals would operate in practice. Each of the five recommendations is discussed in detail.

Part 3 discusses the issue of double inchoate liability. This is where liability is incurred through commission of an

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inchoate offence that relates to another inchoate offence. The aim of the Law Commission is to rationalise the rules in this area. In this respect the chapter considers the implications of the repeal of section 5(7) of the Criminal Law Act, 1977, which provided that incitement to commit the offence of conspiracy was not an offence, by schedule 14 of the Serious Crime Act, 2007. The Law Commission does not recommend the expansion of the law to include an offence of attempting to conspire.

Part 4 deals with how conspiracy should be charged. Where more than one offence may be the outcome of the course of conduct that has been agreed, then separate charges of conspiracy comprising separate counts on the indictment should be used for each offence. This does not require legislative changes. The Law Commission also recommends that the requirement for the consent of the DPP for a prosecution for a conspiracy to commit a summary offence be abolished.

Part 5 examines the current exemptions from liability for conspiracy. The Commission recommends abolishing the out-dated provision that a married couple cannot be charged with conspiracy. This would also apply to civil partners. The exemption should be retained for a victim conspirator provided that certain criteria are met. An agreement involving a child should not give rise to criminal liability for conspiracy.

Part 6 sets out a recommendation for a defence to conspiracy. This would be a defence of reasonableness, and an example of when it would apply would be where a law enforcement officer enters into a conspiracy in order to expose the other participants at a later point. The Law Commission notes that the current absence of a defence of acting reasonably means that the law on conspiracy is inconsistent with the law on encouraging and assisting a crime.

Part 7 considers extra-territorial jurisdiction in relation to the reformed offence of conspiracy. There is a broader approach to the question of jurisdiction where the defendant is charged with conspiracy. The Law Commission recommends that it should be possible to convict a person of conspiracy to commit a substantive offence, regardless of where any of the relevant conduct took place, so long as the defendant knew or believed that the conduct or consequence element of the intended

substantive offence might occur wholly or in part in England and Wales. The Law Commission also makes recommendations that it should be possible to convict a person of conspiracy when various elements of the offence occurred within the jurisdiction or were committed by a person satisfying citizenship, nationality or residency considerations.

Part 8 deals with reform proposals relating to the law on attempt. In response to the provisional recommendations in the Consultation Paper, the Law Commission notes that there was agreement that the current provisions on attempt were not operating satisfactorily. However, there was no consensus as to the most appropriate way forward. The Report sets out in detail the objections raised by those responding to the Consultation Paper. The Law Commission nevertheless makes a number of recommendations to reform the law on attempt, including the introduction of liability for attempted murder by omission where there is a recognised duty to act. However, omissions would not generally give rise to liability for attempt.

Part 9 lists the recommendations of the Law Commission.

Consultation Paper on Adult Social Care
Law Com No. 192
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http://www.lawcom.gov.uk/docs/cp192.pdf

Adult social care refers to the responsibilities of local social service authorities towards adults who need extra support. It includes older people, people with intellectual disabilities, physically disabled people, people with mental health difficulties and carers. It can include things like the provision of meals, day centres, home adaptations, and home care. It also includes the mechanisms for delivering these services, such as community care assessments, carers' assessments and personal budgets. The legislative framework underpinning these services is piecemeal and complicated. There is no single modern statute setting out what the law is. The aim of the Consultation Paper is to establish a simple, consistent, transparent and modern framework for adult social care law. There are 14 parts to this Consultation Paper.

Part 1 introduces the core issues of the project and sets out the scope and structure of the Consultation Paper. This includes a detailed discussion on the difficulties associated with balancing law reform and policy development.

Part 2 sets out the approach of the Law Commission to law reform. Essentially this looks at the objectives of reform and how the future legal framework should be structured. One of the objectives is to bring adult social care law into line with modern understandings of disability by removing the use of discriminatory concepts and developing legislation that is consistent with human rights considerations. In terms of the structure of reform, the Law Commission provisionally recommends the introduction of a unified adult social care statute. This chapter also discusses the role of statutory instruments and guidelines in the legal framework of adult social care.

Part 3 examines whether it would be appropriate to include statutory principles in the context of adult social care. The chapter includes a detailed discussion on the arguments in favour of statutory principles, and provisionally recommends that principles should be included on the face of the proposed adult care statute. The chapter does not set out proposed wording for the principles, but it does discuss the function of principles and propositions that must be kept in mind when drafting the principles. Broadly speaking the principles suggested are that of user choice and control, person-centred planning, the requirement to take a broad view of a person's needs, a focus on preventative services, a focus on independent living and a presumption in favour of home-based care. The need to focus on dignity in care and the importance of preventing neglect and abuse of vulnerable adults would also be included in the principles.

Part 4 discusses community care assessments. These are the gateway to the provision of social care services. The chapter outlines the current duties on a local authority to carry out a community care assessment and the test that is in place. It also examines whether there should be a right to have an assessment on request and invites submissions on this issue. The chapter discusses the importance of considering both a person's needs and also the desired outcomes. The chapter also engages in debate on

the appropriate role for self-assessment within the assessment process.

Part 5 examines carers' assessments. The law in this area is very piecemeal – there are three different statutes that must be read in conjunction with one another. In addition, there are also the Community Care Assessment Directions 2004. These require that local authorities in England include carers in the assessment and care planning process for the cared for person. The Law Commission provisionally recommends consolidating the assessment requirements set out in the three statutes into a single eligibility assessment, and including that in the proposed consolidated statute. It is proposed that the provision of a carers' assessment will no longer be triggered only by the request for an assessment by the carer, but instead where the carer appears to have needs that can be met by the provision of services to the carer or to the cared for person. This chapter also considers if it would be appropriate to merge the community care assessment and the carers' assessment, or at least to provide for a more unified assessment process. Submissions are invited on this issue.

Part 6 focuses on eligibility for services. Once a community care assessment has been carried out a person's needs are evaluated against the risks to the person's autonomy, health and safety and independence to determine if the person is in need of services. It is up to each local authority to determine at what level of need it will provide services. Again the law in this area is extremely complicated as there are statutory provisions but also statutory guidance in place. The Law Commission proposes simplifying the current system and providing one process under which eligibility would be determined. It also proposes that the eligibility criteria should be set out in statutory regulations.

Part 7 looks at section 21 of the National Assistance Act, 1948, and section 2(1) of the Chronically Sick and Disabled Persons Act, 1970. These are examined in this stand-alone manner as they place strong duties on local authorities to provide certain services. The section 21 duty is to provide residential accommodation, and the section 2(1) duty is to arrange certain domiciliary and community based services. Once eligibility is established, an enforceable duty arises. If the proposals set out in part 6 were introduced, these particular provisions may be

abolished. This chapter questions whether this would be appropriate, as the aim of the reform proposals is to make the legal framework simpler and more accessible, but not to remove services from people. The Law Commission invites submissions on this. However, it provisionally proposes repealing section 2(1). In respect of section 21 it provisionally proposes repealing it, provided that a new system is introduced to cover people who might lose services. If a new system is not introduced, then it does not propose repealing section 21.

Part 8 discusses ordinary residence and portability. Basically this is concerned with which local authority is responsible for providing community care services to an individual. Portability is concerned with ensuring that people retain continuity of support if they change residence. The Law Commission recommends that a local authority should have a duty to provide services to persons resident within the area, and a power to provide services to persons not resident in the area. An enhanced duty to co-operate is also recommend to improve the portability of services.

Part 9 examines the scope of adult social care services. The Law Commission provisionally recommends that community care services should be defined by a short and broad list of services. These should be set out in the statute. However, the Law Commission invites submissions on whether community care services should be left undefined. The Law Commission also proposes retaining the current distinction between the services provided as health services and those provided as social care services.

Part 10 discusses the delivery of services. This recommends that the local authority be under a duty to provide a care plan. It also recommends the retention of the direct payment provisions in the current format. The Law Commission also proposes that the adult social care statute would include a regulation-making power to require or authorise the local authority to charge for services. However, the provision stating that certain services must be provided free of charge should be retained and these services should be listed in the regulations.

Part 11 looks at joint working. This essentially refers to ensuring greater co-operation between social services and other

authorities and agencies. This is a very detailed chapter and looks, amongst many other issues, at the interaction between adult social care provisions and section 117 of the Mental Health Act, 1983.

Part 12 focuses on safeguarding adults at risk. The Law Commission notes that there is a balance to be struck between maximising autonomy and ensuring adequate protection for those who need it. The Law Commission proposes that there should be a statutory duty on a local authority to make such enquiries as are necessary where it has reasonable cause to suspect that a person appears to be an "adult at risk", and consider whether there is a need to provide services or take any other actions within its powers to safeguard the person. The term "adult at risk" should replace "vulnerable adult" for the purpose of the duty to make enquiries. There would be a statutory definition of adult at risk. Each social service authority would also be under a duty to establish an adult safeguarding board and should specify the functions and membership of the board.

Part 13 deals with strategic planning. There are three main elements: the register of disabled people; strategic plans; and the provision of information. The aim is to ensure that appropriate services are available to meet local needs. The Law Commission proposes that the register of disabled people should be abolished. The Law Commission does not propose to include provisions on strategic planning in the social care legislation. However, the proposed legislation should include a requirement on local authorities to provide information about services available in the local area.

Part 14 sets out a summary of the provisional recommendations and a list of questions the Law Commission invites submissions on.

Consultation Paper on the Simplification of Criminal Law: Public Nuisance and Outraging Public Decency
Law Com No. 193
March 2010
http://www.lawcom.gov.uk/docs/cp193.pdf

According to the Law Commission the process of simplifying the criminal law involves giving the law a clearer structure, using

more modern terminology, making the law in a given area more consistent with other allied areas of law, and making the law readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness. Simplification is not the same as codification, and this Consultation Paper is the first instalment of the simplification project. One of the central aims of the project is to place a number of common law crimes on a statutory footing and to abolish criminal offences which have become redundant.

Part 1 of the Consultation Paper outlines the content and scope of the project. The focus is on public nuisance and outraging public decency. In relation to both offences the Law Commission questions if the offence is still necessary and whether the factual ingredients of the offence should be revised. It also looks at whether the fault element of the offence should be strengthened to require intention or recklessness, and if it is desirable in principle to restate the offence in statutory form. Ultimately the Law Commission recommends that for public nuisance and outraging public decency the prosecution should have to prove intent or recklessness and that both offences should be restated in statutory form.

Part 2 examines the existing law and practice in respect of public nuisance. Examples of public nuisance are: obstructing the highway, noisy parties and "raves", gang activity involving drug dealing in an urban area, and bomb hoaxes and false calls to the emergency services.

Part 3 sets out the existing law on outraging public decency. The offence consists of performing any indecent activity in such a place or in such a way that more than one member of the public may witness it and be disgusted by it. Examples of outraging public decency are: indecent exposure, nude bathing in an inhabited area, and performing sexual activities in public.

Part 4 sets out criticisms and proposals in respect of the conduct element of the offence. In respect of public nuisance there is a discussion on the possibility of abolishing the offence. This is examined under four headings: vagueness of definition, incompatibility with the constitutional requirement of the rule of law, problems of compatibility with the ECHR, and redundancy. However, the Law Commission ultimately determines that the

offence should be retained. In respect of outraging public decency there is also a discussion on the continuing need for the offence under broadly similar headings. Again, the Law Commission recommends the retention of the offence.

Part 5 sets out criticisms and recommendations in relation to the fault element of the offence. The Law Commission recommends that the fault element for both offences should be intention or recklessness. The prosecution should have to show either "(1) that D intended to cause a public nuisance, or to outrage public decency, or (2) if that cannot be shown, that D was reckless as to whether his or her conduct would cause a public nuisance, or outrage public decency".

Part 6 discusses restating the offences in statute. The argument in favour of restatement is that this will ultimately assist in any future codification of the law, which is one of the long term aims of the Law Commission. The arguments against restatement are that it may reduce the breadth and flexibility of the offence. Ultimately the Law Commission proposes to restate the offences and seeks submissions on the precise wording of the statutory definition.

Part 7 sets out the provisional recommendations for reform and lists the questions for consultation.

Report on the Illegality Defence
Law Com No. 320
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http://www.lawcom.gov.uk/docs/lc320.pdf

The core issue in this Report is to what extent people should be prevented from enforcing their normal legal rights where they are involved in criminal activities. If the courts accept the illegality defence, they may be presenting the defendant with an unjustified windfall where he/she may also have been involved in the illegal activity. However, if the courts do not accept the defence, they may be seen to be helping a claimant who has behaved illegally. Ultimately the Law Commission determined that the illegality defence should remain at common law, except where it applies to trusts law. In this respect the Law Commission attaches a short draft Bill. There are four chapters in this Report.

Part 1 sets out an introduction to the Report. This highlights the main problems that have been identified with the law and summarises the discussion contained in previous consultation papers. It also refers to the submissions that were made on foot of those consultation papers and summarises the recommendations contained in this Report.

Part 2 sets out the recommendations concerned with the illegality defence as it is applied in the context of trusts law. The current law provides that a person is able to enforce his or her equitable interest, provided that he or she does not have to rely on the illegality. An exception is where the claimant is seeking to withdraw from the arrangement before the illegal purpose had been accomplished, as then the claimant is entitled to rely on the illegality. The problems identified with the present law by the Law Commission are that it is arbitrary, uncertain and could potentially lead to injustice. The Law Commission recommends that legislative reform is required to provide the courts with discretion to determine the effect of illegality on a limited class of trusts. This would apply to trusts created to conceal the beneficial ownership of the property for a criminal purpose and to trusts already created but subsequently used to conceal beneficial ownership for a criminal purpose. The discretion would apply even where the parties did not realise that the concealment would be criminal and where there have been no prosecutions.

Part 3 sets out the recommendations on the illegality defence in situations other than where there is a trust. The first section deals with the illegality defence in contract, tort and unjust enrichment claims. There is a detailed discussion of decisions of the House of Lords in this area. The Law Commission recommends that the courts should continue to be able to develop the law in this area, but there should be a greater effort made to justify the decisions on policy grounds. The policy considerations must be applied in the context of the facts of the case. Therefore no legislative reform is recommended.

The next section of part 3 deals with proprietary interests resulting from an illegality. Where a legal interest in property is transferred under a contract involving some element of illegality, ownership of the interest passes. The legal rights created by the contract will be recognised and enforced by the courts.

The reliance principle discussed in the context of trusts also applies in this context. The Law Commission does not recommend any legislative reform in this area.

Part 4 contains a summary of the recommendations made by the Law Commission. These are extremely detailed. A draft Bill is also appended to the Report.

Report on Administrative Redress: Public Bodies and the Citizen
Law Com No. 322
May 2010
http://www.lawcom.gov.uk/docs/lc322.pdf

Part 1 sets out the history of the project and outlines the broad policy of the Law Commission in respect of various aspects of the project. The Law Commission notes that the key stakeholder in this project – the Government – was opposed to the proposed reforms. This chapter also outlines the responses to the Consultation Paper and the Law Commission published electronically a more detailed Analysis of Consultation Responses.

Part 2 focuses on judicial review. In the Consultation Paper the Law Commission proposed that the availability of damages in judicial review should be coherent, and specifically that damages should be available as an additional remedy in judicial review where the claimant could show "serious fault" in the behaviour of the public body. The availability of damages should be further limited to situations where the underlying statutory or common law regime conferred some form of benefit. This chapter discusses the responses to the Consultation Paper in detail, to determine if there is still is case for reform, and if so what form it should take. Ultimately, the Law Commission does not make any recommendations on this issue. It accepts that it was not able to answer many of the criticisms raised by the Government in relation to the impact the proposed reforms would have in practice.

Part 3 examines private law issues. In the Consultation Paper, the Law Commission argued that the current state of private law did not reflect appropriately the position of public

bodies. This has led to piecemeal development of the law in relation to particular aspects of public sector liability. Therefore the Law Commission recommended a reformed system that allowed for a principled approach to liability that reflected the special position of public bodies. The test would have "serious fault" at its core. Only if the public body was doing something "truly public" should the new provisions apply, any other activity would be treated under private law rules. The Law Commission also proposed the abolition of the torts of misfeasance in public office and breach of statutory duty (for activities which came within the proposed scheme). This chapter outlines the responses to the proposals and notes that they were generally negative. These are discussed in considerable detail. Again the Law Commission opted to make no formal recommendations on these issues.

Part 4 examines the difficulties the Law Commission encountered in the course of this project relating to the reporting of compensation figures by public bodies. The lack of easily-accessible data was seen as problematic, and as demonstrating a lack of transparency in this area. The Law Commission also notes that the availability of such data would have assisted the Commission in assessing the financial implications of the proposed reforms. This chapter includes a discussion on how public bodies react to awards of compensation. In light of the experience of the Law Commission, it suggests that reform of the reporting process would be beneficial. It would lead to greater accountability and transparency, improved decision-making and it would contribute to informed debate on this issue. Therefore the Law Commission provisionally recommends the regular collation and publication of the costs of compensation to central government bodies. It also recommends that similar reporting provisions be introduced for local government and the Welsh Assembly.

Part 5 discusses provisions relating to public sector Ombudsmen, namely, the statutorily-established Parliamentary Commissioner for Administration, the Health Service Commissioners, the Commissioner for Local Administration, and the Public Services Ombudsman for Wales. The Law Commission suggests that this list should also include the

Independent Housing Ombudsman. The Law Commission is of the view that public sector Ombudsmen are a vital part of the general scheme for administrative redress. The responses to the Consultation Paper in respect of Ombudsmen were generally positive. In light of the responses the Law Commission has determined to re-consult on more detailed proposals on ombudsmen away from the rest of the project. A further Consultation Paper is to be issued in 2010 followed by a Report in 2011.

Part 6 outlines a summary of the Law Commission's conclusions on this project.

B. Ireland

Consultation Paper on Documentary and Electronic Evidence
(LRC CP 57-2009)
December 2009
http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf

The Consultation Paper is one of three projects concerning aspects of the law of evidence contained in the Law Reform Commission's (LRC) Third Programme of Law Reform. The LRC has also published Consultation Papers on expert evidence and on hearsay evidence in civil and criminal cases. This paper focuses on the extent of the inclusionary exceptions to accommodate documentary evidence and also the extent to which the rules of evidence should apply to electronic and automated documentary evidence. The LRC focuses on how specific concerns in relation to proof of execution, authentication and verification may arise in the context of electronic evidence.

Chapter 1 deals with the terminology used in the context of documentary evidence. It examines current definitions of documents and records at common law and in statute. The LRC defines the term "document" as "anything in which information of any description is recorded", and "documentary evidence" as being a thing in legible form that is capable of being adduced in evidence. It recommends that these definitions should be placed

within a statutory framework, and supplemented by the addition of references to electronic and automated documents and records.

Chapter 2 examines the principles of the law of evidence which impact on documentary evidence, in particular the overarching consideration of relevance and the factors considered in determining the evidential weight to be attached to a document once it is admitted into evidence. Emphasis is placed on the best evidence rule, which often serves to exclude otherwise relevant documentary evidence on the basis that it is not an original document. This chapter also examines the interaction between the best evidence rule and the rule against hearsay and discusses the abolition of the best evidence rule in other jurisdictions.

Chapter 3 focuses on public records and documents as evidence, and as prominent exceptions to the exclusionary rule of evidence. There is a discussion on the characteristics which determine if a record is a public record and so admissible as evidence. This chapter also examines private records, and determines that the current distinction between public and private records should be retained for the purposes of admissibility as evidence.

Chapter 4 discusses business records and the business records exemption. The LRC explores developing a definition of business records, in light of the increase in electronic information. The LRC provisionally recommends excluding documents developed in anticipation of litigation from evidence other than where a specific legislative provision permits and regulates their admission. This leads to a discussion of the bankers' books exception.

Chapter 5 examines methods used to authenticate documentary and electronic documentary evidence. This begins with a discussion on the shift in the types of documents being created in modern day offices. The analysis in this chapter is based on the LRC's provisional recommendation on the move towards a more inclusionary approach to documentary evidence and the abolition of the best evidence rule. This chapter includes a comparative discussion on the methods used in other jurisdictions to authenticate evidence.

Chapter 6 focuses on authenticating specific forms of electronic and automated evidence. This includes a discussion on

how to establish a chain of custody in respect of an electronic document. This chapter also examines the admissibility of telephone records, and whether these are real evidence or documentary hearsay. The LRC discusses the procedural aspects of the discovery process with a particular focus on electronic documents and records. Finally, this chapter looks at the regulation of electronic devices such as internet communications and domain names.

Consultation Paper on Search Warrants and Bench Warrants
(LRC CP 58-2009)
December 2009
http://www.lawreform.ie/_fileupload/consultation%20papers/cpSearchWarrantsandBenchWarrants.pdf

This Consultation Paper involves an examination of the law and procedure in respect of two distinct types of warrants, search warrants and bench warrants. The LRC is of the opinion that this is an area where more effective and efficient procedures could be in place. Chapters 1-6 of the Consultation Paper discuss search warrants. Chapter 7 deals with bench warrants, a long-established arrest warrant procedure used by the courts, usually where a person fails to answer a summons to appear in court. The execution process relating to bench warrants is particularly in need of reform. This chapter also examines the position in respect of unexecuted bench warrants and the arrangements for granting Garda station bail.

Chapter 1 contains an overview of the historical development of search warrants and a discussion of the development of the law on search warrants in England and Wales and in the United States. It also examines the development of the law on search warrants in Ireland, and the impact of the constitutional right to privacy and protection of the dwelling. There is also a discussion on the provisions of the European Convention on Human Rights.

Chapter 2 contains an overview of the modern search warrant framework in Ireland. This is because there are a considerable number of statutes which provide for the issuing of search warrants, and the Consultation Paper contains a list of

these provisions in an appendix. This chapter includes a discussion on the difficulties associated with the absence of a governing framework dealing with search warrants, and examines other jurisdictions where there is a coherent legal framework in place. The LRC provisionally recommends the introduction of a generally applicable statutory framework for search warrants in Ireland.

Chapter 3 examines the process and procedure relating to applications for a search warrant. This includes a discussion on who may apply for a search warrant, the evidential threshold to be reached, the requirement for further information, and the form of a search warrant application. This chapter also examines the legislative requirement and general practice that applications for search warrants are made otherwise than in public. This chapter also looks at the possibility of electronic search warrant applications and applications for anticipatory search warrants.

In Chapter 4 the LRC examines the issuing of search warrants. It is difficult to set out clearly the process for issuing a search warrant, as the empowering statutes differ so considerably. There is a discussion of who has the authority to issue search warrants and the grounds for issuing a warrant. This chapter also examines where a district judge must be when issuing a search warrant, *i.e.* must he or she be within the district to which the search warrant relates? The LRC explores the possibility of introducing a standard search warrant form, and again examines electronically-issued search warrants.

Chapter 5 concerns the execution of search warrants. This examines the lifespan of a search warrant, the use of force when executing a warrant, and the time at which a warrant can be executed. This chapter also discusses whether the occupier of the premises should be present when a search warrant is executed. The LRC devotes some time to examining the law relating to the rights of the owner/occupier of the premises, including whether a copy of the warrant should be given to the owner/occupier, and the notice that should be given to an owner/occupier of a premises. This chapter also examines the law relating to searching persons on the premises when a search warrant is executed, and the finding of material which is not covered by the warrant.

This chapter also discusses the procedures in place for seizing material uncovered on foot of a search warrant.

Chapter 6 is the final chapter relating to search warrants, and it discusses the safeguards which are in place: namely, legal professional privilege and the rules relating to illegally obtained evidence. There are specific statutory provisions in Ireland which prevent the seizure of material subject to legal privilege under search warrants issued under the terms of the particular statute. The LRC notes that the protections afforded by privilege are not limited to those statutory provisions that specifically refer to it, and provisionally recommends that this be clarified in statute. This chapter also examines the application of the exclusionary rule in relation to illegally obtained evidence. This includes a detailed discussion of the *O'Brien* and *Kenny* decisions.

Chapter 7 deals with the law on bench warrants. These are used regularly to secure the attendance of an individual before the courts. This chapter examines the nature of a bench warrant, the power of the court to issue bench warrants, and the specific statutory provisions relating to the issuing of bench warrants. The chapter also includes a discussion on the summons procedure in Ireland, the requirement for a person to appear before the court as a condition of bail, and the procedure around the granting of station bail. The LRC also looks at the issues surrounding delay in the execution of bench warrants and the failure to execute bench warrants. Finally, this chapter examines the information available to the courts in relation to outstanding bench warrants against a person and the relevance of the Garda PULSE database in the context of bench warrants.

Consultation Paper on Children and the Law: Medical Treatment
(LRC CP 59-2009)
December 2009
http://www.lawreform.ie/_fileupload/consultation%20papers/cpChildrenandtheLawMedicalTreatment.pdf

This Consultation Paper examines the law concerning medical treatment as it applies to children. A child is defined in the paper as a person under the age of 18. The paper is a

continuation of the LRC's work on reforming the law concerning children. The paper is also seen as complimenting the LRC's work on the law concerning mental capacity as it relates to people over 18 years of age. The LRC intends that the reform proposals from this paper will ultimately be incorporated into the Government's proposed Mental Capacity Bill.

In Chapter 1 the Consultation Paper examines the rights of children, or the lack thereof, under the Constitution of Ireland and under various international Conventions. It also sets out the terminology that will be used throughout the paper. This chapter also highlights the importance of listening to the voice of the child, and includes findings from a consultation carried out by the LRC with children and young people.

Chapter 2 discusses the evolving capacity of children and the impact this should have on the appropriate age of consent. There is an examination of the principles underpinning the creation of different age limits and ages of consent for different purposes. This chapter also examines the historical development of the age of majority, and sets out the legal rights and responsibilities that are currently granted before majority status is obtained.

Chapter 3 discusses the difficulties associated with developing a definition of the term "medical treatment" and the term "health care", given the potentially wide-ranging scope of application and the development of new technologies. The chapter looks at the current definitions of "medical treatment" in Irish law and the developments that have taken place in other jurisdictions. This chapter also includes a specific discussion on the issue of consent to contraceptive advice and treatment to improve sexual health.

In Chapter 4 the focus is on consent to medical treatment by children. There is a discussion of the current legal provisions in Ireland, including an analysis of the relevance of section 23 of the Non-Fatal Offences Against the Person Act, 1997, which deals with consent to treatment by 16 and 17 year olds. There is also a comprehensive examination of the law on this issue in comparative jurisdictions, including a detailed discussion of the *Gillick* case in England and Wales.

Chapter 5 examines the law relating to the refusal of medical treatment by persons under the age of 18. It also includes a discussion on advance care directives for persons under 18. The chapter begins with a discussion on the current law on the refusal of medical treatment in Ireland, which has arisen primarily in relation to persons over the age of 18. Again there is an extensive examination of the law in other jurisdictions on the refusal of medical treatment by children and adolescents.

Chapter 6 of the Consultation Paper explores the issues relating to treatment of children for a mental disorder. The LRC examines current service provision and the impact of the Mental Health Act, 2001, on persons under the age of 18. Attention is drawn to the legal lacuna that exists in respect of adolescent mental health services, where service provision has generally been directed towards children and adults. The LRC provisionally recommends the introduction of a third category of informal admission for children and adolescents who are admitted under the Mental Health Act, 2001, by parental consent.

Report on Defences in Criminal Law
(LRC 95-2009)
December 2009
http://www.lawreform.ie/_fileupload/Reports/rDefencesinCriminalLaw.pdf

This Report contains the LRC's final recommendations concerning the following defences in criminal law: legitimate defence, public defence, provocation, duress and necessity. The purpose of the Report is to provide a clear and coherent statutory framework for the application of these defences. A draft Criminal Law (Defences) Bill is appended to the Report. This Report is intended to compliment the work of the Criminal Law Codification Advisory Committee. While each of the defences contained in the Report may arise in very different situations, there is a common link between them in that each of the defences discussed are reactive in nature and this lends a coherency of analysis to the Report. The Report deals with circumstances where there may be some conditions or circumstances present which suggest that either no criminal liability should be attached

– a complete defence such as legitimate defence – or at least that criminal liability should be reduced – a partial defence such as provocation.

Chapter 1 sets out an overview of defences in the criminal law, and focuses on the distinction between justification-based and excuse-based defences. This chapter also discusses how the law should assess the accused's reactive conduct – whether it should be an objective or subjective standard, or a combination of both.

Chapter 2 examines the law on legitimate defence (currently referred to as self-defence). This chapter also discusses a particular context in which legitimate defence occurs, namely the defence of a person's home. This includes a discussion on the use of lethal force and whether there is a duty to retreat.

Chapter 3 deals with the law on public defence. This involves the use of force to prevent a crime or in the context of a lawful arrest. This is usually associated with public officials, such as members of the Garda Síochána, but it may also include other persons.

Chapter 4 examines the law on provocation, which is a partial defence and applies only where a person has been charged with murder. The LRC recommends that the defence of provocation should be retained but subject to significant reform. An objective test should be the primary consideration rather than the current subjective approach. This chapter includes a discussion on provocation as a response to cumulative violence.

Chapter 5 examines the law on duress and discusses whether it should be an excusatory or justificatory defence. The LRC concludes that the defence of duress should be retained as an excusatory defence. The LRC also recommends a primarily objective test, tempered with some subjective elements, in relation to the defence of duress.

Chapter 6 discusses the defences of necessity and duress by circumstance. The LRC does not recommend a general defence of necessity but accepts that those limited instances in which it has already developed, such as medical necessity, should be retained on a case-by-case basis. The defence of duress by circumstances should be recognised and the boundaries should be the same as those which apply to duress by threats.

Consultation Paper on hearsay in civil and criminal cases
(LRC CP 60-2010)
March 2010
http://www.lawreform.ie/_fileupload/Hearsayfull.pdf

This Consultation Paper is one of three projects considering aspects of the law of evidence. It is a core principle of the law of evidence that, in order to be admissible, any proposed evidence must be relevant to the issues being determined and have probative value. However, evidence should also be capable of being tested in court under oath, usually through cross-examination. If evidence cannot be tested then it may be deemed inadmissible even if it is of probative value. The hearsay rule attempts to balance these two principles.

Chapter 1 examines the historical development of the hearsay rule as, primarily, an exclusionary rule of evidence. It also examines some of the inclusionary exceptions to the rule which developed. The two core reasons which continue to be given in Ireland in support of the hearsay rule are that the maker of the statement cannot be cross-examined, and that the statement is not made under oath.

Chapter 2 considers the general scope of the hearsay rule as it is currently applied in Ireland. It includes oral hearsay, written and documentary hearsay, statements by conduct, intention to assert, and implied assertions. The LRC provisionally recommends that hearsay should be defined in legislation as "any statement, whether a verbal statement, written document or conduct, which is made, generated or which occurred out of court involving a person who is not produced in court as a witness, and where the statement is presented as testimony to prove the truth of the facts which they assert". This chapter also examines the best evidence rule and the right to fair procedures under both the Constitution and the ECHR. The LRC accepts that in general the giving of direct evidence which can be cross-examined is preferable. However, the LRC is of the opinion that the hearsay rule as it applies to civil cases could be reformed towards an inclusionary approach. In respect of criminal cases the right to

cross-examination under the Constitution may restrict the reform of the hearsay rule.

Chapter 3 discusses the development of inclusionary exceptions to the hearsay rule, and points out the absence of an underlying basis for them. The key exceptions examined are: admissions and confessions, the *res gestae* rule, dying declarations, certain statements of persons now deceased, public documents, and testimony in former proceedings. The LRC provisionally recommends that the existing inclusionary exceptions be retained and that these should not be replaced by a general inclusionary approach based on inherent reliability, as has occurred in other jurisdictions. The LRC is also of the opinion that the courts should retain the discretion to determine whether hearsay may be included or excluded in an individual case.

Chapter 4 focuses on reform of the hearsay rule in civil cases. This examines the current law in Ireland and refers to the Commission's 1988 Report on the Rule Against Hearsay in Civil Cases where it recommended that the exclusionary rule should be retained in principle but with a move towards a "safeguarded inclusionary approach". This position is retained by the LRC in the current consultation paper. In support of this there is a discussion on the approach taken in comparative jurisdictions and an account of consultations the LRC conducted with practitioners in Ireland. The LRC sets out detailed and specific recommendations for the reform of the hearsay rule in civil cases.

Chapter 5 discusses reform of the hearsay rule in criminal proceedings. This requires separate consideration because the standard of proof is higher and the consequences, such as deprivation of liberty, are more serious. There have already been a number of statutory reforms of the application of the hearsay rule in criminal proceedings and these are outlined. This chapter also examines options for reform: first, preserving the current application of the hearsay rule; second, wide exceptions with a narrow discretion to admit; third, judicial discretion based on necessity and reliability. The LRC provisionally recommends retaining the existing exceptions to the rule, but that subject to these exceptions hearsay evidence should continue to be excluded in criminal proceedings. The hearsay rule should apply in the

same manner to the prosecution and the defence and the concepts of reliability and necessity should not form the basis for reform.

Consultation Paper on Jury Service
(LRC CP 61-2010)
March 2010
http://www.lawreform.ie/_fileupload/consultation%20papers/LRC%20JuriesCP%20full.pdf

This Consultation Paper involves an examination of the law concerning jury service with a particular focus on qualification, eligibility and selection processes. Article 38.5 of the Constitution generally requires that major criminal cases tried on indictment (such as murder and robbery) must involve a trial with a jury. The use of juries in civil cases in Ireland is now very limited, although they are still used in High Court defamation actions. Juries play a key role in the administration of justice, particularly in a criminal context, and therefore the basis on which persons are qualified and eligible for jury service, and the selection process, are of great importance to ensure that there is continued public confidence in the jury system.

Chapter 1 examines the process for jury selection in Ireland, including a discussion on the historical origins of the jury within the trial procedure. There is a discussion of the Supreme Court decision in *de Búrca v. Attorney General* in which the jury panel restrictions were declared unconstitutional. This was followed by the enactment of the Juries Act 1976 which removed the property restrictions and the effective exclusion of women from jury panels.

Chapter 2 examines the requirement that in order to serve on a jury a person must be a citizen. This arises because the jury list is drawn from those on the register of Dáil electors which is restricted to Irish citizens. The Consultation Paper questions whether residency might be a more appropriate criterion, where the goal of jury selection should be to ensure that juries are as broadly representative of the community as possible. The LRC provisionally recommends that jury panels should be based on the register of electors for Dáil, European and local elections, and

that non-Irish citizens should satisfy a five year residency requirement in order to qualify for jury service.

Chapter 3 discusses ineligibility for, and excusal from, jury service. There have been concerns raised about the exclusion of significant numbers of people from jury service, with the result that juries are not representative of the community and are heavily weighted towards the unemployed, students and homemakers. There is a very broad category of persons who are ineligible for jury service. The LRC examines each of these groups, and makes recommendations on the appropriateness of the ineligibility status. In respect of excusal from jury service the LRC proposes a general right of excusal for good cause, supported by evidence, to replace the current categories of persons excusable as of right.

Chapter 4 focuses on the capacity of persons to undertake jury service. Under the Juries Act, 1976, capacity was defined to exclude deaf, blind, hearing and sight impaired persons, but this was amended by the Civil Law (Miscellaneous Provisions) Act, 2008, which emphasises the function of the juror. This chapter discusses any further amendments which might be required in the context of the UN Convention on the Rights of Persons with Disabilities 2006. The LRC adopts a capacity-based approach, and suggests that excusal from jury service should be available where a person is incapable of performing the functions of a juror, but this should not be presumed on the basis of a physical or mental impairment.

Chapter 5 discusses disqualifications from jury service for prior convictions, and also the issue of juror vetting. This chapter includes a comparative discussion. The LRC provisionally recommends that the criteria for exclusion should continue to be based on length of sentence rather than seriousness of the offence. The LRC also provisionally recommends that a provision for vetting of juries be included in juries' legislation, to ensure that disqualified jurors are not including on the empanelling list for jurors.

Chapter 6 considers the process for challenging jurors, with particular emphasis on peremptory challenges. The arguments for the abolition of peremptory challenges are that it potentially causes embarrassment to jurors, it is arbitrary and inefficient,

it provides scope for discrimination and can be exploited. The arguments against its abolition are that it provides a role for the accused and so increases her or her confidence in the jury, it can assist in ensuring a representative jury and an unbiased jury. The LRC provisionally recommends that peremptory challenges be retained, but invites submissions on whether the number of such challenges should be reduced from seven.

Chapter 7 discusses the issue of payment for jury service. The LRC does not recommend payment by the state for jury service, but invites submissions on whether a limited form of expenses should be paid to jurors to cover the costs immediately associated with their service on a jury.

Chapter 8 examines juror misconduct and jury tampering. The issue of jurors considering information which was not presented to them in court is increasing with the development of new technologies and the widespread availability of information. This may impact on the accused's right to a fair trial. The LRC provisionally recommends that legislation be introduced to make it a criminal offence for a juror to disclose matters discussed in the jury room or to make inquiries about matters arising in the trial beyond the evidence presented. The Courts Service should provide information to jurors explaining why independent investigations or internet searches about a case should not be undertaken. The LRC invites submissions as to whether a trial judge's directions should be reformulated to cover juror misconduct in all trials.

Interim Report on Personal Debt Management and Debt Enforcement
(LRC 96-2010)
May 2010
http://www.lawreform.ie/_fileupload/Reports/irDebt.pdf

Following the extremely detailed Consultation Paper on *Personal Debt Management and Debt Enforcement* published in September 2009, the LRC established a working group to review short-term measures which could be put in place prior to the publication of the LRC's final recommendations for long-term reform. The progress made by the working group is set out in this

Interim Report, and therefore the format of the Report differs from the LRC's usual practice of issuing specific recommendations for reform. This Interim Report records specific actions on debt management and enforcement that have already been put in place, and which arose from discussions conducted by the working group. There is an action plan containing fourteen specific actions appended to the Interim Report, and each action is linked to a member of the working group.

Chapter 1 provides an overview of the developments following the publication of the Consultation Paper on *Personal Debt Management and Debt Enforcement*. These include the establishment of the LRC's working group and also the establishment of the Government's Mortgage Arrears and Personal Debt Review Group. This chapter also outlines the terms of reference and membership of the LRC's working group. There is also a discussion of the general economic conditions in the country and the impact these have on debt related issues.

Chapter 2 sets out the core issues addressed by the working group: financial regulation, codes of practice, legal processes, and distribution of information to consumers. Under these four headings, the LRC sets out fourteen specific actions that have already taken place or which are in train. These include, but are not limited to: reform of financial services regulation legislation, regulation of debt collection undertakings, reform of the credit union regulatory structure, proposals to clarify the status of statutory codes of practice in court proceedings, and proposals to reduce the waiting period for a discharge application under the Bankruptcy Act, 1988.

In Chapter 3 the LRC sets out the remaining issues relating to the law of personal debt which will be dealt with in the final report to be published by the end of 2010. These are: the regulation of debt collection undertakings, the reform of personal insolvency law, debt enforcement procedures, and final exclusion.

As noted above, the Interim Report contains an appendix setting out the 14 specific actions undertaken arising from the discussions of the working group. The Interim Report also contains an appendix setting out initiatives and actions undertaken or in train by members of the working group and by

other bodies. Finally the Interim Report contains Model Rules of Court which embody the LRC's proposal for the introduction of a Pre-Action Protocol in consumer debt proceedings.

C. Scotland

Report on Unincorporated Associations
Scot Law Com No. 217
November 2009
http://www.scotlawcom.gov.uk/downloads/reps/rep217.pdf

The term "unincorporated association" is generally used to refer to charities, associations established for public benefit or member interest groups. They tend to have a defined purpose and not-for-profit objects. The legal status of incorporated associations in Scotland is derived from the common law, and such associations are currently not recognised as separate legal entities. This gives rise to a variety of legal problems where such associations wish to enter a legal contract, own property or hire employees.

Part 1 of the Report sets out the scope and the structure of the Report.

Part 2 discusses the need for reform of the law in this area. The core impetus is that the absence of separate legal personality of organisations which might have complex juristic relationships with others has created difficulties and injustices. The SLC notes that some of the issues arising from this have been creatively resolved, but others remain. The difficulties are discussed in detail in this chapter. The position is further complicated because the treatment of unincorporated associations as legal non-entities is not consistently adhered to throughout UK legislation. The SLC notes that a considerable amount of legislation with a regulatory purpose includes unincorporated associations within the definition of a body. The SLC is of the view that these difficulties could be satisfactorily addressed by conferring legal personality on unincorporated associations, and proceeds on that basis.

Part 3 discusses the attribution of legal personality to unincorporated associations. The SLC is of the view that the primary beneficiaries of any change in the law should be small associations for whom incorporation in any of the available forms would be unduly burdensome. The core recommendation of the SLC is that unincorporated associations which satisfy certain statutory conditions should be accorded separate legal personality. The conditions are: that the association has a minimum of two members, it has adopted a constitutive document containing specified minimum provisions, and its objects as set out in the constitutive document do not include making a profit for its members. Associations with legal personality would then be given the name "Scottish Association with Legal Personality" (SALP) to distinguish them from unincorporated associations without legal personality. Members of an association may opt out of treatment as a separate legal entity by a resolution, recorded in writing, to the effect that the association is not to have separate legal personality.

Part 4 discusses the consequences of attribution of separate legal personality to an unincorporated association. One consequence is that a SALP will be capable of being a party to a contract, and will be liable for the breach of a contract to third parties or to members of the SALP. Another consequence is that a SALP will be able to own property in its own name, without the necessity for trust arrangements. This will remove the need to transfer ownership when individual trustees die, or decide to no longer act as a trustee for the association. The SLC recommends that a SALP should have to provide the Keeper of the Registers with a copy of its constitution, and details of its official address in order to register an interest in heritable property in Scotland. It should also inform the Keeper of any change in address. This chapter also discusses the execution of documents, raising and defending legal proceedings, and the affect on assets where a SALP ceases to have separate legal personality without being dissolved.

Part 5 examines the protection of other parties' interests in dealings with a SALP. Removing liabilities from individual members of an association implies removal of rights from another party. Also the attachment of rights and duties to an entity that is

not a natural person raises issues of identification and accessibility of information to anyone seeking to take legal action against it. The SLC is not, however, proposing that members of a SALP would be absolved of liability in circumstances where they acted wrongfully or outside the scope of their authority. A SALP will be required to provide its official address on all documents published or sent by it. At this address there should be a copy of the constitution, a list of the names of office bearers or persons responsible for the management of the SALP, and a written record of the date of adoption of the constitution. If these requirements are not complied with, concurrent liability would be imposed on the office holders along with the SALP. The *ultra vires* doctrine would apply to a SALP, subject to certain exceptions where the SALP is also a charity.

Part 6 examines cross-border issues. The recommendations contained in the Report apply only to unincorporated associations in Scotland. Such associations in the remainder of the UK would continue not to attract separate legal personality. It is recommended that for an association to be treated as Scottish, and therefore capable of acquiring separate legal personality, it should satisfy both a formal and a factual test. That is, where is the official address of the association and where is the place of management. Merely having a presence in Scotland would not be sufficient to warrant the grant of separate legal personality by Scots law. The SLC recommends that a SALP must satisfy two conditions: first, that it must have an official address in Scotland and, secondly, that its management must be carried out wholly or mainly in Scotland.

Part 7 sets out transitional issues. The acquisition of separate legal personality will not have retrospective effect. Personal liabilities which have arisen prior to the introduction of the legislation will not automatically transfer to the newly created SALP. The SLC also recommends that the legislation should contain a statement to the effect that a change of employer does not occur when an association acquires or loses separate legal personality, and confirmation that acquisition or loss of legal personality does not break continuity of employment for the purposes of the Employment Rights Act, 1996. There is to be a six-month transition period between the passing of the Act and its

entry into force. This is to allow unincorporated associations who wish to do so to opt out.

Part 8 discusses the possibility of providing a new corporate vehicle designed to be appropriate for not-for-profit organisations, to encourage such associations to incorporate and to obtain separate legal personality. This is the approach adopted in other common law jurisdictions such as New Zealand, Australia and most Canadian provinces. It was noted that most responses to the Discussion Paper were of the opinion that there was no need for the development of a new corporate entity. The SLC agrees with this view, and so makes no recommendation on this issue.

Part 9 sets out the list of recommendations.

Report on Double Jeopardy
Scot Law Com No. 218
December 2009
http://www.scotlawcom.gov.uk/downloads/reps/rep218.pdf

This Report results from a reference by the Cabinet Secretary for Justice to consider, among other issues, the principle of double jeopardy, and whether there should be exceptions to it. It follows on from a Discussion Paper on double jeopardy. The Report relates to aspects of criminal law which fall within the legislative competence of the Scottish Parliament.

Part 1 introduces the structure and scope of the Report. It also sets out a number of preliminary considerations in respect of compliance with European Community law, and also with the provisions of the European Convention on Human Rights.

Part 2 discusses the rule against double jeopardy. Much of this chapter refers to the more detailed discussion contained in the Discussion Paper on this project. This Part begins with a brief consideration of whether there is a continuing need for the rule. The Report concludes that the rule should be retained, and outlines the core principles underpinning the rule, namely that there should be finality of criminal litigation and the avoidance of unnecessary distress to the accused through repetition of the criminal process. It also recommends that the rule should be reformed and restated in statute. Beyond recommending the

retention of the rule that a person should not be prosecuted again for an offence for which he/she has been convicted or acquitted, the Report also proposes a broader principle that a person should not be tried again for the same acts that gave rise to that prosecution. This chapter also contains a very detailed discussion on the approach the law should take to a further prosecution where the victim subsequently dies. Essentially the Report concludes that a subsequent prosecution is permissible where the accused has been convicted of a lesser offence, but that a subsequent prosecution should be prohibited where the accused was acquitted of a lesser offence.

Part 3 discusses tainted acquittals. Where a conviction is tainted by interference with the trial process, the Report recommends that it should be possible to commence a fresh prosecution. This is understood as being a vindication of the rule rather than an exception to it. There are two justifications of this: first, the effect of the interference was to prevent there having been a proper trial, and, secondly, it would be wrong to allow a person who had interfered with the administration of justice to benefit from that conduct. The Report examines in detail what the test should be to determine if a trial has been tainted.

Part 4 considers if there should be a "new evidence" exception to the rule against double jeopardy. This first focuses on whether there should be an exception where the accused admits committing the offence. The Report recommends that where a credible admission of guilt is made by an accused person who has been acquitted of the offence charged, he/she has foregone the equitable justification that provides for a plea of *res judicata*. This is provided that the usual corroboration requirements in relation to confession evidence apply. The chapter then goes on to examine if there should be a more general exception to the rule in the event that new evidence becomes available. This is discussed under five headings: consistency, balance, scientific and technical advance, public perception and moral principle. Ultimately the Report makes no recommendation in respect of this issue as there was division of opinion within the SLC and considerable support for both positions evident in the submissions received.

Nevertheless, Part 5 discusses how a "new evidence" exception to the rule against double jeopardy could be formulated were such an exception to be introduced. It is recommended that such an exception should only apply to the most serious cases and therefore should be limited to cases of murder and rape, but that Scottish Ministers should be able to add further offences to the list by way of affirmative order. Evidence is only to be regarded as "new" if "it was not, and could not with the exercise of reasonable diligence have been, available at the original trial". This chapter also considers various tests to determine when new evidence should be admitted. It recommends that a new prosecution should only be authorised where the new evidence substantially strengthens the case against the accused, and had a reasonable jury heard the original evidence in the trial, together with the new evidence, it is highly likely that the accused would have been convicted. This is subject to any decision being in the interests of justice. This provision would not be retrospective in effect.

Part 6 of the Report sets out a summary of the recommendations made by the SLC. There is a draft Bill appended to the Report.

Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation
Scot Law Com No. 219 (Law Com No. 319)
December 2009
http://www.scotlawcom.gov.uk

This is a joint Report of the English and Scottish Law Commissions, and forms part of the joint review of insurance contract law. The Report recommends a new consumer statute to address the issue of what a consumer must tell an insurer before taking out insurance. The existing law is contained in the Marine Insurance Act, 1906, and requires a consumer to volunteer information to an insurer. The Report takes the position that the law needs to be updated to correspond to the realities of a mass consumer market and therefore insurers should ask consumers for the information they want to know. A consumer who acts honestly and carefully will be protected. However, where a

consumer deliberately or recklessly misrepresents information the insurer can treat the contract as if it did not exist. Where the consumer answers questions carelessly, the insurer will have a proportionate remedy. The draft Bill appended to the Report applies only to consumers, not to businesses. It also only deals with pre-contract information, not with the effect of warranties or conditions precedent.

Part 1 of the Report outlines the scope and structure of the Report.

Part 2 sets out the current legal position. It outlines the statutory provisions and the difficulties associated with them. It also discusses the various layers of self-regulation in operation. The use of discretion by the Ombudsman to protect consumers from the harshness of the current statutory provisions is also explored. This chapter, and the Report as a whole, contains many examples to illustrate the difficulties encountered by consumers when buying insurance under the current system.

Part 3 sets out the need for a new consumer statute. The Commission explains why it is of the opinion that the various layers of soft law in operation do not adequately protect consumers. Therefore, the Commission recommends reforming the Marine Insurance Act 1906.

Part 4 provides an overview of the recommendations of the Commission. In addition to the core provisions outlined above the draft Bill also: abolishes "basis of the contract" clauses; gives insurers remedies where misrepresentations are made by group scheme members and those whose lives are insured by others; provides a structure to decide for whom an intermediary acts when passing information from a consumer to the insurer; and prevents insurers from contracting out of the scheme to the detriment of the consumer.

Parts 5-10 set out the detailed recommendations of the Commission. Parts 5 and 6 discuss the core scheme.

Part 5 examines definitions of consumer and insurance. It discusses the abolition of the consumer's duty to volunteer information and its replacement with a new duty on consumers "to take reasonable care not to make a misrepresentation to the insurer." The chapter also discusses the nature of a misrepresentation and the concept of reasonable care.

Part 6 examines the remedies that should be available to an insurer if the consumer's duty not to misrepresent is breached. It also discusses recommendations to prevent parties contracting out of the recommended scheme.

Part 7 looks at how the core recommendations would apply in a context where the misrepresentation is made by a person who is not a policyholder. The focus is on group insurance and insurance on the life of another.

Part 8 examines the role of intermediaries, for example insurance brokers or agents. The issue is what should happen if the intermediary acts deliberately, recklessly or carelessly in transmitting information from the consumer to the insurer. The general principle is that a person is responsible for the acts of an agent. Therefore, it is important to know whether the intermediary is acting for the consumer or the insurer. The draft Bill is to be read in conjunction with general agency principles and there is a test set out in schedule two of the Bill to determine if an intermediary is acting for a consumer or an insurer. This is set out in detail in the chapter and illustrated with examples.

Part 9 examines amendments to other Acts. The primary legislation to be amended is the Marine Insurance Act 1906. However, the Road Traffic Act, 1988, will also require amendment.

Part 10 discusses certain proposals which were set out in the Discussion Paper but which are not contained in the draft Bill, for example warranties and non-contestability periods in life insurance.

Part 11 examines the costs and benefits of the proposals.

Part 12 lists the recommendations of the Commission. An impact assessment of the proposals is available separately on the website.

Discussion Paper on Accumulation of Income and Lifetime of Private Trusts
Discussion Paper No. 142
January 2010
http://www.scotlawcom.gov.uk/downloads/dps/dp142.pdf

The discussion paper forms part of the Scottish Law Commission's (SLC) review of trust law. The purpose of the paper is to determine if the duration of trust purposes should be restricted by law. The SLC states that this is important for two core policy reasons. First, there may be moral issues attached to allowing the present generation to tie up property long into the future. Second, trusts are important in the financial services sector, and therefore it is important that the law should be, and be perceived to be, suitable for contemporary financial and economic conditions. The current rules date from the 18th century, and therefore could be deemed to be of limited relevance in the current economy. The discussion paper is divided into six parts.

Part 1 introduces the scope and structure of the Discussion Paper.

Part 2 sets out the current law on trusts in Scotland. This is derived both from common law rules and also from statutory provisions. Currently the accumulation of income is restricted, by statute, to one of six specified periods. There are also detailed and complex statutory provisions relating to the creation of liferents. This chapter sets out both the statutory provisions and the common law rules in detail.

Part 3 discusses core criticisms of the current legal provisions. The existing rules are considered to be excessively technical and complicated. It is easy to infringe the prohibitions unintentionally. The rules have also proved to be inflexible and arbitrary in their practical application, sometimes with the effect of frustrating perfectly reasonable trust purposes. The SLC also notes that the policy reasons which originally underpinned the rules are no longer valid. A modern reason for restricting the lifetime of trust purposes is the prevention of what is referred to as "dead hand control", *i.e.* that a truster should not unduly fetter the liberty of future generations to deal with property as they see fit. A balance must be struck between respecting the right of a

truster to do what he/she sees fit with property and the ability of future generations to deal with that property.

Part 4 considers comparative material from other jurisdictions. There is also information on the law in other jurisdictions set out in appendices A and B. Nearly all legal systems that recognise a trust as a legal institution have imposed restrictions on the duration of trust purposes. An exception is South Africa. However, the majority of jurisdictions have also sought to abolish such rules or to substantially curtail their impact (this includes Ireland).

Part 5 summarises the proposals relating to whether a restriction should be imposed on the duration of trusts and if so what form that should take. The SLC recommends that trusts set up for commercial purposes should be entirely free from any statutory restriction on their duration. The existing restrictions should be abolished for private trusts as they are too complex, arbitrary and uncertain in their operation. There is no need to introduce new rules restricting the duration of trust purposes. However, the "dead hand" problem is a real problem. In response to this it is recommended that when a private trust has been in existence for 25 years or longer, the Court of Session should have authority to alter its purpose to take account of any material change of circumstance that have occurred since the trust was created. The court would have discretion in exercising this authority. The court would retain its existing power to reduce any trust purpose on the ground that it is unintelligible, impractical or unreasonable.

Part 6 lists the recommendations of the SLC and sets out a number of further questions.

Report on Land Registrations Vol. 1&2
Scot Law Com No. 222
February 2010
http://www.scotlawcom.gov.uk/downloads/reps/rep222v1.pdf

This is an extremely comprehensive report, which is published in two volumes. Volume one contains a detailed discussion of a variety of issues which impact on land registrations in Scotland. This runs to 39 parts. Volume two

contains six appendices which include a draft Land Registration (Scotland) Bill. This is a very brief outline of the contents of the Report.

Part 1 is the introduction to the Report. This sets out the basic concepts of land registration and describes the structure of the Report. It also outlines what land registration can and cannot achieve, in particular that land registration is designed to identify the owner of the land, but not to provide any further information on the background of that owner, for example who controls a company that owns a property.

Part 2 sets out the background to the Report. This outlines the Sasine system of registration which has been operational in Scotland since 1617, one of the earliest systems of land registration. It also discusses the Land Registration (Scotland) Act, 1979. At present both registration systems operate. This Report is the result of a request by the Keeper of the Registers of Scotland to review the 1979 Act.

Part 3 provides an overview of some of the key recommendations made in the Report. This highlights that the purpose of the reform is to ensure evolution rather than revolution. While the draft Bill recommends repealing the 1979 Act, many of the core provisions of that statute are re-enacted. The basic system of registration is to remain, but modified and updated. This is in part due to the brevity of the 1979 Act and many of the recommendations for reform involve providing a statutory basis for what is already occurring in practice. At present there are two systems of registration in operation in Scotland, and it is recommended that the transitional phase for the closing of the Register of Sasines be accelerated. The Report also recommends the introduction of advance notices, electronic conveyancing, an end to bijulalism, and an improved procedure for the rectification of inaccuracies in the register. The draft Bill also recommends the introduction of a statutory basis for the Archive Record and the Applications Record, both of which the Keeper currently operates as a matter of practice. It is also recommended that there should be no registration without mapping and that the Cadastral map is the term to be used for the general map outlining specific parcels of land.

Part 4 discusses the structure and the contents of the Register. This distinguishes between the *de iure* and the *de facto* structure of the Register.

Part 5 examines the issue of mapping in relation to land registration. This is an issue as the Register of Sasines did not require a registration to be accompanied by a map.

Part 6 deals with registration of common areas which are co-owned.

Part 7 discusses overriding interests and off-register rights. Both the terms appear to be given the same meaning, which is an encumbrance that is (i) valid notwithstanding that it does not appear in the Register, and is (ii) nevertheless capable of being noted in the Register.

Part 8 examines extracts, data, fees and privacy.

Part 9 is concerned with leases.

Part 10 examines servitudes and real burdens.

Part 11 seeks to clarify the current procedure on how the Register is changed as the SLC is of the view that this is not as clear as it ought to be.

Part 12 discusses the registration of transactions. This is the day-to-day life of the Land Register. This part examines ranking within the Register and what is required for a registration to be valid.

Part 13 explores the effect of registration. This is primarily concerned with what happens if the deed which has been registered is invalid.

Part 14 sets out the recommendations in relation to advance notices.

Part 15 discusses uncompleted titles.

Part 16 deals with *non domino* dispositions.

Part 17 examines the effects of inaccuracies in the Register.

Part 18 makes recommendations for rectifying the Register.

Parts 19-25 discuss the guarantee of title under the new scheme proposed in the Report. Part 19 is introductory.

Part 20 considers title guarantee in respect of voidable titles.

Part 21 examines the circumstances where (i) an error in the Register should not be corrected but instead the rights of the parties should be made to conform with the Register (with

compensation being paid to the party who suffered a loss) and (ii) where the error should be corrected and compensation paid. These two options are referred to in the Report as "mud" and "money."

Part 22 discusses the details of the "money" side of the guarantee.

Part 23 examines the "mud" side of the guarantee.

Part 24 discusses the Keepers right of recovery if compensation has to be paid.

Part 25 provides examples of the foregoing.

Part 26 discusses title insurance.

Part 27 examines the Keepers liabilities.

Parts 28 and 29 deal with the concept of challengeable deeds; these are understood as deeds which can be challenged by reduction or rectification. Part 28 examines reduction and part 29 examines rectification.

Part 30 discusses how the property registers interact with other registers such as the Register of Inhibitions, the Companies Register, the Register of Insolvencies and the Register of Floating Charges.

Part 31 deals with the position of the Keeper in litigation about land titles.

Part 32 examines caveats in the context of litigation about land titles.

Part 33 discusses the recommendations directed towards ensuring the registration of all land in Scotland and the closure of the Register of Sasines.

Part 34 examines recommendations relating to electronic conveyancing.

Part 35 discusses the effect of prescription on registered titles. However, it is noted that prescription is not wholly within the remit of this project, and reform would require a distinct project. It is discussed here briefly to the extent that it is necessary to do so.

Part 36 examines the process that will be required to switch over to the new system, although this will not result in any discontinuance of the Register.

Part 37 sets out some implications for conveyancing practice.

Part 38 deals with miscellaneous matters.

Finally, part 39 lists the recommendations contained in the Report.