



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 25 – Part II

Minors' Contracts

REPORT

MAY 1988

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To: **THE HON J M BERINSON QC MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on Minors' Contracts.

C W Ogilvie
CHAIRMAN

10 May 1988

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Abbreviations

Alberta Report	Institute of Law Research and Reform <i>Minors' contracts</i> (Report No 14 1975)
British Columbia Act	<i>Law Reform Amendment Act 1985</i> (BC)
British Columbia Infants Act	<i>Infants Act 1979</i> (BC)
British Columbia Report	Law Reform Commission of British Columbia <i>Minors' contracts</i> (LRC 26 1976)
British Columbia Working Paper	Law Reform Commission of British Columbia <i>Minors' contracts</i> (Working Paper No 16 1975)
Cheshire Fifoot and Furmston	M P Furmston, <i>Cheshire Fifoot and Furmston's Law of Contract</i> (11th ed 1986)
Chitty	<i>Chitty on Contracts</i> (25th ed 1983) Vol 1
Fleming	J G Fleming <i>The Law of Torts</i> (7th ed 1987)
Greig and Davis	D W Greig and J L R Davis <i>The Law of Contract</i> (1987)
Halsbury	Halsbury <i>Laws of England</i> (4th ed 1978)
Harland	D J Harland <i>The Law of Minors in Relation to Contracts and Property</i> (1974)
Ireland Age Working Paper	The Law Reform Commission (Ireland) <i>The law relating to the age of majority, the age for marriage and some connected subjects</i> (Working Paper No 2 (1977))
Ireland Age Report	The Law Reform Commission (Ireland) <i>Report on the law relating to the age of majority, the age for marriage and some connected subjects</i> (LRC 5 1983)
Ireland Contracts Report	The Law Reform Commission (Ireland) <i>Report on minors' contracts</i> (LRC 15 1985)
Latey Report	Report of the Committee on the <i>Age of majority</i> (chaired by the Honourable Mr Justice Latey) 1967 Cmnd 3342
Law Commission Working Paper	Law Commission <i>Law of contract: minors' contracts</i> (Law Com No 81 1982)

Law Commission Report	Law Commission <i>Law of contract Minors' contracts</i> (Law Com No 134 1984)
Lindgren Carter and Harland	K E Lindgren J W Carter D W Harland <i>Contract Law in Australia</i> (1986)
New South Wales Act	<i>Minors (Property and Contracts) Act 1970</i> (NSW)
New South Wales Report	New South Wales Law Reform Commission Report on <i>Infancy in relation to contracts and property</i> (LRC 6 1969)
New Zealand Act	<i>Minors' Contracts Act 1969</i> (NZ)
New Zealand Report	<i>Report of the Committee on the contracts and wills of minors</i> (1966)
O'Donovan and Phillips	J O'Donovan and J C Phillips <i>The Modern Contract of Guarantee</i> (1985)
Ontario Contract Report	Ontario Law Reform Commission <i>Report on amendment of the law of contract</i> (1987)
Ontario Report	Ontario Law Reform Commission <i>Report on the age of majority and related matters</i> (1969)
Queensland Report	Queensland Law Reform Commission <i>Report on a review of the Statute of Frauds, 1677 (29 Car II c 3) (etc)</i> (QLRC 6 1970)
Queensland Working Paper	Queensland Law Reform Commission <i>Working paper on a review of the Statute of Frauds, 1677 (29 Car II c 3) (etc)</i> (QLRC WP 4 1970)
Report	Law Reform Committee of Western Australia <i>Report on legal capacity of minors</i> (Project No 25 1972)
Rowlatt	Rowlatt on <i>The Law of Principal and Surety</i> (4th ed 1982 by D G M Marks and G S Moss)
Scotland Memo	Scottish Law Commission <i>Legal capacity and responsibility of minors and pupils</i> (Consultative Memorandum No 65 1985)
Scotland Research Paper	Scottish Office Central Research Unit <i>The legal capacity of minors and pupils - experiences and attitudes to change</i> (1987)

Scotland Report	Scottish Law Commission <i>Report on the legal capacity and responsibility of minors and pupils</i> (Scot Law Com No 110 1987)
Sheridan	L A Sheridan <i>Fraud in Equity</i> (1957)
South Australia Act	<i>Minors Contracts (Miscellaneous Provisions) Act 1979</i> (SA)
South Australia Report	Law Reform Committee of South Australia <i>Report relating to the contractual capacity of infants</i> (41st Report 1977)
South Australia (Statute of Frauds) Report	Law Reform Committee of South Australia <i>Report relating to the repeal of the Statute of Frauds and cognate enactments in South Australia</i> (34th Report 1975)
Sutton	K C T Sutton <i>Sales and Consumer Law in Australia and New Zealand</i> (3rd ed 1983)
Tasmania Report	Law Reform Commission of Tasmania <i>Report on contracts and the disposition of property by minors</i> (Report No 48 1987)
Tasmania Working Paper	Law Reform Commission of Tasmania <i>The law relating to contracts and the disposition of property by minors</i> (Working Paper by D R C Chalmers 1985)
The Council of State Governments	The Council of State Governments <i>The Age of Majority</i> (1972)
Treitel	G H Treitel <i>The Law of Contract</i> (6th ed 1983)
Trindade and Cane	F A Trindade and P Cane <i>The Law of Torts in Australia</i> (1985)
United Kingdom Act	<i>Minors' Contracts Act 1987</i> (UK)
Victoria Report	Victoria Chief Justice's Law Reform Committee <i>Report on infancy in relation to contracts and property</i> (1970)
Working Paper No 1	Law Reform Committee of Western Australia <i>Working Paper No 1 on Legal capacity of minors</i> (Project No 25 1972)
Working Paper No 2	Law Reform Commission of Western Australia <i>Working Paper No 2 on Legal capacity of minors</i> (Project No 25 1978)

Chapter 1

INTRODUCTION

In this Report the Commission considers the law that should apply to contracts made by minors, that is, people under 18 years of age.

1. TERMS OF REFERENCE

1.1 In June 1971 the Law Reform Committee of Western Australia, predecessor of the Commission, was asked to consider the recommendations contained in the New South Wales Report as they relate to the laws in Western Australia and make recommendations for the necessary legislation.¹ The New South Wales Report, which proposed extensive changes in the law of contracts and property for those below the age of majority, had itself been facilitated² by publication in the United Kingdom of the Latey Report, which had recommended reduction of the age of majority from 21 to 18 years, and had also made recommendations on the principles which should govern the law (particularly of property and contract) for those below that age.

1.2 Shortly after the Committee received its reference the Government announced³ its intention to introduce legislation to lower from 21 to 18 years the age of responsibility for all citizens of Western Australia. The Committee accepted that it had been settled as a matter of policy that the age of majority would be reduced to 18, and in January 1972 issued its Working Paper No 1, Part II of which considered the consequences of reduction of the age of majority, and Part III of which considered the law of minors' contracts. These two matters were regarded as being independent of each other. The Committee presented its Report on the consequences of reduction of the age of majority in April 1972, and its recommendations were adopted in the *Age of Majority Act 1972*. The Committee and its successor the Commission continued work on minors' contracts, and in June 1978 Working Paper No 2 was issued.

¹ Attorney-General to Chairman, 29 June 1971.

² New South Wales Report 8 Para 6.

³ Governor's Speech at the opening of the 1st Session of the 27th Parliament, Western Australian Parliamentary Debates 15 July 1971 p 5.

1.3 The Commission has delayed presenting its Report on minors' contracts initially to enable it to assess the legislation which implemented the New South Wales Report⁴ in light of its operation over a period of time, and subsequently to have the benefit of studying developments in England. The Latey Report had recommended that the English Law Commission⁵ consider certain proposals as the basis for the law relating to infants' contracts.⁶ In response, the Law Commission issued its Working Paper in 1982 and Report in June 1984, the recommendations of which have now been enacted.⁷

1.4 Although the Committee's Working Paper No 1 referred to the issue of consent by minors to medical and dental treatment,⁸ the law on this matter has since become the subject of a separate reference to the Commission.⁹ This Report accordingly does not address the matter, although care has been taken that nothing in this Report should pre-empt the Commission's recommendations when it comes to report on Project No 77.

2. THE WORKING PAPER

1.5 In Working Paper No 2 the Commission analysed the present law relating to minors' contracts and property in Western Australia, New South Wales and New Zealand,¹⁰ compared the practical consequences, in typical fact situations, of the law in each of these three jurisdictions, and expressed tentative views as to how the law of Western Australia should be reformed. The Commission gratefully acknowledges the assistance it derived from the comments received on Working Paper No 2: a list of those who forwarded comment is appended to this Report.

3. PROPOSALS FROM OTHER JURISDICTIONS

1.6 Publication of the Latey Report in 1967 prompted several jurisdictions having law on minors' contracts broadly similar to that in Western Australia to examine the age of majority

⁴ *Minors (Property and Contracts) Act 1970* (NSW), hereafter referred to as New South Wales Act.

⁵ Hereafter Law Commission.

⁶ Latey Report 78 para 286.

⁷ *Minors' Contracts Act 1987* (UK), hereafter referred to as United Kingdom Act.

⁸ Working Paper No 1 8-9 para 11(f).

⁹ Project No 77. The reference was given to the Commission in June 1981 and withdrawn in March 1984; a new reference was given in October 1984.

¹⁰ New Zealand had effected far-reaching reforms to the law in the *Minors' Contracts Act 1969* (NZ), hereafter referred to as New Zealand Act.

and the law that should apply to contracts made by those below that age. The Commission has had the benefit of views¹¹ from

Alberta¹² (1975)

British Columbia¹³ (1975; 1976; 1985)

England and Wales¹⁴ (1967; 1982; 1984; 1987)

Ireland¹⁵ (1977; 1983; 1985)

New South Wales¹⁶ (1969; 1970)

New Zealand¹⁷ (1966; 1969)

Ontario¹⁸ (1969; 1987)

Scotland¹⁹ (1985; 1987)

¹¹ In addition to studying the Reports and Working Papers listed below, a Consultant to the Commission visited the Law Commission, the Alberta Institute of Law Research and Reform and the Law Reform Commissions of British Columbia and New South Wales. One Commissioner was able to visit the Scottish Law Commission. To facilitate study of practical problems encountered, the Law Commission made available its file of responses to the Law Commission Working Paper generally, and to the pamphlet which the Law Commission circulated widely to schools - Law Commission Report 5 para 1.14. The Commission is most grateful for this assistance, and generally for the help and information given by the Law Commission, the Scottish Law Commission, the Alberta Institute and the Law Reform Commissions of British Columbia and New South Wales.

¹² Alberta Report. In September 1982 the Children's Law Committee recommended (Recommendations 60, 61) that the Institute's proposals, subject to some comments of the Committee, be incorporated in a proposed Children's Act. In May 1984 the Standing Committee on Law and Regulations of the Legislative Assembly of Alberta was directed to consider, in general terms, a number of Reports of the Institute, and to report to the Legislative Assembly as to which should be referred to the Committee for study (31 May 1984 Journals 2nd Session of 20th Legislature Vol XCI 163). The Committee reported in October 1984 that inter alia the Report on *Minors' contracts* be studied, and in November the Report was referred to the Committee for study. The Report was considered in February 1985 and approved (Legislative Assembly of Alberta Standing Committee on Law and Regulations 27 February 1985 Transcript No 85-86 at 97-101) and the Committee so reported in May 1985. No legislation has as yet been forthcoming.

¹³ British Columbia Working Paper; British Columbia Report. The Report has been implemented by the *Law Reform Amendment Act 1985* (BC) (hereafter referred to as British Columbia Act), amending the *Infants Act 1979* (BC) (hereafter referred to as British Columbia Infants Act).

¹⁴ Latey Report; Law Commission Working Paper; Law Commission Report; United Kingdom Act.

¹⁵ Ireland Age Working Paper; Ireland Age Report; Ireland Contracts Report.

¹⁶ New South Wales Report; New South Wales Act.

¹⁷ New Zealand Report; New Zealand Act.

¹⁸ Ontario Report; Ontario Contract Report.

South Australia²⁰ (1977; 1979)

Tasmania²¹ (1985; 1987)

Victoria²² (1970)

Reference will be made throughout this report to these proposals.

4. APPROACHES TO REFORM

1.7 In each jurisdiction²³ studied by the Commission, reform has (tentatively or finally) been recommended; in some,²⁴ reforming legislation has been enacted. The various working papers and reports display general agreement on certain basic objectives: the law should protect minors against their own lack of business experience and judgment, but at the same time ensure that other parties are not unduly prejudiced in their dealings with minors, and indeed are not deterred from entering certain contracts judged to be beneficial to minors.²⁵ Although objectives are broadly similar, there are quite wide differences in structure in the approaches taken: this is unusual in that, when a need for reform is recognised and objectives are agreed, generally the technicalities of measures recommended in similar jurisdictions tend to be much the same.

1.8 Approaches to reform of the law of minors' contracts, using classification from the Law Commission Working Paper,²⁶ range from "qualified enforceability"²⁷ to "qualified

¹⁹ Scotland Memo; Scotland Report.

²⁰ South Australia Report; *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA), hereafter referred to as South Australia Act.

²¹ Tasmania Working Paper; Tasmania Report.

²² Victoria Report. This Report recommended adoption of reforms proposed in the New South Wales Report, with one small modification. It appears that the Report has been rejected in Victoria; the *Supreme Court Act 1986* (Vic) ss 49-51 reproduces, in modern language, ss 69-71 of the *Supreme Court Act 1958* (Vic). These sections are themselves virtually identical with *Infants Relief Act 1874* (UK) ss 1, 2 and *Betting and Loans (Infants) Act 1892* (UK) s 5. See generally J L R Davis *Continuation in Victoria of anachronistic English statutory provisions* (1987) 61 ALJ 265.

²³ In Ontario, the initial conclusion in 1969 was that recommendations on the law of infants' contracts ought not to be made at that time (Ontario Report 53) but the Ontario Contract Report has now recommended reforms.

²⁴ British Columbia, England and Wales, New South Wales, New Zealand, South Australia.

²⁵ These and other objectives are fully discussed in ch 4 below.

²⁶ 34-38 paras 3.7-3.14.

²⁷ As in the Victoria Report and New South Wales Act.

unenforceability".²⁸ Reform based on "qualified enforceability" assumes all contracts made by minors should *prima facie* be binding, but creates exceptions or confers powers on a court to grant relief; that based on "qualified unenforceability" assumes minors' contracts in general should not bind, with exceptions and again with discretionary powers being granted to a court. In the former case discretionary power tends to be for the purpose of relieving minors from some contracts and giving consequential relief; in the latter these powers tend to be for the purpose of effecting restoration, restitution and sometimes compensation. The existing law in Western Australia and the other jurisdictions studied (prior to any reform) is characterized by "qualified unenforceability".²⁹ In some jurisdictions the approach to reform has been to retain this existing structure with some modification or clarification, but to expand the powers of the court to grant relief to a greater³⁰ or lesser³¹ degree. Where "qualified enforceability" is introduced³² more far-reaching legislative change is necessary.

1.9 These divergencies in the structure of reform cannot be explained on the basis of differing socio-economic or even legal factors,³³ although in some jurisdictions with legal backgrounds similar to that in Western Australia, there are significant statute-based and sometimes even judicially developed differences. The objectives being broadly similar, choice of an approach appears to depend more on the significance accorded to a number of policy considerations, and a judgment of how these will affect the law in operation. Of particular importance has been the balancing of the justice which can be achieved if courts are granted wide discretionary powers against that certainty which it is thought the law should provide.

²⁸ As in the Lacey Report and the British Columbia Report. This was also the minority view in the Alberta Report 33. The Alberta Report majority approach is not easy to classify: it starts with a general proposition that minors' contracts should not be enforceable against the minor, but excepts any contract which the other party reasonably believed to be fair and reasonable in itself and in the circumstances of the minor. The philosophy is really "qualified enforceability".

²⁹ The law of Scotland does not quite fit this classification. In considering reform, the Scotland Memo recommends qualified unenforceability for those under 16 in its preferred option, and for the lower age group in any option entailing two groups - Scotland Memo 121-123 paras 5.24-5.26. In deference to public opinions the preferred option is not pursued in the Report (Scotland Report 12-13 para 3.15) which in effect recommends qualified unenforceability for those under 16, and qualified enforceability for those between 16 and 18 (Scotland Report 14-16 paras 3.21-3.26, 34-35 paras 3.97-3.101).

³⁰ As in the New Zealand Act.

³¹ As in the Law Commission and South Australia Reports, enacted in the United Kingdom and South Australia Acts.

³² As in New South Wales.

³³ Scots law, following its Roman law origins, differs significantly from the other legal systems studied. The recommendations for reform presented by the Scotland Report have the effect of reducing these differences somewhat.

1.10 Structural differences in approaches to reform may not be as important as at first appears. If the qualifications are sufficiently flexible, there may be little difference in practice between reform based on "qualified enforceability" compared with "qualified unenforceability". Experience with legislative reform of the area in Australia and New Zealand suggests that changes which appear far-reaching may not greatly alter contracting by and with minors. New Zealand introduced radical reform in 1969, New South Wales in 1970; South Australia made less extensive changes in 1979. These jurisdictions appear to operate as effectively as those where the law remains unreformed; certainly no dramatic changes have emerged in the contractual behaviour of minors or those who trade with them.

1.11 Given that change in the law may have little obvious or immediate impact, the questions might be asked whether reform should be attempted at all, or should be minimal and confined to obvious weaknesses in the existing law.³⁴ An alternative would be to select that legislation from another jurisdiction³⁵ which most closely represents the Commission's view of what the law should be. For reasons to be developed, the Commission believes that the time has come to replace the existing structure of the law of minors' contracts. Its views are not sufficiently reflected in proposals for reform developed elsewhere. Accordingly, the Commission recommends that there should be reform, on a general approach based on "qualified enforceability", but not by way of adoption *in toto* of proposals from another jurisdiction.

5. THE COMMISSION'S APPROACH

1.12 The Commission has concluded that the general law (that is, excluding the special rules for minors) has developed to the point that it is now adequate to deal with most problems arising out of contracts to which one party is a minor. That law has established doctrines of undue influence and unconscionability which are particularly appropriate where one party has imposed upon the weakness of another. These doctrines are supplemented by

³⁴ As in the Law Commission Report and United Kingdom Act: the legal position thereby achieved in England and Wales is very similar to that now obtaining in Western Australia. The same would be true of Tasmania if the Tasmania Report were adopted: that Report makes only two recommendations - that the *Infants' Relief Act 1875* (Tas) be repealed, and that where a guarantee of a minor's contract is given but the principal contract is unenforceable because of minority, the guarantee should not for that reason alone be unenforceable against the guarantor.

³⁵ New South Wales Act for "qualified enforceability", New Zealand Act for "qualified unenforceability", United Kingdom Act or South Australia Act for minimal change. Even so, these last two differ in some respects: for instance, the former amplifies a court's power to order restitution of property *by* a minor (s 3); the latter legislates for restitution *to* a minor (s 7)

statutory provisions designed for the protection of consumers. The Commission is satisfied that, with one qualification, the normal contractual principle whereby contracts are enforceable by and against both parties should form the basis of a revised law of minors' contracts. The qualification recognises that cases may arise where the general law is not able to provide that protection which a minor, in the particular circumstances of the case, ought to have. Accordingly, the Commission considers that in any action on or involving a contract to which a minor is party, including an action by the minor to seek relief from a contract whether executed or not, the court should have power, at the instance of the minor, to grant relief where it is satisfied that the contract is prejudicial to the minor's best interests.

1.13 In summary, the Commission bases its recommendations on the proposition that the law for contracts generally should apply to contracts made by minors, subject to a special right in the minor to seek relief. In succeeding chapters the Commission discusses in detail its attitude to reform of this area of the law, the existing law in theory and practice, the objectives which the law should seek to achieve, and its own proposals for reform and the effect thereof on the existing law.

Chapter 2

GENERAL APPROACH TO REFORM

2.1 This chapter deals in general terms with the approach to reform taken by the Commission, addressing in particular issues relating to

Scope of reform

Need for reform

Specific reform or general reform

1. SCOPE OF REFORM

2.2 The Commission has accepted that the age of full contractual capacity should accord with the general age of majority, that is 18, and has not reconsidered the case for some age higher or lower than 18 to be set especially for contractual capacity. That the age should be no higher than 18 is settled by statute.¹ The Law Commission in its Working Paper presented an "Alternative Proposal"² for reduction of the age of contractual capacity to 16.³ The Alternative Proposal was not pursued in the Law Commission Report,⁴ although that Commission continued to feel that the proposal had merit.⁵ Similarly, the preferred option of the Scottish Law Commission was to have a single age for civil capacity, set at 16,⁶ but again this option was abandoned in the Scotland Report.⁷ Arguments for reduction of the age of contractual capacity below 18 are similar to those which justify an approach based on "qualified enforceability".⁸ The Commission's recommendations go far towards meeting those arguments by providing that contracts with minors will bind both parties, regardless of age, but also provide protection by way of the court's power to grant relief.

¹ *Age of Majority Act 1972.*

² Law Commission Working Paper 136-155 paras 12.1-12.26.

³ One writer has suggested 14: see W D Navin Jr *The Contracts of Minors Viewed from the Perspective of Fair Exchange* (1972) 50 NCL Rev 517.

⁴ Law Commission Report 7 paras 2.1-2.3.

⁵ Id para 2.3.

⁶ Scotland Memo 109-111 para 5.12; 113 para 5.15.

⁷ Scotland Report 12-13 para 3.15. That Report did however recommend different rules for those below 16, and those between 16 and 18.

⁸ See generally Law Commission Working Paper 136-143 paras 12.1-12.9; Scotland Memo 109-113 paras 5.12-5.14.

2. NEED FOR REFORM

2.3 The Commission is of the view that reform should be recommended only when necessary. A judgment here requires a weighing up of factors and short and long term advantages and disadvantages. It is possible to take the view that the law is working satisfactorily. It is familiar at least to lawyers and other professional advisers, possibly also the public. It is admittedly complex, but its very complexity may allow just results to be achieved, either by a court,⁹ or through settlement out of court. There has been no groundswell of public opinion in favour of reform, either in Western Australia,¹⁰ or in other jurisdictions where reform has been considered.¹¹ In some of those jurisdictions, only relatively small changes have been recommended or implemented.¹² The present law may be uncertain, but change would also create a period of uncertainty, and there is the further danger that, despite all efforts, reform will create as many problems or injustices as it tries to resolve, or will have unforeseen and undesirable social or economic effects. Even simple measures for reform occupy Parliamentary time, and an effort to cover every contingency may have a result that is too complex, and too costly.

2.4 Against this, there are powerful arguments in favour of reform. The present law is complex and in many areas unclear, and its complexity is unrelated to the objectives it seeks to achieve. Complexity is not a virtue where the avenues available to a court to do what it sees to be just are limited: it leads only to artificial manipulation of the law and further complexity. Furthermore, judicial ingenuity has limits: decided cases have been reported where the court has had to come to a solution which seemed unfair, because a legal avenue to a better solution has not been available.¹³ Such cases have not been common in recent times, but it may be that potential claims are abandoned, or disputes settled, on the basis of the existing law and unfairly to one of the participants.

⁹ See para 3.21 below.

¹⁰ The general consensus of comment to the Commission on Working Paper No 2 was in favour of reform, but no urgency was expressed.

¹¹ The working papers and reports from jurisdictions listed at para 1.6 above show a consistent pattern in this regard.

¹² Law Commission Report; South Australia Report (implemented respectively by United Kingdom Act and South Australia Act); Tasmania Report.

¹³ An example is *Bojczuk v Gregorcowicz* [1961] SASR 128. A judge who abandons accepted law in favour of a "just solution" faces criticism - as in a casenote by J D McCamus on *Prokopetz v Richardson's Marina Ltd* (1979) 93 DLR (3d) 442: (1980) 14 UBCL Rev 363.

2.5 The experience from other countries suggests that change is warranted. The consensus of comment to other law reform bodies which have undertaken consideration of the matter has been in favour of change. All have recommended, tentatively or finally, that reform be undertaken. Of course the approach and scope of recommendations vary, from the radical New South Wales reforms to the Law Commission and Tasmania Reports and recent United Kingdom Act. In general terms, the thrust of reform has been to make the law more clear and more simple, and to extend the remedies available both to the minor and to the other party, where a contract is not fully performed and a defence of minority is raised.

2.6 In the final analysis, a decision that reform should be undertaken must be based on judgment. The existing law is complex and unclear, and has a potential to create injustice in particular cases. The scope for judicial reform is limited, in that the law appears to have crystallized into categories of contracts with fixed and sometimes unfair consequences. The Commission believes that legislative reform is necessary and that its proposals, introducing¹⁴ a discretionary power in the court to do what is just in the circumstances, will result in significant improvement.

3. SPECIFIC REFORM OR GENERAL REFORM

2.7 An important question is whether reform should be by way of specific changes within the framework of the existing law on minors' contracts, or introduction of a new approach. Experience in other jurisdictions has varied. The Lately Report in 1967 favoured reform on radical lines, but recommended that the matter be referred to the Law Commission,¹⁵ which was at that stage engaged on a major project to codify the law of contract generally. By the time the Law Commission issued its Working Paper in 1982, it had suspended the codification project,¹⁶ and it therefore dealt with minors' contracts as a separate aspect of the law of contract. The Law Commission considered the advantages of codification, but its tentative

¹⁴ An argument that the law already provides that all contracts which are of benefit to a minor are binding was put, but rejected, in *Bojczuk v Gregorcowicz* [1961] SASR 128, 132-134. General statements that beneficial contracts bind and non-beneficial contracts do not bind minors can be found in cases concerning land and apprenticeships, and should be read in that context: *Maddon d Baker v White* (1787) 2 Term Rep 159, 161: 100 ER 86, 87 per Buller J; *R v Evered* (1777) Cald Mag Cas 26, 28 per Lord Mansfield; *R v Great Wigston (Inhabitants)* (1824) 3 B & C 484, 486: 107 ER 813, 814 per Abbott CJ. For comment on the early confusion of rationales of necessity and benefit see A W B Simpson *A History of the Common Law of Contract* (1975) 541-542.

¹⁵ Lately Report 78 para 286.

¹⁶ Law Commission Working Paper 1-2 para 1.2.

recommendations in the Working Paper, and final recommendations in the Report,¹⁷ were for specific reforms. The Latey Report however prompted the New South Wales Report (1969) and Act (1970), which in turn led to this Commission receiving its original reference. That Act both reforms and codifies the law in the area.

2.8 No doubt a choice between general and specific reform is affected by decisions as to whether and how much reform is needed. General reform allows a single consistent approach to be taken, harmonizing as far as possible the different objectives sought to be achieved by the law. Existing law can be reformed, clarified and simplified and, at least initially, will be contained in one source, thus becoming more accessible to professionals and public. An authoritative starting point can be provided, so that reference to the great bulk of existing case-law becomes of less importance. The process of introducing general reform allows for Parliamentary as well as legal professional scrutiny of the whole area.

2.9 There are of course disadvantages. General reform often introduces new concepts, the unfamiliarity of which produces uncertainty, at least in the short term. Application of the new law to actual cases is unpredictable until case-law develops, and when cases do arise, courts may not feel able to draw on precedent and may apply the new concepts in unexpected ways. If an attempt is made to cover every possible situation by way of a code, the area reformed may become isolated from the rest of the law, and if in fact the code has failed to provide for particular situations which arise, courts may be unwilling to fill the gap by drawing on general principles, so that further statutory reform becomes necessary. Thus codification tends to crystallize the law at a particular point in its development. Unless there is inbuilt flexibility, the general statement of the law may not permit development to meet new conditions and problems.¹⁸

2.10 The Commission considers that a general approach to reform of the law of minors' contracts has become necessary. The law in the area is remarkable for the number of different

¹⁷ As implemented by the United Kingdom Act.

¹⁸ For a general discussion of codification see A L Diamond *Codification of the Law of Contract* (1968) 31 Mod L Rev 361; E Bodenheimer *Is Codification an Outmoded Form of Legislation?* (1982) 30 Am J Comp L 15 (Supp). Debate for and against codification is of long standing: for a recent contribution see H R Hahlo *Here Lies the Common Law: Rest in Peace* (1967) 30 Mod L Rev 241; letter (1967) 30 Mod L Rev 607; M R Topping and J P M Vandenlinden *Ibi Renascit Jus Commune* (1970) 33 Mod L Rev 170; H R Hahlo *Codifying the Common Law: Protracted Gestation* (1975) 38 Mod L Rev 23. Ultimately codification may make little difference - G Gilmore *On Statutory Obsolescence* (1967) 39 U Colo L Rev 461, 465: "Both the gains we had hoped for and the losses we had feared turned out to be largely illusory".

legal categories of contracts made by minors,¹⁹ to which different legal consequences apply. Creation of these categories may have come about through the law's attempt to reconcile conflicting objectives,²⁰ each category giving effect to a different set of objectives. As a matter of history the law has developed almost exclusively in common law courts (as opposed to courts of equity) applying common law principles and remedies. In the context of minors' contracts the principles, and more particularly the remedies, have been too limited to deal with the variety of situations which have arisen. The Commission believes it has become necessary to break away from the existing common law pattern, and that a single unifying principle should be introduced which will render the complexities of categorization unnecessary, by allowing a court to address itself to the conflicting objectives directly. At the same time a greater range of remedies, broadly equitable in concept, can be provided. Such an approach prompts general rather than specific reform. The Commission nevertheless believes that its proposals can be set in the context of basic principles of the existing law, so that the law of minors' contracts can develop in harmony with other areas.

¹⁹ See para 3.6 below.

²⁰ See para 4.1 below.

Chapter 3

EXISTING LAW

3.1 The law is said by judges and textbook writers to pursue certain stated objectives. This chapter sets out those objectives,¹ the present legal position achieved as a result,² and the defects which the Commission and others have perceived as existing in the present law.³ A statement of legal rules and their defects does not however give a full picture of the operation of the law.⁴ Although factual materials are scanty, the Commission gives, later in this chapter, an account of the kinds of contracts minors are likely to make.⁵

1. STATED OBJECTIVES

3.2 The primary objective of the law of minors' contracts is said to be the protection of minors from the consequences of their own inexperience:

"An infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity."⁶

The law protects the minor, not the other party;⁷ hence the minor may sue on the contract,⁸ but cannot be sued.⁹ Two clear exceptions have always been recognised: contracts whereby minors supply their own day-to-day needs,¹⁰ even on credit, are to a greater or lesser extent binding,¹¹ as are certain contracts whereby a minor is able to earn a living.¹² These

¹ At paras 3.2-3.4 below.

² At paras 3.6-3.15 below.

³ At paras 3.16-3.21 below.

⁴ See J Tillotson *Contract law in perspective* (1981) 11; M Galanter *The Legal Malaise; or, Justice Observed* (1985) 19 *Law & Soc'y Rev* 537 (revised version of the Presidential Address to the Law and Society Association on its twentieth anniversary).

⁵ At paras 3.24-3.33 below.

⁶ *Compton v Collison* (1788) 2 Bro CC 377, 387; 29 ER 209, 213 per Buller J. Taken at face value, the statement no longer represents the law, insofar as it suggests that the only criterion of contracts which bind minors is that they be of benefit to the minor.

⁷ Here, and in like contexts, "the other party" refers to someone with full contractual capacity.

⁸ Working Paper No 2 13-14 para 1.30.

⁹ *Ibid.*

¹⁰ This is a compendious expression designed to indicate the kinds of goods and services supplied, and the means and ability of the minor to pay for them.

¹¹ Contracts for necessary goods and for other necessities are discussed in Working Paper No 2 4-6 paras 1.8-1.11.

¹² Contracts of service are discussed in Working Paper No 2 6 para 1.12.

exceptions are said to benefit minors, by encouraging other parties to deal with them through the assurance that these contracts will bind the minor:

"Miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and, without prejudice to themselves, for the benefit of others."¹³

3.3 The law being primarily for the protection of minors, it is not surprising that, where they conflict, the interests of the other parties to contracts are usually subordinated to those of the minors. Particularly where money, services or goods have been supplied to a minor who has not given the full contractual recompense, the other party may suffer loss if unable to sue on the contract. For the discouragement of fraud, however, minors are obliged to restore property obtained through fraud,¹⁴ although they cannot be sued for damages in the tort of deceit.¹⁵

3.4 The Law Commission in its Working Paper¹⁶ summarized the policy objectives which the law should and does now achieve as being:

- (a) the law should protect minors against their inexperience and immaturity;
- (b) the law should not cause unnecessary prejudice to adults who deal with minors;
- (c) the law should not deter adults from entering into certain types of contract with minors.

These objectives have general acceptance, although there may well be other implicit objectives, some of which will be discussed below.¹⁷ Furthermore, identification of objectives is one thing; implementation thereof is another. What is certain is that the law,

¹³ *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794, 1801: 97 ER 1103, 1106-1107 per Lord Mansfield.

¹⁴ Working Paper No 2 19 para 1.42.

¹⁵ Id 18 para 1.40; 19 para 1.42.

¹⁶ 34 para 3.5.

¹⁷ Ch 4.

through the effort to implement its objectives, has in the course of centuries become complex and technical.

2. LEGAL POSITION

3.5 The law relating to minors' contracts and property in Western Australia was fully set out in Working Paper No 2 issued in 1978, to which reference will generally be made. There have been no significant developments in Western Australia since that time. What follows is a brief outline given for purposes of discussion, and an account of how the existing law pursues its stated objectives.

(a) Categories of contracts

3.6 Primarily the law seeks to achieve its objectives by drawing distinctions between categories, and attaching different consequences to each. The categories are:

contracts for necessary goods;¹⁸

contracts for other necessities;

contracts of service which are beneficial to the minor;¹⁹

contracts which are binding until repudiated;²⁰

contracts which are not binding on the minor unless ratified;²¹

contracts which are absolutely void.²²

3.7 The first three categories contain those contracts which it is thought adults should not be deterred from making with minors. Contracts in these categories are therefore binding on both parties, although with qualifications designed to protect minors. Thus in all three categories it is clear that the contract must also be beneficial,²³ and in the case of necessary

¹⁸ Working Paper No 2 describes a single category of "necessaries" comprising goods and other necessities at 4-6 paras 1.8-1.11. Necessary goods are however the subject of separate legislation in the *Sale of Goods Act 1895* s 2, in which the definition of "necessaries" is confined to goods, and the basis of liability on contracts for supply of necessary goods, and of other necessities, may differ: see further at para 3.7 below.

¹⁹ Working Paper No 2 6 para 1.12.

²⁰ Id 8-13 paras 1.17-1.29.

²¹ Id 13-18 paras 1.30-1.39.

²² Id 6-8 paras 1.13-1.16.

²³ Id 5 para 1.10 (necessaries): 6 para 1.12 (services).

goods sold and delivered only a reasonable price need be paid.²⁴ There is dispute about other qualifications which, if they exist, would operate further to protect minors: whether the goods or services must be necessary at the time of contract, or of delivery or provision, or at both times;²⁵ whether a minor may be sued for damages for non-acceptance of necessary goods or services;²⁶ whether only reasonable remuneration, as opposed to the contractually agreed remuneration, need be made for necessaries which are not goods.²⁷

3.8 The last three categories contain those contracts which to a greater or lesser extent are not binding on minors, and thus perform a protective function. Contracts which are absolutely void are nullities: possibly not even the minor can sue on such a contract.²⁸ They cannot be ratified,²⁹ property and money given pursuant to them can be recovered,³⁰ and even a *bona fide* third party purchaser of property previously the subject of a void contract may not obtain good title.³¹ By contrast, contracts which are binding until repudiated bind both parties at the outset. Protection resides only in the ability of the minor to repudiate before or within a reasonable time after achieving majority.³² Meanwhile property passes to or from the parties to the contract,³³ and often cannot be recovered after repudiation.³⁴ A third party purchaser will acquire title, possibly even after repudiation.³⁵ Any performance completed before repudiation is valid, and possibly obligations due but unperformed at the time of repudiation must still be performed.³⁶ What is clear is that repudiation releases both parties from obligations to be performed thereafter.³⁷

²⁴ *Sale of Goods Act 1895* s 2.

²⁵ See Working Paper No 2 5 para 1.10.

²⁶ Id 4 para 1.8.

²⁷ If liability for necessaries which are not goods arises from contract, it should follow that the agreed remuneration is payable. If on the other hand *Sale of Goods Act 1895* s 2 reflects the common law for all necessaries, only reasonable remuneration is due. Early authorities show that a minor could be sued on a promise, bill or "single" (that is, not penal) bond for necessaries: *Dale v Copping* (1601) 1 Bulst 39: 80 ER 743 (medical treatment); *Russel v Lee* 1 Lev 86: 83 ER 310 (victuals and necessary clothes); *Ayliff v Archdale* (1660) Cro Eliz 920: 78 ER 1142 (obiter: penal bond for necessary meat and drink). It appears, however, from *Walter v Everard* [1891] 2 QB 369 (balance of premium for apprenticeship) that the agreed cost must be fair and reasonable.

²⁸ No case has arisen, or seems likely to arise, given that most contracts are in this category because they are unduly oppressive. If the minor cannot ratify, it seems to follow that the minor cannot sue. As to ratification, see Working Paper No 2 7 para 1.14.

²⁹ Ibid.

³⁰ Ibid.

³¹ Id 7 para 1.15.

³² Id 8 para 1.17.

³³ Id 10-11 para 1.23 (shares); 12-13 para 1.28 (land).

³⁴ Id 9-10 para 1.21, 10-11 para 1.23 (shares); 12-13 para 1.28 (land).

³⁵ Id 11 para 1.24 (shares); 13 para 1.29 (land).

³⁶ The matter is open to doubt: id 10 para 1.22, dealing with unpaid rent.

³⁷ Ibid.

3.9 The category of contracts not binding unless ratified is a residual category, containing all contracts not falling within any other category. Again the consequences of making such contracts differ from those attaching to contracts in other categories. The minor may ratify the contract on achieving majority, thereby becoming fully bound.³⁸ Meanwhile the minor can sue on the contract, but cannot be sued.³⁹ Property passes to or from the parties to the contract and may be irrecoverable,⁴⁰ and third parties acquiring the subject matter of such a contract may be protected.⁴¹

(b) Supplementary rules

3.10 The integrity of the last three categories, being contracts not binding on the minor, is further maintained by supplementary rules, usually aimed at preventing the enforcement of the contract by some other legal, but non-contractual, means. So an action in tort, which in substance enforces an otherwise unenforceable contract, will not be permitted.⁴² This interdict applies even when the tort is that of deceit, typically occurring where the minor claims to be of full age.⁴³ Fraud may however affect recovery of property transferred to a minor. In the absence of fraud, recovery will in many cases not be permitted,⁴⁴ but will be ordered where the minor has been fraudulent.⁴⁵ Even when permitted, recovery is of property retained by the minor, and possibly does not extend to other property, or money, for which such property has been exchanged.⁴⁶ "Restitution stopped where repayment began."⁴⁷ Otherwise, a false representation of age has no contractual effect; it is settled, for instance, that a minor will not be estopped from denying a representation of full age, so as to permit a contractual action to succeed.⁴⁸

³⁸ Id 13-14 para 1.30.

³⁹ Ibid.

⁴⁰ Id 15-16 paras 1.32-1.35.

⁴¹ Id 17-18 paras 1.37-1.39. In this, and the other categories of contracts not binding on minors, statements about passing and recovery of property must be tentative only, as the whole area is one of great doubt and difficulty - see generally Sutton 79-84.

⁴² Id 18-19 para 1.41.

⁴³ Id 18 para 1.40.

⁴⁴ See paras 3.8-3.9 above.

⁴⁵ Working Paper No 2 19 para 1.42.

⁴⁶ Ibid.

⁴⁷ *R Leslie Ltd v Sheill* [1914] 3 KB 607, 618 per Lord Sumner.

⁴⁸ Sutton 72; G Spencer Bower and A K Turner *The Law Relating to Estoppel by Representation* (3rd ed 1977) 127 para 128, 146 para 145, 169 para 168.

3.11 The primary objective of the law being protection of the minor, that protection need not be called in aid. Thus, except possibly for contracts absolutely void,⁴⁹ minority is a personal defence;⁵⁰ the minor may sue on any contract to the same extent as could an adult,⁵¹ and even in such a case there is doubt whether the minor thereby becomes bound to perform contractual obligations still outstanding.⁵² Once action is commenced by or against a minor advice is available, as the minor can only act as defendant through a guardian *ad litem* or as plaintiff through a next friend.⁵³ A minor plaintiff has however no greater advantage than an adult: defences which would have been available against an adult, for example misrepresentation leading to rescission, are equally available against a minor.⁵⁴

(c) Common law and equity

3.12 A most important point about the existing law is that it is based on common law as opposed to equity. There are of course small statutory modifications,⁵⁵ and one equitable intrusion - minors' obligations to make restitution in cases of fraud.⁵⁶ The dominance of common law principles has had significant effects. Courts have for instance made little or no use, in favour of minors, of specifically equitable doctrines such as undue influence or unconscionability.⁵⁷ Application of these doctrines leads to the contract being voidable, allowing for the equitable remedy of rescission. The common law doctrines permit scrutiny of the categories of binding contracts for unfairness or one-sidedness;⁵⁸ and this may have pre-empted the development of any equitable rules. As for categories of contracts not

⁴⁹ It may be that not even the minor can sue on such a contract. For different views on whether a minor can sue on a contract declared to be "absolutely void" by the *Infants Relief Act 1874* (UK) s 1 see G H Treitel *The Infants Relief Act, 1874* (1957) 73 LQR 194, 200-202; P S Atiyah *The Infants' Relief Act, 1874 - A Reply* (1958) 74 LQR 97, 99-101; G H Treitel *The Infants' Relief Act, 1874 - A Short Rebutter* (1958) 74 LQR 104, 104-106.

⁵⁰ *Coan v Bowles* (1691) Holt KB 358, 359: 90 ER 1097, 1098 per Holt CJ: "infancy is a personal privilege, of which none can take benefit but he himself"; *Keane v Boycott* (1795) 2 H B1 511: 126 ER 676. There are however some circumstances in which minority may be raised by someone other than the minor: see G H Treitel *The Infants Relief Act 1874* (1957) 73 LQR 194, 201; Lindgren Carter and Harland 240 para 808.

⁵¹ Working Paper No 2 13-14 para 1.30.

⁵² *Ibid.*

⁵³ *Rules of the Supreme Court 1971* Order 70 r 2; *Local Court Act 1904* s 57; *Local Court Rules 1961* Order 3(9).

⁵⁴ Working Paper No 2 19 para 1.42, referring to the right of the other party to rescind for fraudulent misrepresentation.

⁵⁵ *Id* Appendix I.

⁵⁶ See para 3.10 above.

⁵⁷ These and other equitable doctrines have been used in cases where the impugned transaction was effected shortly after attainment of majority, the comparative youth, inexperience and reliance of one party being an important factor. They are discussed more fully at paras 5.6-5.9 below.

⁵⁸ See at para 3.7 above.

binding, the very fact that they are unenforceable against the minor means that equitable intervention is unnecessary.

3.13 A further effect is that only the limited common law mechanisms are available for adjusting the rights of parties where the contract is not performed in whole or part. A comparison between the remedial approaches of the common law and equity is instructive. In general terms, under the common law approach, money is not recoverable by or from a minor unless there has been a total failure of consideration.⁵⁹ Recovery of property by or from a minor remains a moot point. On one view there must be total failure of consideration,⁶⁰ but the theoretical basis for recovery is then doubtful, the true total failure of consideration action being in debt and for money.⁶¹ Another approach investigates passing and reversion of title,⁶² and a third turns on the ability of the party seeking recovery to restore the *status quo ante*.⁶³ By contrast, the equitable notion of rescission, available for misrepresentation, undue influence, unconscionability and other vitiating factors, is an established remedy which effects a *restitutio in integrum*. The possibility of this kind of relief should be introduced by way of reform.

(d) Discussion

3.14 Although the law protects minors, it seems at first sight to do so rather crudely, being based on age and apparently taking little account of factors such as the terms or benefit of the contract, the conduct of the other party, or the understanding, experience, means and other circumstances of the minor. On closer analysis, however, it appears that the creation of the various categories, and their use, derives from a desire to take such matters into account. The factors mentioned are important within categories, and for distinguishing between them. Thus a contract may be absolutely void if the minor lacks understanding, or if the contract is unduly prejudicial to the minor's interests.⁶⁴ In the categories of binding contracts, control is exercised over the terms of the contract: a reasonable price, not necessarily the contract price, is payable for necessary goods sold and delivered, and possibly only reasonable recompense

⁵⁹ Working Paper No 2 10 para 1.22; 10-11 para 1.23; 15 para 1.32; 16 para 1.35.

⁶⁰ Id 9-10 para 1.21; 10-11 para 1.23; 15-16 para 1.34; 16 para 1.35.

⁶¹ Sutton 79.

⁶² Id 79-83 especially 80 and 83.

⁶³ Working Paper No 2 9-10 para 1.21; 10-11 para 1.23; 15-16 para 1.34.

⁶⁴ Id 6-7 para 1.13.

need be made for other kinds of necessities supplied.⁶⁵ Contracts for necessities (goods or services) must not contain unreasonable or oppressive terms.⁶⁶ Similar control is exercised over contracts of service, which must be beneficial, that is, generally and substantially for the benefit of the minor.⁶⁷ In considering whether the contract is beneficial, all the terms and obligations must be weighed.⁶⁸ Whether something is in fact necessary depends on the minor's means, station in life and other circumstances,⁶⁹ including the extent to which the minor's needs have already been supplied by a parent or other person.⁷⁰

3.15 These factors however only come into play in the exceptional categories: in the category of contracts binding unless repudiated, and in the residual category of contracts not binding unless ratified, no inquiry is necessary as to the minor's understanding or circumstances, or the fairness of the contract, as liability can be avoided regardless of the minor's understanding or means, or of whether the contract is beneficial or fair.⁷¹ Such contracts can only become binding when majority is attained, by failure to repudiate, or by ratification, at which point the newly acquired majority carries with it the ability to accept even unfair contracts made during minority. One of the main objectives of the Commission's proposals for reform is to enable a court to address directly the factors discussed in the previous paragraph, rather than through the medium of the common law categories of contracts.

⁶⁵ See para 3.7 above.

⁶⁶ Working Paper No 2 5 para 1.10.

⁶⁷ Id 6 para 1.12.

⁶⁸ *De Francesco v Barnum* (1890) 45 Ch D 430.

⁶⁹ The 19th century formulation of Alderson B in *Chapple v Cooper* (1844) 13 M & W 252, 258: 153 ER 105, 107 is still referred to, but has been criticised for its lack of relevance to present day society:

"The subject matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill."

Similar formulations may be found in contemporary cases:

"articles fit to maintain the particular person in the state, station, and degree of life in which he is"

Peters v Fleming (1840) 6 M & W 42, 47: 151 ER 314, 315 per Parke B;

"the age of the infant, his income and his rank, his profession or calling, if he belongs to any profession, or has any duties or occupations in life"

Ryder v Wombwell (1868) LR 3 Ex 90, 99 per Kelly CB.

⁷⁰ Working Paper No 2 4-5 para 1.9.

⁷¹ The proposition that any contract which is beneficial to the minor is binding was fully discussed, and rejected, in *Bojczuk v Gregorcowicz* [1961] SASR 128.

3. PERCEIVED DEFECTS

(a) Complexity and uncertainty

3.16 A major defect of the present law is its complexity and uncertainty. Complexity results from the proliferation of categories and rules, discussed above. Of itself, complexity may not be objectionable,⁷² so long as results can be clearly predicted. If demarcation is clear, development of categories provides a convenient and quick, if sometimes rough and ready, way of solving legal problems. It is when boundaries are not clear and rules not settled, or where subjective criteria are used to determine which category applies, that complexity becomes objectionable. In the law of minors' contracts it seems likely that in the centuries of development of the law, courts have been conscious of the need to give protection in individual cases, and the categories and rules may be no more than a manifestation of consistent efforts to achieve individual justice. If a solution could not be found within existing categories, a new one emerged. The difficulty with the present law is that the categories and rules are now somewhat inflexible, and have become a substitute for the search for individual justice. Through its proposals the Commission seeks to reverse this process, by allowing courts to address more directly the justifications for enforcing or not enforcing a minor's contract.

3.17 Uncertainty in the present law of minors' contracts takes different forms. Much uncertainty arises from the unsettled state of the law: there are still no clear legal answers to questions about recovery of property or other benefits by or from a minor who refuses to proceed with a contract which is not binding.⁷³ There is also uncertainty as to whether any category of contracts binding on a minor is appropriate: further, if a court concludes that a particular contract binds, there is sometimes difficulty in deciding which category applies. Thus in modern times courts have expanded the category of contracts of service which are beneficial to the minor⁷⁴ to include professional contracts⁷⁵ and contracts in aid of professions,⁷⁶ but it is constantly stated that trading contracts⁷⁷ and contracts in aid of trade⁷⁸

⁷² Complexity becomes necessary as legislation is required to become more specific, as in taxing statutes.

⁷³ See generally Working Paper No 2 13-16 paras 1.30-1.35.

⁷⁴ Id 6 para 1.12.

⁷⁵ An example is *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 (contracts enabling the plaintiff to make a start as an author).

⁷⁶ An extreme example is *McLaughlin v Darcy* (1918) 18 SR (NSW) 585 (contract to use best efforts to obtain a passport so that the defendant could pursue a boxing career abroad).

⁷⁷ An example is *Cowern v Nield* [1912] 2 KB 419 (sale of clover and hay by a hay and straw merchant).

are not enforceable.⁷⁹ Where the contract is for provision of professional instruction it is not clear whether the contract should be classified as being for a necessary⁸⁰ or of beneficial service.⁸¹ A decision about whether any category applies tends to be a matter of subjective judgment - for example, various factors must be weighed in deciding whether something is in fact a necessary for a particular minor.⁸² An individual about to deal with a minor has, in addition to difficulties about legal rules and decisions, the further uncertainty arising from lack of access to facts on which judicial decisions will be based. Thus someone supplying a minor cannot easily assess means, circumstances and actual state of supply of goods or services which the minor seeks to obtain, so as to decide whether they are necessities. The minor's own view of the transaction is not necessarily determinative, and information supplied may be inaccurate or deliberately false.⁸³

(b) Lack of accord with modern conditions

3.18 Another defect is the law's lack of accord with modern conditions. Examples are the categories of contracts for necessities, and contracts which are binding until repudiated. What is a necessary depends partly on the "rank" and "station in life" of the minor:⁸⁴ the nineteenth century language betrays a legal distinction based on wealth and status which is

⁷⁸ *Mercantile Union Guarantee Corporation Ltd v Ball* [1937] 2 KB 498 (acquisition of a motor lorry on hire purchase by a haulage contractor); see also *Pyett v Lampman* (1922) 53 OLR 149 (purchase of a motor car for purposes of running a farm, and to go into the business of peddling fish).

⁷⁹ The distinction has been criticised as being difficult to draw - see Treitel 415-416; Greig and Davis 766-767; Latey Report 90-91 paras 343-345; Law Commission Working Paper 28 para 2.28(iii), 147-148 para 12.16 (in connection with the Alternative Proposal); Alberta Report 6; British Columbia Working Paper 8; British Columbia Report 9-10; Tasmania Working Paper 24 para 4.2.3; Ireland Contracts Report 18-19 (but see 125-126 where the distinction is continued); Ontario Contract Report 182-183. In Scotland trading contracts are binding - Scotland Memo 21-24 paras 2.20-2.22 - and Scotland Report 39 para 3.115 recommends that this rule should continue to apply to 16-18 year olds. Minors under 16 would not be bound by trading contracts unless they fell within the exceptional category of contracts of a type commonly entered into by minors of the contracting minor's age and circumstances and which are entered into on terms which are not unreasonable - Scotland Report 33 para 3.92.

⁸⁰ Education has long been regarded as capable of being a necessary - Co Litt 172a ("good teaching or instruction, whereby he may profit himself afterwards"); *Pickering v Gunning* (1629) Jones 182: 82 ER 96; Palm 528: 81 ER 1204. See also *Chapple v Cooper* (1844) 13 M & W 252, 258: 153 ER 105, 107 per Alderson B:

"as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also"

⁸¹ In *De Francesco v Barnum* (1890) 45 Ch D 430 a contract to learn stage dancing was clearly in the latter category: in *Roberts v Gray* [1913] 1 KB 520 a contract to undertake a world tour with a professional billiardist was spoken of as being in the former.

⁸² Working Paper No 2 4-5 para 1.9.

⁸³ A minor cannot be sued in tort for deceit arising from a fraudulent representation as to age - id 18 para 1.40. The same rule apparently applies to other fraudulent statements - Harland 193-194 para 1311. The ability of the other party to rescind the contract for misrepresentation or to obtain restitution (as to which see Working Paper No 2 18-19 paras 1.40-1.42) may provide inadequate redress where goods have been disposed of or consumed.

⁸⁴ See the formulations given at para 3.15 fn 69 above.

less welcome in our more egalitarian society.⁸⁵ It may in any case be doubted whether the category now fulfils its objective of encouraging other parties to supply minors' immediate needs on credit.⁸⁶ The kinds of contracts in the category of contracts valid unless repudiated display no obvious common factor,⁸⁷ and the category itself is said to have no discernible rationale in modern times.⁸⁸

(c) Inconsistency

3.19 The present law is capable of producing inconsistency of result. Because of difficulties surrounding recovery by a minor of money or other benefits,⁸⁹ a one-sided but executed contract for a non-necessary is likely to bind the minor, in the sense that nothing can be done to overturn the contract. On the other hand, on one view at least,⁹⁰ a minor can with impunity refuse to perform even a favourable contract for necessary goods, while it is still executory. The law can also produce unfairness: in particular, application of the rules relating to recovery of money, property and other benefits⁹¹ may result in situations where the other party to a contract with a minor, or indeed the minor, loses money or property without recovery or redress.

(d) Inflexibility

3.20 A final defect to be mentioned is the inflexibility of the present law. The law has hardened into categories, one category at least⁹² being possibly now closed. Once any uncertainty is overcome and a contract categorized, the consequences of that category apply.

⁸⁵ Law Commission Working Paper 81-82 para 7.15 refers to the unsuitability of basing rules about legal capacity on a notion of reasonable requirements according to the condition of life of minors but, as is pointed out by Ireland Contracts Report 117-118, the present law is merely recognising the fact of inequalities between different minors.

⁸⁶ Working Paper No 2 4-5 para 1.9; Latey Report 84 para 315.

⁸⁷ Case-law establishes the existence of four kinds of contracts in the category: contracts concerning land, contracts to subscribe for shares, partnerships and marriage settlements. There may be others.

⁸⁸ Treitel 419.

⁸⁹ Working Paper No 2 15-16 paras 1.32-1.34.

⁹⁰ The issue remains untested whether a minor can be sued in damages for breach of an executory contract to buy necessary goods, although the decision in *Roberts v Gray* [1913] 1 KB 520 shows that damages may be awarded against a minor for breach of some kinds of executory contracts. For law reform comment on the unsettled state of the law see New Zealand Report 3-4 para 13; Latey Report 83-84 para 314; Ontario Report 38; Alberta Report 4-5; British Columbia Working Paper 5-6; British Columbia Report 8-9; Law Commission Working Paper 10-11 para 2.6; Tasmania Working Paper 78; Ireland Contracts Report 13-14; Scotland Memo 16-19 paras 2.14-2.15; Ontario Contract Report 181-182.

⁹¹ Working Paper No 2 15-18 paras 1.32-1.39.

⁹² It is usually said that the category of contracts which are binding until repudiated contains four kinds of contracts: one modern English text regards the category as now closed - Treitel 416-419. There is however Australian authority that other kinds of contracts are included - Greig and Davis 769-771.

Thus a contract not falling within one of the three categories of enforceable contracts cannot be sued upon, even though beneficial to the minor.

(e) Positive aspects

3.21 A statement of defects should not hide positive aspects of the existing law. It has been said that the existing law adequately fulfils the objective of protecting minors,⁹³ and has achieved a satisfactory balance of competing policy considerations.⁹⁴ The very complexity of the law may allow just solutions in difficult cases, by enabling selection of a category with the most appropriate consequences for the case before the court. In Canada, for example, the category of contracts which are absolutely void has been developed and used in cases to defeat the purported ratification of improvident bargains.⁹⁵ Nevertheless the Commission believes that its proposals will preserve these advantages, while mitigating some of the defects of the existing law.

4. THE LAW IN PRACTICE

3.22 However the rules of law may be stated, and the defects and advantages of the existing law weighed, the effectiveness of the law cannot be judged in a vacuum. Minors, as a class, do make contracts. In aggregate, these contracts are numerous and commercially valuable.⁹⁶ Their nature and context, however, may be such that the legal rules and sanctions relating to minors' contracts are not of great relevance to their making, performance or enforcement. This section explores this theme, although lack of empirical studies of the contracting patterns of minors makes what follows somewhat speculative.⁹⁷ The research and comments of law reform bodies in other jurisdictions have been drawn upon here on the assumption that socioeconomic conditions are similar to those obtaining in Western Australia.

⁹³ Law Commission Report 4-5 para 1.12.

⁹⁴ Law Commission Working Paper 34 paras 3.5-3.7.

⁹⁵ This development is discussed and criticised by D R Percy *The Present Law of Infants' Contracts* (1975) 53 Can B Rev 1, 32-36. See also *De Garis v Dalgety & Co Ltd* [1915] SALR 102, dealing with a contract prima facie in the category of contracts valid unless repudiated.

⁹⁶ Some submissions to the Commission which produced the Latey Report unashamedly advocated lowering the age of majority to 18 to simplify and extend trade - Latey Report 30 para 82.

⁹⁷ As part of the research preliminary to the issue of its Working Paper, the Law Commission obtained from the Office of Population Censuses and Surveys in 1978 a report on spending habits of 16-17 year olds. Research was also commissioned by the Scottish Law Commission - Scottish Research Paper.

3.23 The inquiry here is as to the kinds of contracts minors make, and the degree to which the law may be called in aid of one or both parties. Since a minor is anyone under the age of 18, and the law applies to all minors alike, it is immediately apparent that a considerable range of contractual behaviour is covered by the same law. Subject to minimum requirements of understanding,⁹⁸ contracts may be made at any age, but will vary greatly in value and significance over the whole range: the contracts likely to be made by someone just under eight will be very different from those made by someone just under eighteen, married and living independently of parents.

(a) Family contracts

3.24 A first point is that, compared with contracts made by adults, a higher proportion of minors' contracts is likely to be made with family members or friends. Small loans, for example, may simply not be available from commercial sources. Many family arrangements made with young children may not be contracts at all, because they lack the element of an intention to create legal relations. With older minors, even though an intention to create legal relations may have existed, enforcement or non-performance is likely to have more to do with family or peer group pressure or indulgence than with strict legalities. In many such cases the law relating to minors' contracts is seldom called upon.⁹⁹

(b) Cash purchases

3.25 Outside the family, the vast majority of contracts will be cash purchases. Being executed on both sides, these are effective and cannot be upset under existing law: the other party having received the price will have no reason to sue; the minor having received value cannot recover money paid. The special rules protective of minors thus have no scope in which to act. Such contracts are however limited by the availability of cash to minors. Sources of cash for minors of tender years may be gifts from parents or relatives, or casual earnings while fully supported by parents or others. Amounts are likely to be small.¹⁰⁰

⁹⁸ Contracts by minors who are too young to understand the nature of the agreement are absolutely void - Working Paper No 2 6-7 para 1.13.

⁹⁹ An apparent exception is *Bojczuk v Gregorcowicz* [1961] SASR 128, where the plaintiff was uncle (by marriage) to the defendant.

¹⁰⁰ Scotland Research Paper 8-9 para 3.8 reveals that of the schoolchildren surveyed (with ages ranging from below 14 to over 17) more than half had 5 pounds or less spending money each week (excluding lunch money) with a further third having between 6 pounds and 10 pounds, and a very small minority having over 20 pounds.

Moving up the age scale, sources of cash and likely amounts increase, and include substantial support from parents or the state,¹⁰¹ earnings while self-supporting in whole or part, sale of assets, bequests and awards of damages. In some of these situations, particularly when the sum is large,¹⁰² the minor may not have immediate or complete control over the money, as with bequests¹⁰³ or awards of damages.¹⁰⁴ Given these sources, it seems a fair assumption that few minors will do themselves serious harm through making cash purchases.

3.26 Whatever the source of funds, most contracts made by minors are themselves of low value in terms of consideration exchanged,¹⁰⁵ although the outlay may be subjectively and relatively high in context of resources available to the minor. This too lessens the danger of serious harm to a minor's overall financial interests. Moreover, in many cash contracts, the minor is likely to be a consumer, so there is less need of a special legal regime designed in part to protect minors against bad bargains. Self-regulation in many industries supplying the consumer market, with or without the existence of consumer protection legislation, in general ensures that contracts with reputable traders will not, viewed objectively, be obnoxious. If any contract were obnoxious, the minor would have the benefit, as much as any adult, of consumer protection legislation designed to protect all consumers.¹⁰⁶ Even in cases where an adult might not be directly protected by such legislation, the fact of minority itself may give additional bite to measures which depend more on moral than on legal pressures, such as complaints to the Department of Consumer Affairs¹⁰⁷ or media publicity.

3.27 At this stage a general comment is appropriate. If indeed the bulk of contracts made by minors comprises low value cash consumer contracts, where the special rules protective of minors either do not operate or are not really necessary, it might seem that the policy of the

¹⁰¹ As from 1 January 1988 a person between the ages of 16 and 18 years is not qualified to receive an unemployment benefit, but is qualified to receive a benefit, to be known as a job search allowance - *Social Security Act 1947* (Cth) s 117A.

¹⁰² Instances of substantial sums being freely available to be squandered are sufficiently rare that the danger of occurrence can be discounted - see Latey Report 36 paras 113-114.

¹⁰³ The intervention of a trustee is likely.

¹⁰⁴ Where proceedings have been commenced, the minor needs to proceed through a next friend and settlement must be court approved: *Rules of the Supreme Court 1971* Order 70 r 2; *Local Court Act 1904* s 57; *Local Court Rules 1961* Order 3(9).

¹⁰⁵ The report obtained by the Law Commission in 1978 revealed that transactions by 16-17 year olds in the course of a fortnightly period involving more than 20 pounds were very much the exception - Law Commission Working Paper 4 para 1.7. For purposes of the Scotland Research Paper school leavers (most being over 18 at the time of the survey) were asked about the most expensive item purchased before 18: almost a quarter of the purchases cost less than 50 pounds, one-fifth between 50-100 pounds and a similar proportion between 200-500 pounds, 15% between 200-500 pounds, and very few more expensive than this - Scotland Research Paper 12 para 3.17.

¹⁰⁶ Contracts for accommodation are dealt with separately at para 3.32 below.

¹⁰⁷ *Consumer Affairs Act 1971* s 17.

law does not mesh with practice. Closer analysis may show that certain policy objectives are nevertheless achieved even though the law does not extend special protection to minors. Such analysis is attempted below.¹⁰⁸

(c) Executed contracts

3.28 Other contracts made by minors, though not cash purchases, are also likely to have been executed at the time of or shortly after the contract was made. These contracts include cash sales by minors, exchanges of goods and provision of services by or to a minor for reward. Again, because the contract is executed, the special rules protective of minors lack operation.¹⁰⁹

(d) Credit contracts

3.29 The description of minors' contracts given above suggests that the special rules for minors, and difficulties associated therewith, come into play mainly where the minor is given credit or the contract is otherwise executory. Yet even as regards credit contracts, the present law may have little practical relevance. There is little evidence of the extent to which commercial credit is available to minors in Western Australia. The Latey Report in 1967¹¹⁰ suggested it was not common in England: the Ontario Report in 1969¹¹¹ thought the credit market for teenagers was extensive and growing:¹¹² in both jurisdictions the age of majority was then 21. More recently it has been reported from Tasmania,¹¹³ where the age of majority has been 18 since 1973,¹¹⁴ that credit providers in that State will not knowingly contract with minors alone,¹¹⁵ and that elaborate age and credit checks are made by the business community to avoid unenforceable minors' contracts. It may be that, in Western Australia also, commercial interests avoid the legal difficulties involved in granting credit to minors by

¹⁰⁸ See paras 4.5-4.7 (selected contracts not to be discouraged); paras 4.8-4.16 (protection of minors); paras 4.17-4.20 (protection of other parties to contracts with minors); paras 4.25-4.26 (finality); paras 4.31-4.32 (security of property); para 4.33 (protection of third parties).

¹⁰⁹ See para 3.25 above.

¹¹⁰ Latey Report 27 para 70; 30 para 83.

¹¹¹ Ontario Report 24, 33 and 36.

¹¹² The Ontario Report also noted that credit granting to teenagers had become large-scale in the United States - id 33. See also The Council of State Governments 16-17.

¹¹³ Tasmania Report 13.

¹¹⁴ *Age of Majority Act 1973* (Tas).

¹¹⁵ Some accept guarantees of parents, but most insist upon the parent entering the contract as principal - Tasmania Report 13.

refusing to contract with them.¹¹⁶ In Scotland, however, mail order credit is relatively popular among minors,¹¹⁷ reflecting perhaps the prevalence of that form of credit in the community.¹¹⁸

3.30 Whatever its actual use by minors, credit tends to be granted to or withheld from a minor, not so much because of capacity or lack thereof, as of assessments of ability to repay. The Latey Report¹¹⁹ for instance doubted whether extension of credit was much influenced by an assessment of whether goods to be acquired with the credit were necessities. Whether or not the contract is for a necessary, where credit is extended, the credit provider is likely to require and rely upon some other source of repayment than the minor, such as a guarantee or indemnity given by an adult,¹²⁰ and may use a battery of non-legal sanctions to secure performance by the minor.¹²¹ If the minor seeks recovery or relief, having for example repaid some of the credit allowed, but being prepared to restore goods acquired, a credit provider may be prepared to come to some arrangement as a matter of good business practice and regardless of legalities. The legal background may influence the arrangement finally achieved, but perhaps not greatly.

(e) **Contracts of service**

3.31 Leaving aside credit contracts, the most important long-term or executory contracts made by minors are probably contracts of service.¹²² Under existing law these bind both parties, but only if generally beneficial to the minor.¹²³ The protective function of the law for

¹¹⁶ See also letter on file dated 12 February 1988 to the Commission from Australian Finance Conference WA Division.

¹¹⁷ Just under a quarter (24%) of schoolchildren surveyed in Scotland (age under 14 to over 17) had used mail order credit: 4% had tried to get a personal account in a shop (of those 87% had succeeded, making a total of 3% of all users) but only 2% had applied for other forms of credit, principally trading check accounts (refusal rate 21%). Credit of some kind had been used before age 18 by 33% of school leavers surveyed, mail order credit accounting for 25%, with 5% applying for personal shop accounts and 8% for other forms of credit (principally trading check accounts). Few appeared to have regular problems with keeping up repayments, but a very small number had encountered serious difficulties - Scotland Research Paper 14-17 paras 4.1-4.14.

¹¹⁸ For discussion of mail order credit in Britain see *Consumer Credit* Report of the Committee (chaired by Lord Crowther) 1971 Cmnd 4596 96-98 paras 2.5.9-2.5.15. There is no equivalent in Western Australia. The closest approximation in practical effect, purchase by layby, does not involve the provision of credit. Latey Report 84 para 318.

¹²⁰ Issues relating to guarantees and indemnities are discussed at paras 7.11-7.16 below.

¹²¹ Some of these are set out in Working Paper No 2 16-17 para 1.36. The technique there mentioned of retaining title to goods sold would in most cases now be subject to the *Credit Act 1984*. The efficacy against a minor of retaining title has not been tested in Western Australia.

¹²² Although in practice the relationship of employer and employee may last for some time, many employment contracts with minors will be terminable by either side on relatively short periods of notice. Contracts for apprenticeship or providing for training may however be for specified periods.

¹²³ Working Paper No 2 6 para 1.12.

minors, exercised through the requirement that the contract be beneficial, appears to be directed more to the objective fairness of the contract than to the minor's subjective wishes, so that a contract may continue to bind even if the minor subsequently decides for example to change careers. Again it may be doubted whether the special minority rules greatly influence the behaviour of either party. The fact that these contracts bind may well be a background factor in employers' decisions to engage minors,¹²⁴ and the existence of a rule against unduly one-sided contracts may exercise a restraining influence on employers. Nevertheless an employment contract is likely to be governed by an industrial award¹²⁵ controlling terms and conditions of employment, and disputes will be resolved against a known background of the law of employment rather than by reference to the law relating to minors' contracts. These mechanisms, protective of the interests of all workers, are clearly of greater importance in this context than the law of minors' contracts, and will not be affected by the Commission's recommendations.¹²⁶

(f) Accommodation

3.32 One important group of continuing contracts where the special protection of the law may be needed is that whereby minors obtain accommodation. Accommodation may be a necessary,¹²⁷ in which case the contract, to be binding, must be beneficial.¹²⁸ If the contract is not beneficial, or the accommodation not necessary, the minor may escape liability, although in the case of a lease¹²⁹ repudiation would have to occur within a reasonable time of attaining majority. In these kinds of contracts there is now some legislative intervention in favour of tenants.¹³⁰

¹²⁴ It is said that the category exists so that employers should not be discouraged from engaging minors.

¹²⁵ See also *Industrial Relations Act 1979* s 29(b).

¹²⁶ At paras 5.5-5.11 below the Commission recommends that the existing law continue to apply to contracts made by minors.

¹²⁷ *Duncomb v Tickridge* (1648) Aleyn 94: 82 ER 933 ("dyet, lodging and apparel"). In *Sultman v Bond* [1956] St R Qd 180 accommodation was regarded as capable of being a necessary, but on the particular facts a contract whereby work, labour and materials were obtained for construction of a house intended to be used as the matrimonial home by a minor engaged to be married was considered neither beneficial nor necessary. By contrast, in *Soon v Watson* (1962) 33 DLR (2d) 428 a small modern house for a married minor with one child (and another expected) was regarded as necessary.

¹²⁸ Working Paper No 2 5 para 1.10.

¹²⁹ Leases fall within the category of contracts binding until repudiated.

¹³⁰ See *Residential Tenancies Act 1987*.

(g) Other long-term contracts

3.33 Other long-term or executory contracts may well be made by minors. Some may be sufficiently analogous to contracts of service to be enforceable within that category: examples are contracts with "pop" musicians,¹³¹ boxers,¹³² billiardists¹³³ and authors.¹³⁴ Others, such as contracts concerning land, shares, marriage settlements and partnerships, will fall in the category of contracts valid unless repudiated. Contracts of this nature are not often entered into by minors but, being usually of considerable intrinsic value, are for that reason likely to be entered into with the assistance of professional legal or other advice. It is precisely these kinds of contracts that tend to come before the court.¹³⁵

(h) Conclusion

3.34 The foregoing discussion suggests that while minors as a class may make many contracts, the special rules which protect minors come into play directly less often than might be thought, and sometimes appear to be contradicted by practice.¹³⁶ A consideration of the law in practice need not be confined to examination of the kinds of contracts minors make. Other features arising from the fact that one party to a contract is a minor may, when problems arise, lead to solutions not in accordance with the strict legal position. These features include the willingness of parents to support their children or to accept their moral responsibility even where there is no legal liability on parent or child, adverse publicity associated with pursuing minors through the courts, and doubts about the enforceability of any judgment obtained against a minor because of lack of income or assets.¹³⁷

¹³¹ *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 Sol Jo 715; on appeal [1969] 1 QB 699.

¹³² *McLaughlin v Darcy* (1918) 18 SR (NSW) 585; *Doyle v White City Stadium Ltd* [1935] 1 KB 110.

¹³³ *Roberts v Gray* [1913] 1 KB 520.

¹³⁴ *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71.

¹³⁵ Some submissions to the Law Commission referred to the need for care in contracts with minors in the professional sporting and entertainment world. For some, this justified introduction of a procedure for validation of contracts in advance. For discussion of a validation procedure, see paras 7.8-7.9 below.

¹³⁶ Contracts for non-necessary goods are said not to bind minors, but if executed cannot be upset by either party.

¹³⁷ The first feature would lead to the other party receiving satisfaction in whole or part; the second and third to that party accepting a loss.

Chapter 4

OBJECTIVES

4.1 The stated objectives of the existing law have been noted above.¹ These and others should be considered with some care before any proposed reform can be properly assessed. Objectives here to be discussed are:

Freedom of commerce

Selected contracts not to be discouraged

Protection of minors

Protection of other parties to contracts with minors

Unjust enrichment and restitution

Protection of other social interests

Finality

Certainty

Security of property

Protection of third parties

1. FREEDOM OF COMMERCE

4.2 There is general acceptance of the proposition, qualified to a greater or lesser extent, that the economic life of the community is promoted by the ability of individuals to make binding contracts. Some general analysts of contract argue that contracts enable individuals to make best use of resources available to them.² There seems no reason to exclude minors from this activity and this benefit, provided that the benefit does accrue.³ In one sense minors are not excluded, in that they can make and enforce contracts by legal means, if they can find a contractual partner. That partner however has no reciprocal ability to enforce, except in the limited categories of contracts for necessities and contracts of service. If ability to enforce,

¹ Paras 3.2-3.4.

² For example see A T Kronman and R A Posner *The Economics of Contract Law* (1979) 1-4; R A Posner *Economic Analysis of Law* (3rd ed 1986) 79-85.

³ The proviso is given effect by the requirement that, where the law allows minors to bind themselves, for example in a contract for necessities, the contract must as a whole be of benefit to the minor - see at para 3.14 above.

by legal means, is a factor in deciding whether or not to make a contract,⁴ then minors are to that extent excluded from a general ability to contract.

4.3 Such tendency as there is for the general rule that contracts do not bind minors to exclude minors from contractual activity is recognised by the creation of categories of contracts for necessities and service, to which minors may bind themselves.⁵ The present law, by rendering all other contracts unenforceable against minors, appears designed positively to discourage adults from contracting with minors, except perhaps for cash.⁶ The difficulty of obtaining restitution from minors of benefits conferred but not paid for⁷ may be said to perform the same function. Adults are thus discouraged from, and minors to that extent are deprived of, the opportunity of making all other contracts, notwithstanding that some or perhaps many of those contracts might be perfectly proper and beneficial to both parties. The present law therefore, save in the exceptional categories of contracts for necessities and of service, suppresses the objective of freedom of commerce where minors are concerned as a general policy, and not only in those cases where the benefits of that freedom are not achieved because, for instance, of exploitation of one party by another.

4.4 If freedom of commerce is generally desirable, reform could seek to achieve that objective to a greater extent, perhaps by rendering minors' contracts unenforceable only where the benefits of free commerce are not achieved. All contracts with minors could be made binding, except where the other party has used the minor's inexperience to obtain a contract which is unfair to the minor, or the contract is otherwise improvident or unnecessary.⁸ Of course the objective of freedom of commerce must be weighed against other objectives. Removal of the disincentives to contracting with minors could result in an unacceptably greater number of cases where minors were disadvantaged, thus entrenching upon the objective of protection of minors.⁹ There might be less certainty¹⁰ as to which contracts would or would not bind minors, and more cases, perhaps funded from the scarce resources available for legal aid, might come before the already overloaded courts. The benefits and

⁴ It is suggested at para 3.30 above that ability to repay may be a more important factor than legal liability in a decision whether or not to grant credit to a minor.

⁵ These contracts are further discussed at para 3.7 above.

⁶ Contracts with minors for cash are discussed at paras 3.25-3.27 above.

⁷ See para 3.13 above.

⁸ The dangers which minors face in making contracts are discussed more fully at para 4.10-4.13 below.

⁹ This objective is discussed at para 4.8-4.16 below.

¹⁰ The objective of certainty is considered at paras 4.27-4.30 below.

disadvantages of change of this nature cannot however be calculated or weighed in any precise way; there are too many imponderables.

2. SELECTED CONTRACTS NOT TO BE DISCOURAGED

4.5 The existing law binds minors to two classes of contracts: for necessities and of service. As to contracts of service, and again subject to the question whether the binding nature of these contracts affects adult decisions to make them, the law thus facilitates deployment by minors of their labour on the market. It is unprofitable to speculate on the ends that employment of children may have served over the centuries. Included among these are effectively reducing the size of the family,¹¹ supplementing family income,¹² obtaining housing¹³ or employment¹⁴ for adult family members, denying the family poor relief,¹⁵ and of

¹¹ In England until the end of the seventeenth century a master invariably was obliged to provide board, lodging and clothing, in effect all necessities, and the apprentice lived as a member of the master's household: O Jocelyn Dunlop *English Apprenticeship and Child Labour* (1912) 179, 195-198. Early cases hold that an apprentice is not bound contractually, at least on the covenant to serve (*Gylbert v Fletcher* (1629) Cro Car 179; 79 ER 757 and see *De Francesco v Barnum* (1889) 43 Ch D 165) except by the custom of London (*Code v Holmes* (1623) Palm 361; 81 ER 1124) but apprenticeship clearly required the minor to be party to the indenture (*R v Inhabitants of Arnesby* (1820) 3 B & Ald 584; 106 ER 775) and other covenants have been held contractually binding on the minor (*Walter v Everard* [1891] 2 QB 369). For a Western Australian experience of youthful labour away from home see A B Facey *A Fortunate Life* (1981) ch 3.

¹² For one among many see P Gaskell *The Manufacturing Population of England* (1833) 93-94. The proposition that some parents "would willingly batten on the toil of their children" is put in different light by Alfred (Samuel Kydd) *The History of the Factory Movement* (1857) 47 attributing to (the first) Sir Robert Peel the understanding that "in some cases the parents themselves were not free agents, they having had the value of their own labour reduced by the introduction of machinery, not a few having been forced into unwilling idleness". It was perhaps only in the chimney sweeping trade that a parent might both reduce the family and gain financially - reports from 1785 (Jonas Hanaway *A Sentimental History of Chimney Sweeps* 25) to 1863 (*First Report of the Children's Employment Commission House of Commons Vol 18 lxxxviii paras 623-625*) testify to the market for "climbing boys". The words of Blake's (innocent) chimney sweeper could have been practically, if not legally, true:

"And my father sold me while yet my tongue
Could scarcely cry "'weep! 'weep! 'weep! 'weep!"
(*Songs of Innocence* 1789).

¹³ E Forster *The Pit Children* (1978) 25 (writing of conditions in 1842): "Should the widow have boys aged from four and a half upwards, then the master's charity would be forthcoming. He would offer her children work, and allow her to retain the colliery cottage."

¹⁴ *Report from the Committee on the Minutes of Evidence representing the Callico Printers* Reprinted HC 1806-1807 (130) ii 129: "Your Committee felt surprised, that any parent could be persuaded to apprentice their children upon such terms, but their surprise soon ceased, when they found that Masters have compelled Journeymen in their service so to bind their children, under the threat of dismissal from employment if they refused"; *Report of the Committee on the Bill to Regulate the Labour of Children in the Mills and Factories of the United Kingdom Minutes of Evidence* (1831-1832) HC xv 126: Richard Coulton - "Mr Varley asked my father if he had some young children, because he would not take him unless he had some children."

¹⁵ Sadler, in support of the Factories' Regulation Bill Hansard vol XI (3rd ser 1832) col 346: "The Overseer, as is in evidence, refuses relief if they have children capable of working in factories whom they refuse to send there." See also Richard Oastler's allegorical weaver in *Eight Letters to the Duke of Wellington* (1835) 23. The use of apprenticeship of parish children as a method of poor relief was on a different

course generally providing a source of cheap labour.¹⁶ In present times there seems no reason why adults should be discouraged from employing minors, provided potential exploitation is nullified. This last is achieved by the existing law not only by the requirement, in favour of minors only, that such contracts be beneficial,¹⁷ but also by the general law of employment.

4.6 As to contracts for necessities obtained on credit, these are almost by definition unobjectionable.¹⁸ As noted above,¹⁹ it may however be doubted whether the legally binding nature of such contracts induces other parties to make them, where otherwise they would not.

4.7 The existing law also effectively renders all executed contracts binding by refusing to enable either side to recover money paid or goods supplied. In terms of number of contracts made and possibly aggregate value, executed contracts, usually purchases for cash, probably represent a substantial portion of contracts minors do make, or indeed could induce other parties to make with them, even if all contracts by minors were binding on them. Minors have no special protection here, even if the contracts made are not beneficial, although some remedy may be obtained through the law and the commercial pressures and practices that protect all consumers. The existing law thus accepts that some contracts will bind minors, legally or practically, and admits of the operation of other factors than protection of the minors concerned, such as finality of transactions in respect of executed contracts.

3. PROTECTION OF MINORS

4.8 This is generally accepted as the major objective of the present law: the Commission too accepts it as the major objective. Despite that general acceptance, there has been little

footing, and did not depend on contract. See generally O Jocelyn Dunlop *English Apprenticeship and Child Labour* (1912) ch XVI 248-260.

¹⁶ For one summary see Article VIII *The Factories* (1836) 26 Westminster Review 174, 181 in *Working Conditions in the Victorian Age* (1973): "On account of their great cheapness there is, as the whole evidence shows, a constant demand for children of the younger ages." The damage to trade that would ensue from reduction of the hours of work and limitation of ages of working children is a constant theme in the nineteenth century movement for reform of child labour: see the resolutions of a meeting of millowners opposed to factory legislation 5th March 1831 given in Alfred (Samuel Kydd) *The History of the Factory Movement* (1857) 109-113 and Richard Oastler's 'synopsis' thereof id at 113; also Cobbett's 'discovery' that the great stay and bulwark of England was, not her Navy, her maritime commerce, her colonies or, as had even been whispered, the Bank, but "was to be found in three hundred thousand little girls, or rather in one-eighth of that number. Yes; for it was asserted, that if these little girls worked two hours less per day, our manufacturing superiority would depart from us.": Hansard 3rd ser vol 19 col 912.

¹⁷ See para 3.14 above.

¹⁸ Protection is moreover provided by requirements that the contract be beneficial and that only a reasonable price need be paid - *ibid*.

¹⁹ Para 3.30.

discussion of what minors are to be protected from, apart from token references to immaturity, inexperience, lack of business understanding, lack of judgment and the like.²⁰ A search of legal literature has disclosed little published work on the jurisprudential underpinnings for legal intervention in favour of minors. Two slightly different justifications for intervention have been put forward. One writer²¹ argues that making promises within an existing convention, whereby a promise creates a commitment, involves a moral obligation because it invites the trust of the promisee in the promisor's future intentions.²² Holding people to promises is a way of taking them seriously and allowing them to take responsibility for their own choices. If the assumption of an obligation by way of a promise is not taken seriously, to that extent the promisor is not taken seriously as a person. This, in the writer's view, is quite proper in the case of the very young.²³ Another writer²⁴ likens the contractual incapacity of children to a mandatory cooling-off period.²⁵ A child may show poor judgment in making a particular contract, and should have an opportunity to withdraw. Good judgment, in this context, requires a disengagement from the immediacy of the interests and desires which prompt a course of action. A lack of good judgment means a lack of capacity to evaluate critically those interests and desires, through an inability to form an imaginative conception of the moral consequences of the proposed course of action and to anticipate its effect on one's own character.²⁶ Persons have a natural history in which they undergo moral and psychological development along predictable lines and normally acquire various capacities, including judgment or moral imagination. That capacity cannot be expected in children as it can in adults, hence the existence of rules which operate like a mandatory cooling-off period seems perfectly acceptable.²⁷

4.9 No published work has been found dealing directly with the economic or other consequences of protecting or not protecting minors in contracting. The Latey Report²⁸ and other studies²⁹ directed to considering the age of majority cite evidence about physical maturity in children, but make little reference to literature about psychological development

²⁰ It may be that protection is less for the benefit of the minor personally than for family or other interests - see further para 4.24 below.

²¹ C Fried *Contract as Promise* (1981).

²² Id 16-17.

²³ Id 20-21.

²⁴ A T Kronman *Paternalism and the Law of Contracts* (1983) 92 Yale LJ 763.

²⁵ Id 787.

²⁶ Id 789-790.

²⁷ Id 795-796.

²⁸ Latey Report 28 paras 73-74, 45-46 paras 142-145.

²⁹ For example New South Wales Report 9 para 14; Ontario Report 23-24; The Council of State Governments 6-7.

of children with respect to an ability to make commercial judgments. What follows is therefore somewhat speculative, but to a certain extent draws inferences from the existing law about the dangers that framers of that law sought to guard against.

4.10 Minors may need to be protected from different kinds of danger. One kind is the danger of exploitation by the other party to the contract through the minor paying too high a price,³⁰ agreeing to terms which are too onerous, or otherwise entering contracts which are one-sided or unfair. Here danger manifests itself in an objectively bad bargain.

4.11 Another kind of danger is that of minors acquiring things they do not want or need. Minors may be unable to weigh competing needs, perhaps preferring small short-term gain to long term advantage, or may not appreciate their own real needs.³¹ This danger manifests itself in unnecessary contracts which need not be objectively bad bargains: there has been a misapplication of resources.

4.12 A third kind of danger is that of failing to appreciate consequences. Unperceived consequences may include an inability to make other more desirable contracts³² because resources have been used or committed, or the need to incur other expenditures required for the proper enjoyment of a contract.³³ Minors might also not foresee the consequences to others of a failure to perform³⁴ or the risks inherent in a contract, such as a fall in the value of shares purchased, calls being still payable.³⁵ The danger here does not necessarily manifest itself in an objectively bad contract (though failure to appreciate the extent of potential damages may mean an inadequate consideration has been demanded) but rather one that costs more than at first sight appeared. At bottom, there has again been a misallocation of resources.

³⁰ Existing law protects against this in the case of necessary goods sold and delivered (*Sale of Goods Act* s 2 requires that a reasonable price be paid) and probably other necessities: see at para 3.14 above.

³¹ Here particularly, but also elsewhere, there is a temptation paternalistically to substitute a 'good' adult judgment for a 'bad' minor one. Comment here should be understood as confined to the more extreme manifestations of the danger. An archetype might be a perceived need of nourishment satisfied by the purchase of spun sugar rather than spinach.

³² A minor might regret a service contract or apprenticeship because higher remuneration or better terms are offered, as was apparently the case in *De Francesco v Barnum* (1890) 45 Ch D 430. The problem is not confined to minors, as witness recent cases of young songwriters seeking to escape music publishing contracts and accompanying restraints, once they have made their mark: see *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 (21 year old); *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 (23 year old at time of first contract).

³³ Examples are the licence fees, insurance, repairs and running costs associated with use of a motor vehicle.

³⁴ This in turn may lead to a failure to appreciate the extent of damages the other party might suffer from breach.

³⁵ An example is *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452.

4.13 Finally there is the danger of overestimating ability to perform: a change of plans in life may be inhibited by an existing contract,³⁶ loss of employment or simply rises in the cost of living may mean credit commitments cannot be met, or a minor may lack the skill or knowledge to perform services or deliver goods to contract specifications.³⁷ These last two dangers may be summarised as referring to improvident contracts.

4.14 The existing law protects against some of these dangers, but to a limited extent and sometimes by circuitous routes. The unenforceability of all contracts not within the limited categories of contracts for necessities and of service means that the minor can escape executory liability on such contracts whether they be objectively bad or fair, and whether or not any of the dangers discussed above have materialized. On the other hand, the difficulty of recovering money paid or property transferred under an executed contract³⁸ means that, as regards law specific to minors, such contracts cannot be undone whether bad or fair, whether dangers have materialized or not.

4.15 This second result may not be as unfortunate, from a protective point of view, as at first appears. Many executed contracts by minors will be small cash consumer purchases. In such cases, while cash purchases can be impulsive, the need to have and to hand over cash provides some restraint. Most minors will have an idea of "the value of money": some will have earned it.³⁹ Given the possible sources of money, amounts will be low (at least objectively) and excess to needs, as are the casual earnings of a minor fully supported by a parent. The law protective of consumers generally will give some safeguard against

³⁶ In *Minister for Education v Oxwell and Moreschini* [1966] WAR 39 an agreement for training as a teacher required repayment by way of damages of all allowances previously made if the student's course of study was terminated for any reason other than death, disease or accident. It also provided that if the student married, the course would be terminated. The defendant wished to marry, was required to resign, and was held to the contract, it being analogous to a contract of service, and as a whole beneficial.

³⁷ There may of course be a cynical reliance on the defence of minority, as in *Sellin v Scott* (1901) 1 SR (NSW) Eq 64, where the plaintiff reports the defendant as saying "It does not suit me to keep to that agreement, I am going to chuck it."

³⁸ See para 3.13 above

³⁹ In the recent survey conducted in Scotland over a third of the schoolchildren reported some form of paid work. Almost all had some form of savings account; nearly two-thirds with a bank and some two-fifths with a building society: nearly a third had more than one type of account - Scotland Research Paper 9 para 3.10. Similarly most school leavers had had some form of savings account by the time they were age 18 - id at 12 para 3.16

objectively bad contracts; as for unnecessary contracts,⁴⁰ the making of these may be seen as part of the process of learning by experience.⁴¹

4.16 Minors in general, therefore, might not cause great harm to themselves even if unable to resile from executed contracts. Nevertheless, and even discounting the "caviare-eating, Ferrari-buying minority" whose tendency "to squander away their money is as great as it ever was"⁴² cases may arise where significant harm results to a minor who misallocates available resources by entering one or more bad or unnecessary, but executed, contracts.

4. PROTECTION OF OTHER PARTIES TO CONTRACTS WITH MINORS

4.17 To the extent that a contract with a minor is binding on or executed by the minor, the other contracting party is protected. Indeed, the protection can be greater with an executed than with a binding but executory contract: the other party may, if there has been no total failure of consideration, keep the contractual price actually paid for non-necessary goods which have been delivered, but can recover, if the price is yet unpaid, only a reasonable price for necessary goods sold and delivered.⁴³ Cases may even arise where the other party is overprotected, as where a minor pays in part, receives some value, and then resiles from the contract.⁴⁴

4.18 Where the contract is not executed, under existing law protection of the other party to a contract not binding on a minor is minimal. The other party cannot sue for failure by the minor to perform contractual obligations, but may escape liability to perform if performance by the minor is a precedent requirement to that liability, and the minor fails or refuses to perform.⁴⁵ Where the contract requires the other party to perform first, the minor can insist on

⁴⁰ It would be rare for a cash contract to be improvident in the ways discussed at paras 4.12-4.13 above

⁴¹ Several of the young respondents to the pamphlet circulated to schools by the Law Commission (see Law Commission Report 5-6 para 1.14) who favoured reduction of the age of contractual capacity to 16 gave as a reason the increased independence and sense of responsibility that the change would bring.

⁴² Latey Report 36 para 113.

⁴³ *Sale of Goods Act 1895* s 2.

⁴⁴ In *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 Miss Tulip Steinberg, having subscribed for shares in the defendant company and paid a deposit and some calls, subsequently had her name removed from the register of shareholders in respect of the partly paid shares, which apparently had some value, but recovered nothing of the amount already paid, thereby losing her dowry altogether.

⁴⁵ This stems from the general law of contract: whatever immunity from suit minors have, they have no special advantages as plaintiffs. In a contract for sale of non-necessary goods, payment and delivery to take place concurrently, a minor cannot for instance refuse payment but sue successfully for non-delivery.

performance,⁴⁶ perhaps thereby gaining benefits which the other party may not retrieve,⁴⁷ whereas the other party has no legal right to enforce performance by the minor when that falls due. The same inability to recover benefits conferred arises where the other party performs without compulsion, but before performance by the minor becomes due or is executed.

4.19 Lack of protection of other parties extends to depriving them of protection derived from other, non-contractual, areas of law. Such parties cannot sue in tort if the effect of that action would be indirectly to enforce against a minor a contract that was itself otherwise unenforceable.⁴⁸ The one doctrine directly protective of the other party to a contract with a minor is that which, at the least, allows recovery from the minor of property obtained through fraud.⁴⁹ The scope of the doctrine is uncertain: there is doubt whether, for instance, it allows recovery of other property for which the property originally transferred has been exchanged.⁵⁰

4.20 A recurrent theme in discussions about reform is the lack of legal mechanisms for recovery from minors of benefits retained but not paid for, payment here referring not necessarily to money, but to the consideration to be provided by the minor.⁵¹ Most of those who deal with the matter recommend strengthening the law in favour of other parties who have dealt with minors.⁵² The Latey Report went further than advocating restoration of benefits obtained, and recommended that the law permit or require fair compensation for

⁴⁶ If the other party refused to perform, the minor could terminate the contract and sue for damages. An action for specific performance would fail because of lack of mutuality - *Flight v Bolland* (1828) 4 Russ 298: 38 ER 817. It was suggested in the Law Commission Working Paper 68-69 para 6.20 and 70-71 paras 6.22-6.24 that specific performance could be ordered, in favour of a minor, on terms that the minor also perform, either concurrently or in the future.

⁴⁷ For discussion of the difficulty of recovering benefits see para 3.13 above.

⁴⁸ See para 3.10 above.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Latey Report 80-82 paras 300-309; Ontario Report 40-44 (discussion); Alberta Report 12-13 (discussion) 28-29 (recommendation); British Columbia Working Paper 13-16, 20-22, 25 (discussion) 48-49 (recommendation); British Columbia Report 12-14, 16-17, 18-19 (discussion) 31-32 (recommendation); South Australia Report 7 (minority: the majority favoured provision for restitution to a minor - 8); Law Commission Working Paper 58-64 paras 6.5-6.12; Law Commission Report 14-16 paras 4.16-4.23; Ontario Contract Report 184 (discussion) 204 (recommendation). The Ireland Contracts Report based its recommendations on a restitutionary approach - Ireland Contracts Report 103-110; Scots law, on the other hand, has always had an obligation to restore property or money still retained by a pupil or minor where a contract is challenged because void, or reduced for minority and lesion - Scotland Memo 38 para 2.39, 39-40 para 2.41, 70 para 3.9 - and Scotland Report 17-18 paras 3.34-3.37, 37-38 para 3.111 recommends application of the general law of unjustified enrichment to the void transactions of those below 16, and to cases where the contract of a 16-18 year old is set aside.

⁵² The Latey Report was particularly emphatic - see 81 para 302, 82 para 307, 88 para 335. See also Alberta Report 28-29; British Columbia Working Paper 48; British Columbia Report 31; Law Commission Working Paper 58-64 paras 6.5-6.12; Law Commission Report 15-16 paras 4.21-4.23; Tasmania Working Paper Recommendation 9.1; Ireland Contracts Report 103-106; Ontario Contract Report 204.

benefits received, where restoration itself could not be made.⁵³ The Law Commission⁵⁴ and others⁵⁵ rejected this extension, considering that it came too close to enforcement of contracts which were unenforceable under the existing law, although the Law Commission did recommend⁵⁶ that provision be made for recovery of property even where there was no fraud. Since protection through restoration of benefits conferred is of such importance, it is further discussed under the next heading.

5. UNJUST ENRICHMENT AND RESTITUTION

4.21 Recovery from a fraudulent minor is the one instance of restitution permitted by existing law: it is clearly based on a notion of unjust enrichment, and was developed in the equity jurisdiction before fusion with the common law jurisdiction. Just as the other party could not, and cannot now in the absence of fraud, recover from the minor benefits conferred under a contract,⁵⁷ so also the minor could not and cannot recover from the other party, where the minor had received some part of the consideration.⁵⁸ The law here runs counter to the objective of protection of minors: even if it be thought that the danger of losing property without compensation should remain part of the law, as a disincentive to other parties making

⁵³ Latey Report 81 para 303, 82 para 307-309. The Ireland Contracts Report, in recommending a restitutionary approach, echoes the Latey Report.

⁵⁴ The Law Commission Working Paper gave full consideration to the Latey Report in Part IV 39-49 paras 4.1-4.15 and dealt specifically with the issue of minors' liability to account at 44-45 para 4.7 and 47-48 paras 4.11-4.14. The only circumstance in which it was thought proper to allow a compensatory remedy was where the minor had disposed of goods with the purpose of defrauding the supplier - *id* at 60-62 paras 6.9-6.10. Even this possible variation was in the end not pursued - Law Commission Report 15-16 para 4.23.

⁵⁵ Ontario Report 50-51; South Australia Report 6-7 (majority view). Others again have accepted the Latey Report view on this point - Alberta Report 28-29; British Columbia Working Paper 48-50; British Columbia Report 31-32; South Australia Report 7 (minority view); Tasmania Working Paper Recommendation 9.1 (if the contract is enforceable). The Scotland Memo, too, gave consideration to introduction of a flexible rule whereby a minor who seeks restitution but is unable to restore benefits received could be required to make such restitution or recompense as is equitable in the circumstances of the case. This proposal would have resulted in change of the present law of Scotland under which, by special modification of the general rules for unjustified enrichment, a pupil or minor who was unable to restore benefits received could nevertheless recover benefits conferred - see generally Scotland Memo 186-189 paras 5.96-5.99 (preferred option) 212-213 para 5.123 (second option). The Scotland Report however recommends application of the general law of unjustified enrichment to all cases where a transaction is void (under 16) or set aside (16-18), without special modification in favour of young people, so that full restoration by both parties will be required - Scotland Report 17-18 paras 3.34-3.37, 37-38 para 3.111.

⁵⁶ Law Commission Working Paper 60-61 para 6.9; Law Commission Report 15 para 4.21. The tentative recommendation in the Working Paper was narrower than that finally made in the Report, in that it referred only to property retained by the minor in specie, whereas the recommendation in the Report extended to property representing the property originally acquired by the minor. The United Kingdom Act enacts the Law Commission's draft Bill as contained in its Report with only very small changes.

⁵⁷ See para 3.13 above.

⁵⁸ *Ibid.*

contracts with minors, there is no justification for applying the same rule to minors, unless indeed they too are to be discouraged from contracting, except in limited categories.

4.22 Fusion of the jurisdictions of equity and common law has not resulted in equitable remedial doctrines becoming available in the field of minors' contracts. Suggestions have been made that recovery should be permitted where, the contract having broken down, the *status quo ante* can be restored,⁵⁹ but no such doctrine has developed. By way of contrast, in other areas of law where there are elements of one party taking advantage of another, for example undue influence and unconscionability, the equitable remedy of rescission provides effective relief through restoration of the *status quo ante*.

4.23 Most Working Papers and Reports dealing with minors' contracts have recognised the unfairness of allowing unjust enrichment to remain in the hands of minors or other parties to contracts, and have made tentative or final recommendations designed to provide a remedy.⁶⁰

6. PROTECTION OF OTHER SOCIAL INTERESTS

4.24 Without indulging in too much speculation, it is possible to suggest other interests which have been, perhaps still are, indirectly protected by the law relating to minors' contracts. A brief list is protection of parents or other relatives, protection of family property and protection of the public purse. Parents may well feel a moral obligation to meet the contractual defaults of their children, even if they are themselves not legally liable, but may feel less inclined to do so if the children are not legally bound. In other times, when efforts were made through marriage, marriage settlements or otherwise to concentrate and retain family property through the generations, restriction on contracting by minors served to prevent dissipation of the property.⁶¹ At the same time settlements, which tended to preserve

⁵⁹ See for example *Valentini v Canali* (1889) 24 QBD 166 as discussed in Sutton 77-79. That case was decided under the *Infants Relief Act 1874* (UK), and it has been argued that before the Act a minor could not recover money paid in performance of the contract, whereas the Act was designed to remedy this by rendering certain contracts void and not merely voidable, so as to permit recovery of money in accordance with the usual common law rules - G H Treitel *The Infants Relief Act, 1874* (1957) 73 LQR 194, 202. See further P S Atiyah *The Infants Relief Act, 1874 - A Reply* (1958) 74 LQR 97, 101-103; G H Treitel *The Infants' Relief Act 1874 - A Short Rebutter* (1958) 74 LQR 104, 106-107.

⁶⁰ Latey Report 80-83 paras 300-310; Alberta Report 28-29; British Columbia Working Paper 48; British Columbia Report 31; Law Commission Working Paper 58-64 paras 6.5-6.12; Law Commission Report 15-16 paras 4.21-4.23; Tasmania Working Paper Recommendation 4.2, 9.1 (where the contract is binding or enforceable); Ireland Contracts Report 109-110; Ontario Contract Report 204. See also the minority view in the South Australia Report 7.

⁶¹ No doubt credit and loans at high interest continued to be supplied to minors, in the hope of ratification after majority, or that parents would pay. The former was much in mind of the promoters of the Infants'

property in family hands,⁶² though not made binding on minors were at least valid unless repudiated within a reasonable time of majority. It may be doubted whether family property in the sense now discussed remains a significant object of protection at the present time in Western Australia. If it does, other legal mechanisms such as the trust are available to protect the property from the extravagant minor. Employment of minors may lessen the need that they or their families may have for economic support from the State. If minors have provision for their maintenance, from their own labour, their parents or the State, rules which permit them to satisfy their own day-to-day needs, but inhibit their squandering the provision, have a similar effect.

7. FINALITY

4.25 It is undoubtedly important that limits be set on the time within which transactions can be reopened or questioned: the general reasons for seeking finality in transactions need not be catalogued. The existing law of minors' contracts provides finality, sometimes even at the expense of other factors. Thus executed contracts usually cannot be undone,⁶³ and certain contracts will bind unless repudiated within a reasonable time of attaining majority.⁶⁴

4.26 In other situations lack of finality is a criticism which can be levelled at the existing law. There is some authority that, with respect to contracts valid until repudiated, a repudiation made during minority can itself be retracted during minority or within a reasonable time of attaining majority.⁶⁵ The other party must thus wait until majority is achieved, and an unspecified but reasonable time thereafter, before being sure that the contract is fully binding. Possibly the position is the same with contracts not binding unless

Contracts Bill (passed as the *Infants Relief Act 1874* (UK)): Hansard 3rd ser Vol 219 at 1225; the latter was sometimes realized - the living intended for Edmund Bertram had to be otherwise disposed of to meet the extravagances of his elder brother Tom: Jane Austen *Mansfield Park* ch 3. A precursor to the *Betting and Loans (Infants) Act 1892* (UK), Mr Henry Mitchell's Loans to Infants Bill of 1872, was certainly perceived as a measure to protect the children of the rich - see note in [1872] *Law Journal* 277. The same perception dogged the *Betting and Loans (Infants) Bill of 1892* (passed as the *Betting and Loans (Infants) Act 1892* (UK)): Hansard 4th ser Vol 352 at 1001 and 1005. The earlier remarks of the Earl of Aberdeen had no doubt done some damage: "Perhaps, no body of individuals in this country is more exposed to the evils aimed at by this Bill [Betting by Infants Bill 1891, later withdrawn] arising from this pest of money-lending circulars, than the members of your Lordships' House, whether as sons or fathers.": Hansard 3rd ser Vol 350 at 1326.

⁶² See P S Atiyah *The Rise and Fall of Freedom of Contract* (1979) 131-133; and generally M R Chesterman *Family Settlements on Trust: Landowners and the Rising Bourgeoisie* in G R Rubin and D Sugarman (eds) *Law Economy and Society* (1984) 124-167; E Spring *The Family, Strict Settlement and Historians* id at 168-191.

⁶³ Cash purchases are discussed at paras 3.25-3.27 above.

⁶⁴ The category is discussed in Working Paper No 2 8 paras 1.17-1.18.

⁶⁵ Id 8 para 1.17 fn 30.

ratified: a minor might make a contract, refuse to perform⁶⁶ but still, with the mature judgment that majority brings, decide that the contract is beneficial and seek to ratify.⁶⁷ Similarly, where a contract is not binding unless ratified and no step is taken to repudiate or ratify, the contract languishes in limbo until some limitation period operates.

8. CERTAINTY

4.27 A brief comment on the kinds of uncertainty inherent in the existing law was made earlier.⁶⁸ Certainty in the law requires rules which are clear and easy to follow and apply, and which can be seen as applicable to all cases which may arise, but becomes less important where it is thought necessary that individual cases be decided on their particular merits to achieve substantial and individual justice. Uncertainty, particularly in the law of contracts, is generally regarded as undesirable: it inhibits contracting; if not actually dissuaded, people contracting in an uncertain climate may devote resources (unnecessarily, if the law were more certain) to clarifying or dealing with uncertainty in advance. Uncertainty of legal outcome may lead to economically unsound decisions about performance, breach and settlement, if the parties have different attitudes to the risks inherent in litigation.⁶⁹ Increased litigation in turn is a general cost to society.

4.28 Specifically in the context of minors' contracts, parties dealing with minors on credit⁷⁰ under the existing law tend to take indemnities⁷¹ from adults. At a cost, they thus bypass issues of uncertainty both as to minors' capacity to contract and ability to repay. If the law were changed so that minors became bound in a wider range of contracts, the practice of

⁶⁶ Refusal to perform may constitute actual or repudiatory breach such as to give the other party the right to terminate the contract, pursuant to the general law of contract. In apprenticeship contracts binding on the minor, repudiatory conduct will not give the other party a right to end the contract unless termination is for the benefit of the minor, or the minor's conduct is such that continuation of the relationship is impossible - *Waterman v Fryer* [1922] 1 KB 499.

⁶⁷ These difficulties are dealt with in the New South Wales Act through the concept of a "civil act", which includes repudiation of contractual liability as much as creation thereof - s 6(1). All beneficial "civil acts" are presumptively binding on minors - s 19. See also Harland 135-136 para 1011.

⁶⁸ See para 3.17 above.

⁶⁹ For discussion of the effects of uncertainty on parties' decisions on these matters see A Y Sieta *Uncertainty and Contract Law* (1984) 46 U Pitt L Rev 75, 108-112. As to settlement, a contrary view could be taken - see J F Burrows *Contract Statutes: The New Zealand Experience* [1983] Stat L R 76, 90: "It may not be true that a firm rule is always the best guide to negotiating a settlement. In many cases the knowledge of both parties that fairness to both is the goal may be a more acceptable starting premise." [footnote omitted]

⁷⁰ In cash sales and other executed contracts the existing law promotes certainty by, in general, preventing the minor from going back on the transaction. The rules in the area are however themselves somewhat unclear - see above para 3.13.

⁷¹ Indemnities and guarantees of minors' contracts are dealt with at paras 7.11-7.16 below.

taking indemnities would be likely to continue, as ability to repay would still be a major factor. If the changes also increased uncertainty this, together with a chance of success in a wider range of cases, may induce parties who contract with minors not only to pursue more claims, but also to appear less willing to settle, being probably more able to absorb associated costs.⁷² Increased litigation, or the threat thereof, may in turn drive more minors to seek legal aid, thereby increasing costs to society: greater intransigence from other parties to contracts with minors about settling disputes may force more minors to accept unfavourable settlements, with consequent injustice in individual cases.

4.29 Analyses and criticisms of the unreformed law of contracts with minors often stress the uncertainty of the existing position.⁷³ Options for reform are sometimes rejected because it is argued that they will increase uncertainty of outcome.⁷⁴ This is particularly true with respect to proposals which place a wide discretion in the hands of adjudicatory bodies. Such criticisms have been made generally⁷⁵ as well as specifically in relation to the law of minors' contracts.⁷⁶ Uncertainty arising from conferral of a wide discretion may however be more acceptable in jurisdictions and areas of law where few cases arise.⁷⁷ Uncertainty as to the

⁷² Uncertainty may lead a "risk averse" party (assumed to be comparatively less wealthy) to settle with a "risk neutral" opponent, the former's belief about the justice of the case notwithstanding - A Y Sieta *Uncertainty and Contract Law* (1984) 46 U Pitt L Rev 75, 108.

⁷³ D R Percy *The Present Law of Infants' Contracts* (1975) 53 Can B Rev 1, 55; New Zealand Report 6-7 paras 23-25; Latey Report 74-75 para 273; Ontario Report 32; New South Wales Report 13 para 34, 16 Appendix A para 1; Alberta Report 27; British Columbia Working Paper 1; British Columbia Report 5; Law Commission Working Paper 1 para 1.1, 27-29 para 2.28; Law Commission Report 4 para 1.11; Tasmania Working Paper 24-26 para 4.2 passim; Ireland Contracts Report 85; Scotland Memo 74-75 paras 3.17-3.18; Ontario Contract Report 177; Scotland Report 7 para 2.17.

⁷⁴ Latey Report 75 paras 274-275 (different age groups with different rules); Alberta Report 26-27 (New South Wales concept of contracts which are for the benefit of the minor); British Columbia Working Paper 38 (similarly), 46 (Alberta majority proposal on contracts which should bind minors); British Columbia Report 26 (New South Wales), 30 (Alberta); South Australia Report 6 (different age groups with different rules; New Zealand principle that a court may declare a contract previously entered into to be binding); Law Commission Working Paper 36-37 para 3.12 ("qualified enforceability"), 47-49 paras 4.11-4.15 (Latey Report); Ireland Contracts Report 99-100 ("qualified enforceability"); Ontario Contract Report 192 (New South Wales).

⁷⁵ G H Treitel *Doctrine and Discretion in the Law of Contract* (1981) (An Inaugural Lecture delivered before the University of Oxford on 7 March 1980). For criticism of recent reforms of contract law in New Zealand, where a discretionary approach of this nature has consistently been taken, see D W McLauchlan *Contract and Commercial Law Reform in New Zealand* (1984) 11 NZ Uni L R 36; F Dawson *The New Zealand Contract Statutes* [1985] LMCLQ 42.

⁷⁶ Ontario Report 51-52 (of the Latey Report); Law Commission Working Paper 47-49 paras 4.11-4.15 (of the Latey Report). Those who recommend conferral of wide discretions themselves recognise the problem of uncertainty thus raised: see New Zealand Report 15 para 47(3); New South Wales Report 87 Appendix G para 30 (Note on the Proposed Bill); British Columbia Working Paper 35, 49; British Columbia Report 24, 31-32; Ireland Contracts Report 107-108.

⁷⁷ J F Burrows *Contracts Statutes: The New Zealand Experience* [1983] Stat L Rev 76, 83-84 citing F M B Reynolds (1977) 3 Recent Law NS 239.

rules governing formulation of all contracts is unacceptable,⁷⁸ whereas uncertainty of loss apportionment in the aftermath of a frustrated contract, arising from a discretionary power, may be justified.⁷⁹

4.30 It is difficult to theorise upon, let alone measure, the respective merits of unreformed certainty and reforms introducing discretionary power, especially when, as in the area of minors' contracts, disputed cases under the unreformed law appear rarely through decisions of courts. There may be few reported cases because fact situations giving rise to dispute are themselves uncommon. In that case a change introducing discretion, and hence uncertainty, will affect few people, but will allow for better decisions for those aggrieved. On the other hand fact situations producing hardship may be quite common, but the unjust unreformed law may be so certain that claims are never litigated.⁸⁰ Either way, a reform introducing discretions would seem desirable. If however it is true that uncertainty becomes less acceptable as the number of cases governed by the law increases, a reform which both increases the number of potential disputes and renders their resolution more uncertain should be viewed with caution. This would be so in the case of a reform which encouraged minors to make more contracts, but at the same time rendered the status of those contracts uncertain by introducing adjudicatory discretion.

9. SECURITY OF PROPERTY

4.31 Certainty becomes of great importance where property is concerned. Property is discussed separately here, although there are overlaps with the objectives of finality of transactions and certainty of the law. The existing law of minors' contracts promotes certainty of title and passing of property in various ways. The finality of executed contracts⁸¹ promotes certainty of title, many executed contracts being sales of goods. Transactions relating to land fall in the category of contracts binding unless repudiated.⁸² This provides greater certainty of title than placing such contracts in the category of contracts not binding unless ratified, and

⁷⁸ The postal rule, though anomalous, is sometimes justified on grounds of certainty - Lindgren Carter and Harland 44 para 235 citing *Corbin on Contracts* (1963) Vol 1 337.

⁷⁹ See United Kingdom and Victorian legislation dealing with frustrated contracts: *Law Reform (Frustrated Contracts) Act 1943* (UK); *Frustrated Contracts Act 1959* (Vic). Other jurisdictions - as Western Australia is in this area - may be willing to live with the more certain unreformed law.

⁸⁰ In that case, one might expect calls for reform from those injured, or at least support for reform when the issue is aired. Neither has occurred in Western Australia with respect to the law of minors' contracts.

⁸¹ Finality is discussed at paras 4.25-4.26 above.

⁸² The category is discussed in Working Paper No 2 8 paras 1.17-1.18.

the general law also promotes certainty of title in land contracts involving minors.⁸³ Where a transfer of property other than land has been executed, even if the contract has not been fully performed, a court will not effect retransfer at the instance of a minor.⁸⁴ The concept of property passing by delivery with intention to transfer title is used, not only so that title will accord with appearances and intention, but also to protect third parties.⁸⁵

4.32 There are however considerable areas of uncertainty in the law relating to passing and more particularly to revesting of property under contracts with minors. Where the contract is voidable in the sense of being valid unless repudiated, the rule for land at common law was that property passed to or from the minor pursuant to the contract, but it was said that, on effective repudiation, property reverted in the grantor.⁸⁶ The rule must be modified where there is a system of registered title such as prevails in Australia, so that rectification of the register is a necessary step for restoring the pre-contractual position following repudiation.⁸⁷ The use of the term voidable to describe contracts not binding unless ratified, as well as contracts binding until repudiated, suggests that if a minor refuses to perform obligations under such a contract, the contract is avoided. The inference has been drawn that under such contracts, for instance sales of non-necessary goods, a voidable title passes to the minor or to the other party:⁸⁸ the further implication is that on avoidance, title will revert.⁸⁹ This may be an unjustified importation⁹⁰ into the law of minors' contracts of equitable doctrines relating to contracts capable of rescission in equity for various reasons such as misrepresentation, and also referred to as being voidable. The theory seems incompatible with generally accepted doctrine that, in the absence of fraud, a minor cannot be required to restore property acquired.⁹¹ Were property to revert, the other party should be able to succeed in a tort action

⁸³ Contracts for the purchase of land are given separate consideration in Working Paper No 2 11-13 paras 1.25-1.29.

⁸⁴ *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] ch 71 (transfer of copyright).

⁸⁵ Protection of third parties is discussed at para 4.33 below.

⁸⁶ Harland 12-13 para 210.

⁸⁷ *Coras v Webb and Hoare* [1942] St R Qd 66.

⁸⁸ There is no clear line of authority for jurisdictions like Western Australia which do not have legislation identical to or based on the *Infants Relief Act 1874* (UK). In jurisdictions having such legislation the current of authority is that, notwithstanding that contracts for non-necessary goods supplied or to be supplied are expressly declared to be absolutely void, title passes by delivery with intention to pass title: *Hall v Wells* [1962] Tas SR 122; contra *Prokopetz v Richardson's Marina Ltd* (1979) 93 DLR (3d) 442. It follows a fortiori that the position is the same in jurisdictions not having like legislation.

⁸⁹ *In re Henderson* (1916) 12 Tas LR 40, doubted in *Hall v Wells* [1962] Tas SR 122, 128-129 by Burbury CJ. The point is discussed in Sutton 80.

⁹⁰ In contracts for the sale of goods between adults where property and possession have passed but the seller has not yet been paid, the remedy is an action for the price - *Sale of Goods Act 1895* s 48. The seller has no right to repossess the goods - *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

⁹¹ The law on recovery of property by and from a non-fraudulent minor is discussed in Working Paper No 2 15-16 paras 1.34-1.35.

such as conversion or detinue, unless the tort action were seen as an indirect enforcement of the contract.⁹² There has so far been no authoritative statement of the law in this area.

10. PROTECTION OF THIRD PARTIES

4.33 Security of property and protection of third parties are closely connected. Whatever the position *inter partes*, it is usually thought that a third party who acquires in good faith for value and without notice property which has been the subject matter of a minor's contract should be assured of title.⁹³ In the case of sale of goods, property under an executed contract is likely to pass at the time of contracting,⁹⁴ and a third party purchaser acquiring thereafter will also get title. Even if title to goods the subject matter of a minor's contract is voidable, in the sense that it is capable of reverting in certain circumstances, it is generally agreed that a third party, who acquires title before reversion occurs, is secure.⁹⁵ In England prior to 1987, and possibly in other jurisdictions⁹⁶ with legislation based on section 1 of the *Infants Relief Act 1874* (UK)⁹⁷ whereby certain contracts are described as absolutely void, desire to protect third parties has led to adoption of a doctrine whereby some kind of title, usually called voidable, may pass to a minor, and a good title to a third party who deals with that minor before avoidance.⁹⁸ The law cannot be regarded as clear: some reforms or proposals for reform have addressed the need for securing property interests of third parties.⁹⁹

⁹² Denial of the use of a tort action indirectly to enforce a contract against a minor is discussed in Working Paper No 2 18-19 paras 1.40-1.41.

⁹³ As to the position with respect to goods, see *Hall v Wells* [1962] Tas SR 122, 129 per Burbury CJ; Sutton 81; and generally Working Paper No 2 17-18 paras 1.37-1.39. For a view that a purchaser of neither realty nor personalty is protected against subsequent repudiation by a minor see D J Harland *The Contractual Capacity of Minors - A New Approach* (1973) 7 Syd L Rev 41, 55.

⁹⁴ *Sale of Goods Act 1895* s 18 r 1.

⁹⁵ Working Paper No 2 17-18 paras 1.38-1.39 discusses the point, and also the position where the third party buys after the minor repudiates the contract. A simpler explanation for protection of the third party is that title passes pursuant to the sale, but does not revert on repudiation by the minor - see para 4.32 above.

⁹⁶ Ireland, New Zealand (prior to 1969), Tasmania, Victoria.

⁹⁷ This legislation has now been repealed in England by United Kingdom Act s 4(2) and in British Columbia by British Columbia Act s 2.

⁹⁸ *Stocks v Wilson* [1913] 2 KB 235 (possibly obiter); *Hall v Wells* [1962] Tas SR 122. The doctrine was treated with great caution by F B Adam J in *Nelson Guarantee Corporation v Farrell* [1955] NZLR 405, 410-411 and was not accepted in British Columbia - *Prokopetz v Richardson's Marina Ltd* (1979) 93 DLR (3d) 442.

⁹⁹ British Columbia Working Paper 69-70; British Columbia Report 43; British Columbia *Infants Act* s 16.3(5) (the statutory provision also clarifies a small point of uncertainty about successors in title); Ireland Contracts Report 113-115. Provision has also been thought necessary in those jurisdictions where there is no equivalent of the *Infants Relief Act 1874* (UK): see New South Wales Act ss 24, 35; Alberta Report 40-41; Ontario Contract Report 206-207. The Scotland Memo formed no concluded opinion on protection for third parties (Scotland Memo 182-185 paras 5.90-5.93) but suggested that third party rights should prevail over attempted reduction by someone over 16 at the time of the original transaction (id 207 para 5.117). The Scotland Report recommends no change to the existing law regarding third party rights as applied to its recommendations: thus a third party could derive no title through the void transaction of

an under-16 year old (Scotland Report 17 para 3.33) but could derive title through a voidable transaction (id 38 para 3.112).

Chapter 5

THE COMMISSION'S PROPOSALS

5.1 As do Commissions and Committees from other jurisdictions,¹ this Commission considers the primary objective of the law of minors' contracts to be the protection of minors. Protection can be achieved in two possible ways: by placing disincentives in the path of other parties intending to contract with minors, or by accepting that contracts will be made, but providing relief when and to the extent that protection is required. The present law takes the former approach: the Commission prefers the latter. Implicit in this second approach is a desire to do individual justice, and acceptance of the necessity of granting broad discretionary powers to courts to achieve this, with its accompanying uncertainty.

5.2 The Commission bases its proposals on three general propositions:

- (a) Any contract to which a minor is party should be enforceable both by and against the minor.
- (b) The existing law, and particularly the equitable doctrines of undue influence and unconscionability,² should continue to apply to any such contract.
- (c) In any action on or involving such a contract, including an action by the minor to seek relief from a contract whether fully executed or not, the court should have power, at the instance of the minor, to grant relief where it is satisfied that the contract is prejudicial to the minor's best interests.

1. CONTRACTS SHOULD BE ENFORCEABLE

5.3 Most contracts made by minors probably bind them, or cannot be upset, as falling within one of the categories of contracts for necessities or service, or as being executed as

¹ New Zealand Report 8 Para 29; Latey Report 78 para 289; Ontario Report 53; Alberta Report 27; British Columbia Working Paper 41-42; British Columbia Report 28; South Australia Report 6; Law Commission Working Paper 32-33 para 3.2; Scotland Memo 67 para 3.1; Ontario Contract Report 202; Tasmania Report 7.

² See paras 5.6-5.9 below.

soon as made.³ Of contracts not binding in this way, many are performed by both parties without legal compulsion, because both parties are satisfied with the deal, or are persuaded by other non-legal factors. There may be a significant number of cases where a minor does not perform, but the other party takes no action, knowing that the contract is not legally binding. The rare cases which reach the courts are those where each party believes they have some chance of success: usually the argument turns on categorization. The Commission believes, however, that it accords more with reality and expectation to start from the position that minors' contracts should bind both parties.

5.4 There may also be psychological advantages which accrue from this approach. To the extent that minors, and for that matter adults, think of legal consequences when they make contracts, a sense of the legally binding nature of their acts should promote caution.⁴ A minor who truly knows the law as proposed by the Commission will also know the safety-net of the Commission's third proposition, that relief should be available where a contract is found to be prejudicial to a minor's best interests. Even so, the binding nature of the contract, and the need positively to seek relief if it is to be obtained at all, should nevertheless make any minor about to enter a contract pause for thought. Psychological factors may of course work against minors, as where the other party uses the binding nature of the contract to induce performance or settlement of a prejudicial contract. The weight to be given to these psychological factors is a matter of judgment.

2. EXISTING LAW SHOULD APPLY

5.5 Under the existing law, it goes without saying that, apart from the special rules protective of minors, the general law applies to their contracts. They thus have the benefit of consumer protective and other doctrines, where applicable. Some Working Papers and Reports have recommended confirmation of the applicability of existing law.⁵ Such confirmation appears to the Commission desirable, if only to achieve one particular result: it

³ The kinds of contracts minors make are discussed at paras 3.23-3.33 above.

⁴ Several of the young people who, responding to the Law Commission's pamphlet to schools, favoured the Alternative Approach whereby the age for contracting would be lowered to 16, gave as a reason that this would foster independence and promote care and responsibility in contractual matters. About one third of the young people who responded favoured the Alternative Approach - Law Commission Report 7 para 2.2. Among those who did not, a reason frequently given was immaturity, lack of foresight and inexperience.

⁵ Alberta Report 43; British Columbia Working Paper 75; British Columbia Report 46; see now British Columbia Infants Act s 16.7.

should be made clear that the general rules of common law and equity, and in particular the doctrines of undue influence and unconscionable contracts,⁶ apply to contracts with minors.

5.6 A claim for relief on the ground of undue influence may arise in various ways. One categorization⁷ distinguishes between cases where influence,⁸ pressure⁹ or domination¹⁰ is used directly by one person over another, and those where the relationship between the parties is such that one party reposes trust and confidence in the other. As for direct influence, few cases concern a transaction entered into during minority¹¹ although the doctrine is capable of application,¹² and in some an influence or domination established during minority vitiates a transaction entered into immediately on majority being attained.¹³

5.7 Certain recognised relationships between parties,¹⁴ such as parent and child¹⁵ and guardian and ward,¹⁶ are considered of themselves to involve a reposing of trust and confidence. Furthermore, it is open to one party to a transaction to establish on the facts that a relationship of trust and confidence had arisen between the parties.¹⁷ In such cases the youth and inexperience of the party seeking relief may be a factor.¹⁸ Where a relationship exists, a

⁶ One comment received by the Commission after Working Paper No 2 was published argued cogently that minors' ability to contract should be qualified only by a statutory unconscionability regime.

⁷ That of Lindley L J in *Allcard v Skinner* (1887) 36 Ch D 145, 181. Categorizations and allocations of cases to categories vary and overlap - see for example Cotton L J id 171. The case cited concerns a voluntary gift, but for this purpose the difference between gift and contract is only a matter of degree - Chitty 283 para 502; *Tufton v Sporni* [1952] 2 TLR 516, 526 per Jenkins L J.

⁸ Examples often relate to religious influence - see *Allcard v Skinner* (1887) 36 Ch D 145; *Morley v Loughnan* [1893] 1 Ch 736. See also the decision of Starke J in *Johnson v Buttress* (1936) 56 CLR 113.

⁹ See for example *Williams v Bayley* (1866) LR 1 H L 200; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389.

¹⁰ *Smith v Kay* (1859) 7 HLC 750: 11 ER 299. In this case fraud was established (Lord Wensleydale doubting whether the fraud as actually practised led to or caused the transaction) but even without fraud the outcome of the case would have been no different - Chelmsworth LC at 761: 304; Lord Cranworth at 770-771: 307.

¹¹ A rare example is *Taylor v Johnston* (1882) 19 Ch D 603 where, in the absence of proof of the exercise of control or influence, or of a relationship of guardian and ward, money gifts by a twenty year old orphan, suffering from a terminal illness, to a relative with whom she lived after her father's death, were upheld.

¹² *Smith v Kay* (1859) 7 HLC 750, 770-1: 11 ER 299, 307 per Lord Cranworth.

¹³ *Say v Barwick* (1812) 1 V & B 195: 35 ER 76; *Smith v Kay* (1849) 7 HLC 750: 11 ER 299.

¹⁴ Some are referred to by Romilly MR in *Hoghton v Hoghton* (1852) 15 Beav 278, 299: 51 ER 545, 553. The case arose from the resettlement of an estate by an eldest son shortly after majority was attained.

¹⁵ *Hoghton v Hoghton* (1852) 15 Beav 278: 51 ER 545; *Lancashire Loans Ltd v Black* [1934] 1 KB 380; *Kerr v West Australian Trustee Executor & Agency Co Ltd* (1937) 39 WALR 34.

¹⁶ *Hylton v Hylton* (1754) 2 Ves Sen 547: 28 ER 349; see also *Allfrey v Allfrey* (1847) 10 Beav 353: 50 ER 618.

¹⁷ *Fowler v Wyatt* (1857) 24 Beav 232, 237-238: 53 ER 347, 349 per Romilly MR (no such relationship between two competent businessmen); *Tufton v Sporni* [1952] 2 TLR 516, 522 per Evershed M R (relationship arising from the common pursuit of an altruistic purpose); *Johnson v Buttress* (1936) 56 CLR 113, 119 per Latham CJ, 134-135 per Dixon J (relationship of gratitude and of dependency).

¹⁸ See for example *Tate v Williamson* (1866) LR 2 Ch App 55 (23 year old Oxford undergraduate, at least nominally. He died of an attack of delirium tremens a year after the impeached transaction); *O'Sullivan v*

rebuttable presumption arises that undue influence was exerted, so that relief will be granted unless it can be shown¹⁹ that the decision was made independently of any influence.

5.8 Law relating to unconscionability can be found in nineteenth century cases in England, and is well established in Australia.²⁰ The doctrine differs from undue influence in that the latter looks to the quality of consent of the innocent party, whereas the former looks to the conduct of a stronger party in attempting to enforce or maintain a contract, it being in all the circumstances against good conscience to do so.²¹ It permits a court to rescind a contract where one or more elements²² of age, financial need, ignorance, illness, impaired faculties, inexperience, lack of assistance explanation or understanding, language difficulties, poverty or other circumstances on the part of one party to a contract are combined with elements of exploitation or overreaching by the other party, to produce a contract which in all the circumstances is against good conscience. If elements of inequality and exploitation are shown to exist, the onus passes to the stronger party to show that the contract is fair, just and reasonable.²³

5.9 The doctrine of unconscionability appears capable of application to contracts with minors, notwithstanding that age as a factor in applying the doctrine refers, in the context of most cases so far decided,²⁴ rather to old age than to immaturity. No decided case relates to a

Management Agency and Music Ltd [1985] QB 428 (23 year old composer and performer). None of the cases involves a transaction entered into during minority.

¹⁹ The onus is on the party presumed to have exercised influence: *Powell v Powell* [1900] 1 Ch 243, 245-246 per Farwell J (voluntary settlement by step-daughter); *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, 132-133, 135-136 per Hailsham LC (gift to nephew).

²⁰ R P Meagher, W M C Gummow, J R F Lehane *Equity Doctrines and Remedies* (2nd ed 1984) 385 para 1601.

²¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 per Deane J; see also 461 per Mason J.

²² See *Blomley v Ryan* (1956) 99 CLR 362, 405 per Fullagar J, 415 per Kitto J.

²³ *Fry v Lane* (1888) 40 Ch D 312, 321 per Kay J citing Lord Selbourne in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 490-491.

²⁴ In the group of cases on heirs, reversioners and expectants the person seeking relief is sometimes, but not always, youthful: *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 (21 year old); *Beynon v Cook* (1875) LR 10 Ch App 389 (26 year old); *Nevill v Snelling* (1880) 15 Ch D 679 (money lending transactions commencing during minority and extending over two years: the borrower was not an expectant *stricto sensu*). See also *Prideaux v Lonsdale* (1863) 1 De G J & S 433: 46 ER 172 and *Everitt v Everitt* (1870) LR 10 Eq 405, both cases of young ladies being persuaded to settle their property so that they could the better resist the financial importunities of others.

transaction entered into during minority,²⁵ though in some the plaintiff's relative youth and lack of business experience is mentioned as a factor.²⁶

5.10 The dearth of cases in which a transaction by a minor has been set aside on grounds of undue influence or unconscionability is not surprising, given that contracts with minors for necessities and service must be beneficial²⁷ in order to bind, and other contracts²⁸ do not bind at all or, at the least, can be repudiated.²⁹ If, as recommended by the Commission,³⁰ all contracts made by minors become binding, these doctrines will have greater scope, and their applicability should be put beyond doubt by legislation. This should be done by a simple confirmatory provision: the Commission sees no need for statutory formulations of the doctrines as they affect contracts with minors, or for specific statutory directions as to how they should be applied. In some jurisdictions the doctrine of unconscionability has been given statutory force, and guidelines for its application have been included in the legislation.³¹ The Commission has not been asked to consider the doctrine of unconscionability generally, and does not believe that it should make recommendations for legislation on unconscionability which would apply to minors' contracts only. As for guidelines, these have already developed in the case-law.

5.11 The Commission is of opinion that the doctrine of unconscionability, as developed by the courts and applied to minors' contracts, will provide relief to minors in many cases where sharp practice by the other party combines with unfairness to the minor. The Commission does not however believe that the doctrine of unconscionability is capable of providing relief in all circumstances where minors need protection. The third of the Commission's basic propositions is designed to cover these cases.

²⁵ *Say v Barwick* (1812) 1 V & B 195: 35 ER 76, cited earlier in the context of undue influence, may be viewed as a case of unconscionability, the defendant pandering to the plaintiff's drinking habits during the latter's minority, and securing a signature to the disputed lease from a hung-over (if not inebriated) plaintiff at 7.00 am on the morn of majority. Compare *Blomley v Ryan* (1956) 99 CLR 362.

²⁶ See for example *Beynon v Cook* (1875) LR 10 Ch App 389.

²⁷ See para 3.14 above.

²⁸ See paras 3.8-3.9 above.

²⁹ See also para 3.12 above, discussing the dominance of common law principles in the field of minors' contracts.

³⁰ Para 5.3 above.

³¹ For recent reviews of law and legislation see N-Y Chin *Unconscionable Contracts in Anglo-Australian Law* (1985) 16 UWALRev 162 and D C Ford "Unconscionable Conduct - A Matter for the Courts or the Legislatures?" (1985) 13 Aust Bus L Rev 309. Since publication of those articles the *Trade Practices Act 1974* (Cth) has been amended, as foreshadowed, by insertion of an unconscionable conduct provision s 52A - see *Trade Practices Revision Act 1986* s 22.

3. RELIEF

5.12 The Commission believes that minors should continue to be protected from the consequences of making contracts which are not in their own best interests. The doctrine of unconscionability is adequate to protect against the danger of objectively bad contracts:³² the kind of protection which the Commission's third basic proposition is designed to give has been referred to earlier as protection against unnecessary and improvident contracts.³³ That proposition is that relief should be available, at the instance of the minor only and not the other party, if the court is satisfied that the contract is prejudicial to the best interests of the minor. As this third proposition is innovatory some explanation is given, under the headings:

At the instance of the minor

Prejudicial to the best interests of the minor

Court to be satisfied

Time of applying test

Objective of relief

Nature of relief.

(a) At the instance of the minor

5.13 Under the existing law minority is a personal defence available to the minor only,³⁴ and the Commission does not propose to alter this. Its proposal is that minority may be raised by the minor by way of defence, or in an action initiated by the minor seeking relief from the contract, but that the other party will not have an equivalent right to initiate an action to test whether the minor will raise, or can substantiate, a case for relief.³⁵

5.14 Situations can be envisaged where performance by a minor falls due only after performance by the other party, who is thus in an invidious position: if performance is made, the minor may not give a counter-performance;³⁶ if not made, the minor may regard the contract as terminated for non-performance and sue for damages, including damages

³² For earlier use of this term see para 4.10 above.

³³ See paras 4.11-4.13 above.

³⁴ See para 3.11 above.

³⁵ This Report later discusses, but does not recommend, procedures whereby a court may approve in advance of a proposed contract with a minor - see paras 7.8-7.9 below.

³⁶ In that event, the minor may be unjustly enriched: the problem is discussed also at para 4.18 above.

representing loss of the bargain. The question is whether the possibility of these situations arising in practice creates sufficient danger of hardship that the other party should have an equivalent right to test whether the minor has a case for relief, before proceeding to performance. In other discussions of reform the difficulty has been met by a suggestion that the other party be given a right to approach the court for a ruling on the validity of the contract.³⁷ In order to achieve this, a specific right of this nature would be necessary: an action seeking a declaration would seem of little use under existing law, or under the Commission's proposals, as the contract is binding so far as the other party is concerned unless and until the minor refuses performance,³⁸ and a declaration could only confirm this.

5.15 Under the Commission's proposals the contract is binding on both parties, and will be enforced against the minor unless the court is satisfied that there is a better solution. In the situation outlined in the preceding paragraph the other party, faced with a decision whether or not to perform, is in no worse position than when the contract was made, because from the outset there was always the danger that the minor might successfully claim relief. If, after performance by the other party, the minor refuses performance, an action is brought, and the court decides that the contract is prejudicial to the minor's best interests, relief may yet be given to the other party in respect of that party's performance.³⁹ Although hypothetical cases can be created in which the other party suffers uncompensated loss in this kind of situation, even if all steps described above have been followed,⁴⁰ the Commission considers that such cases are so unlikely to occur in practice that no special provision need be made.

5.16 The position is different where the minor seeks relief. Although the contract will, under the Commission's proposals, be binding on the minor, there is a potential defence. Whether or not performance is yet due, the minor should have the advantage of being relieved of future obligations under a contract which is prejudicial to the minor.

³⁷ Reference is made to these discussions in the Commission's consideration, at para 7.10 below, of whether a procedure for subsequent approval of contracts should be introduced.

³⁸ A clear refusal by the minor to perform, though hard to classify as breach, would if so classified on general principles of the law of contract give the other party a right to terminate the contract.

³⁹ Relief to the other party is discussed at para 5.33 below.

⁴⁰ For example, a contract is made for services to be provided to a minor, payment to be made later. The services are provided, payment is not made, and in an action for payment minority is raised as a defence. The court finds the contract was prejudicial to the minor's best interests because the minor did not need the services and has no means of payment, and makes no order for compensation. The services, of course, cannot be the subject of an order for restitution.

(b) Prejudicial to the best interests of the minor

5.17 The court would have power to grant relief where it is satisfied that the contract is prejudicial to the minor's best interests. The court would need to be satisfied that the continued existence and enforcement of the contract, viewed as a whole and in its commercial setting, is harmful to the minor. The test envisaged by the Commission is not the same as the test familiar to practitioners of Family Law in custodial proceedings, that the court regard the welfare of the child as the paramount consideration,⁴¹ or the test commonly said to apply when decisions are made about the placement of children when the State intervenes in parental care, that is, whether intervention is "in the best interests of the child". These tests give great latitude to courts which are required to decide matters of guardianship and protection of the physical and emotional safety of children. In the commercial arena, it is not appropriate for the court to have regard only to the interests of the minor, overriding the interests (and perhaps even the property rights) of other parties to the contract and third parties. Such an approach could indeed be counterproductive if, as is likely, the prospect that their interests would be ignored would deter traders from dealing with minors at all. The Commission envisages that in the context of business and trade a court would intervene only if, having taken into account the general desirability of the minor's being able to enter into contracts, and the circumstances of the particular case, it is satisfied that the minor's best interests would be prejudiced if the contract were to be given full force and effect. Once satisfied that intervention is justified, the court would continue to give consideration to the interests of all parties affected by the decision, its object being to provide such relief as is fair, just and reasonable in all the circumstances.⁴²

5.18 For relief to be granted under the Commission's proposals the contract viewed as a whole, rather than the performance required of the minor, must be prejudicial to the best interests of the minor. This avoids the argument that performance by the minor, viewed alone, is prejudicial in that escaping from the need to perform while still getting or retaining the benefit of performance by the other party will give the minor something for nothing. The requirement that the contract be viewed as a whole is similar to the rule of the existing law

⁴¹ *Family Law Act 1975* (Cth) s 64(1)(a).

⁴² See para 5.25 below.

that, in determining whether contracts for necessities and of service are beneficial, regard must be had to all the provisions of the contract.⁴³

5.19 A judgment about the minor's best interests must be made in the light of all the circumstances. The test is new, and there is something to be said for not inhibiting the courts by supplying guidelines.⁴⁴ Such guidelines will inevitably be paraphrases. Circumstances to which the court may have regard could be listed in legislation, to provide some context for application of the new test. These could include the need of the minor to make the contract; alternative and competing needs of the minor; the means and ability of the minor to provide the consideration when due; the adequacy of consideration provided to, and reasonableness of consideration provided by, the minor; all the terms of the contract; the ability of the minor to make other provision associated with the contract; the effect of the contract in precluding the minor from entering other arrangements; the obligations undertaken by the minor in the contract and the commercial risks associated with the contract.

5.20 The onus is on the minor to raise and establish grounds for relief. The grounds will be different in each case, it being indeed the intention of the reform that the court judge each in context and without the need for categorization. That being so, the Commission considers on balance that neither guidelines nor circumstances to which the court may have regard should be included in the legislation.

(c) Court to be satisfied

5.21 If relief is to be given, it will be because a court has concluded that, although there has been no duress, undue influence, unconscionability or other ground for relief such as is now recognised by law, nevertheless because of the minority of one party at the time of contracting, some solution other than enforcing the contract in full ought to be adopted. Since the court is interfering in a contract which, without the minority of one party, would be perfectly valid, the court should be satisfied that intervention is required in the best interests of the minor. The nature of the relief which can be given in the particular circumstances, as

⁴³ The requirement that these contracts be beneficial is discussed in Working Paper No 2 5 para 1.10 (necessaries), 6 para 1.12 (service).

⁴⁴ The New South Wales Act introduces a radical concept in s 19, whereby participation by a minor in a "civil act" renders that act presumptively binding if participation is "for his benefit". No guidelines are given as to the meaning of the word "benefit", and it is likely that the court will look to the existing law on contracts beneficial as a whole, and contracts for necessities - see Harland 75 para 603, 85 para 616.

well as the value and importance of the contract and the reasons for the minor's dissatisfaction with it, will be factors in any decision that the contract is prejudicial to the minor's best interests.

(d) Time of applying the test

5.22 At first sight the most obvious time for judging whether a contract is prejudicial to the best interests of a minor is the time of contracting. It is at this point, if ever, that the other party to a contract with a minor will make a deliberate effort to find out the circumstances of the minor, in order to see whether the minor may have a defence, if sued. There is therefore much to be said for the court also applying its own test, and assessing the minor's interests, at this point. The Commission is however of the view that the test should be applied at the time of judgment, rather than the time of contracting.

5.23 After a contract is made circumstances may occur which, without frustrating the contract, render it less beneficial to the minor than originally expected. Aided by hindsight, a court may be able to decide that the contract was initially prejudicial to the minor's best interests, as no provision was made for circumstances which in fact occurred. Even so, cases may arise where it cannot be said that the contract was prejudicial at the outset. The issue here is allocation of the risk of loss arising from unexpected events, the contract being at the outset unexceptionable. As between adults, in such a case the loss would lie where it fell. There is no logical reason for changing this where one party is a minor; nevertheless, the importance of protecting minors leads the Commission to recommend the change in this particular instance.

5.24 The court should therefore consider whether the contract is prejudicial to the best interests of the minor at the time of judgment, rather than at the time of contracting. This allows the court directly, rather than by way of hindsight, to take account of changes in circumstances.⁴⁵ The Commission is of the view that this will not greatly prejudice other parties to contracts with minors. Placing the risk of a change in circumstances on the other party is unlikely to affect the inquiry that that party makes at the time of contracting, and

⁴⁵ In other areas of the law where welfare, often of minors, is important, a court may be given power to adjust previous provision because of changes in circumstances. Thus maintenance orders previously made may be varied by increasing or decreasing the amount to be paid - *Family Law Act 1975* (Cth) s 83 - and an application for increase of provision previously granted may be made pursuant to the *Inheritance (Family and Dependents Provision) Act 1972* s 16.

significant changes are in any case likely to be rare. A minor who delays taking action while the situation deteriorates may do so through inexperience and therefore may not be culpable; deliberate delay after majority may preclude relief on the grounds of affirmation, estoppel or lapse of time⁴⁶ The other party may indeed benefit by this rule where a contract, initially prejudicial to the minor, is now no longer so.

(e) Objective of relief

5.25 The degree to which a contract is prejudicial to the best interests of a minor will vary with circumstances. Once satisfied that the contract should not be allowed to stand unchanged, the objective of the court should be to do what is fair, just and reasonable in all the circumstances of the case. In order to achieve this, the court should have available to it a range of powers greater than that now available to it under the present law.

(f) Nature of relief

5.26 Relief available under the special defence of minority should be in the nature of rescission in equity of contracts containing some vitiating element such as duress, undue influence or unconscionability. The Commission has recommended above⁴⁷ that these doctrines be available in respect of contracts with minors. Where they do not apply, but the special defence of minority succeeds, the court should have power to set the contract aside; the existing limits to the remedy of rescission⁴⁸ should affect the decision as to whether any and if so what relief should be granted, but not operate in all cases as absolute bars to relief. The court should also, where the special defence of minority is raised, have power to modify and enforce the contract as modified. Powers which the court should have are discussed under separate headings below. They are:

- Enforcing the contract
- Restoration of the *status quo ante*
- Bars to rescission
- Restoration of property
- Recovery of money paid

⁴⁶ For discussion of these bars to relief see paras 6.11-6.17 below.

⁴⁷ Para 5.5.

⁴⁸ Discussed at paras 5.35-5.40, 6.11-6.17 below.

Compensation and payment of money.

(i) *Enforcing the contract*

5.27 The contract may be prejudicial to the best interests of the minor because of the terms of the contract itself. Adjustment or omission of terms may remove the objections, and render it just and equitable that the contract as amended be enforced. A court should therefore have power to reform a contract, and enforce the contract as reformed. In some jurisdictions power has now been given to a court to enforce a contract in part only⁴⁹ although it is not clear whether relief may extend to adjusting the consideration or altering but not deleting objectionable terms.⁵⁰ Legislation in Western Australia should make it clear that such power is available.

5.28 It has been said that "the Chancery mends no man's bargain":⁵¹ the relief now suggested is thus unusual, but can in fact be obtained under the existing law, to a very limited extent. For example, only a reasonable price need be paid for necessary goods sold and delivered⁵² and possibly only reasonable recompense need be made for other necessities supplied.⁵³ The agreed price can therefore be changed.⁵⁴ Another instance is the rule that contracts for necessities and of service must be beneficial.⁵⁵ The theoretical effect of one of these contracts being found to be non-beneficial is that the whole contract is unenforceable: the contract is either binding or not - there is no middle path.⁵⁶ In many cases however the contract is non-beneficial because of the very clause or clauses which give rise to dispute, so the practical effect of unenforceability is that the other party cannot enforce the objectionable term. Thus cases have arisen where reliance is placed on a clause exempting liability in

⁴⁹ New South Wales Act s 37 (discussed in Working Paper No 2 32-33 paras 1.74-1.76); New Zealand Act ss 5-6 (discussed in Working Paper No 2 35 para 1.81 and 37-38 para 1.88).

⁵⁰ By the *Contracts Review Act 1980* (NSW) s 7 relief may be given in respect of all contracts, and not merely those made by minors, where the contract or a provision thereof was unjust in the circumstances relating to the contract at the time it was made. Under this section any provision of the contract may be varied in whole or in part.

⁵¹ *Maynard v Moseley* (1676) 2 Swans 651, 655: 36 ER 1009, 1011 per Lord Nottingham.

⁵² *Sale of Goods Act 1895* s 2.

⁵³ See para 3.7 above.

⁵⁴ This at least is the practical effect. According to one theory on minors' liability to pay for necessary goods, a minor is not liable in contract or for an agreed price at all, but simply through the fact of supply - Working Paper No 2 4 para 1.8 fn 9.

⁵⁵ Working Paper No 2 5 para 1.10 (necessaries); 6 para 1.12 (service).

⁵⁶ The point is discussed in Harland 81-82 para 612, although the conclusion reached is tentative because of lack of clear authority.

negligence,⁵⁷ or a restraint of trade.⁵⁸ the contract has been held not to be beneficial because of the existence of the clause, but the effect is simply that the clause is not enforced. The effect is the same, but the principle is different, where a restraint of trade or part thereof is held to be void and severable from the rest of the contract according to common law principles unrelated to minority. In such a case the rest of the contract, purged of the unreasonable parts of the restraint and now beneficial as a whole, may continue to bind the minor.⁵⁹

5.29 The court should be able, but not required,⁶⁰ to offer the other party a choice between enforcement of the contract as reformed, and such other relief as the court may be prepared to grant. Such a choice is sometimes offered in the exercise of equitable jurisdiction.⁶¹ The justification for giving a choice is that the other party should not be held to a contract which differs from that actually made: there is no reason to offer the minor a similar choice, as reformation can only favour the minor.

(ii) *Restoration of the status quo ante*

5.30 Rescission and restoration of the *status quo ante* is the relief typically available in equity when the view of the law is that the contract should not bind one of the parties, as in cases of misrepresentation, undue influence, unconscionability, duress, certain kinds of mistake and certain contracts with persons of unsound mind. Relief of this nature never developed for minors,⁶² possibly because of the more protective doctrines of the common law,⁶³ although it has been suggested that what amounts to rescission can be obtained in some circumstances.⁶⁴ Nevertheless the availability of rescission under existing law remains

⁵⁷ *Flower v London and North Western Railway Co* [1894] 2 QB 65; *Fawcett v Smethurst* (1914) 84 LJKB 473; *Miller v Smith & Co* [1925] 3 DLR 251; *Keays v Great Southern Railway Co* [1941] IR 534.

⁵⁸ *Sir W C Leng & Co Ltd v Andrews* [1909] 1 Ch 763 (Cozens Hardy MR and Farwell LJ).

⁵⁹ *Bromley v Smith* [1909] 2 KB 235.

⁶⁰ It would be inexpedient to require the court always to offer a choice. There is no choice for instance under existing law as regards the price of necessary goods sold and delivered: under *Sale of Goods Act* s 2 the minor must pay a reasonable price, and the seller cannot require a return of the goods instead.

⁶¹ In *Solle v Butcher* [1950] 1 KB 671, a case of mistake relating to the rent which could be charged for a flat, the order in effect gave the tenant the option of leaving the flat, or of taking another lease on the same terms but at a higher rent.

⁶² Relief by way of restoration is available *against* minors in cases of fraud - *Stocks v Wilson* [1913] 2 KB 235 represents the high point of this doctrine.

⁶³ The dominance of common law principles is discussed at para 3.12 above.

⁶⁴ *Valentini v Canali* (1889) 24 QBD 166 can be read as a case where a minor's claim for return of money failed because restoration had become impossible: it seems to follow that rescission would have been available if restoration had been possible. See also the unofficial reports of this case at 59 LJ QB 74, 76; 6 TLR 75, 76; 61 LT 731, 732 per Lord Coleridge CJ. For a general discussion see Sutton 77-79.

unclear, and in some other jurisdictions reforms, recommended or implemented, have included power in a court to rescind a contract and effect restoration of the *status quo ante* in whole or part.⁶⁵

5.31 It was mentioned in the preceding paragraph that rescission and restoration of the *status quo ante* is the relief typically available in equity in respect of certain contracts with persons of unsound mind. The law here contrasts strongly with that which governs contracts made by minors. The rule that a reasonable price⁶⁶ must be paid for necessities⁶⁷ sold and delivered applies both to minors⁶⁸ and to persons of unsound mind.⁶⁹ For the latter, however, there is no residual category of contracts unenforceable on the sole ground of incapacity;⁷⁰ instead, contracts generally bind⁷¹ unless the mental state was such that the person concerned was unable to understand the nature of the transaction,⁷² and the other party was aware of

⁶⁵ New South Wales Act s 37(4); British Columbia Infants Act s 16.3 (in effect), Ireland Contracts Report 104-105. After considerable discussion - 100-111 paras 8.1-8.14, the Law Commission Working Paper provisionally recommended that the court have power to set aside a contract with a minor which was, in effect, unconscionable - 111 para 8.15. It had previously been noted that such power might already exist: 109-110 para 8.13. This provisional recommendation was not pursued in the Law Commission Report: 17 para 5.2. Scots law has always had principles of reduction of contracts for minority and lesion and challenge on the ground of nullity - Scotland Memo 30 para 2.30. The Memo recommends that the transactions of those under 16 be void (hence subject to challenge for nullity) under both its preferred and second options (Scotland Memo 173-174 para 5.79, 192 para 5.102), and under its second option that transactions of 16 and 17 year olds be subject to reduction (Scotland Memo 194-195 para 5.104). In these cases the requirement to make full restitution by way of compensatory payments could be relaxed - id 186-189 paras 5.96-5.99, 212-213 para 5.123. The Scotland Report recommends adoption of its second option and not its preferred option, but recommends against any relaxation in favour of pupils or minors of the general rules governing unjustified enrichment - Scotland Report 17-18 paras 3.34-3.36, 37-38 para 3.111.

⁶⁶ There are perhaps stronger arguments than in the case of minors that the liability to pay arises from the fact of supply, and not from contract - see generally P Matthews *Contracts for Necessaries and Mental Incapacity* (1982) 33 NILQ 148.

⁶⁷ There is no doctrine of beneficial contracts of service with persons of unsound mind.

⁶⁸ *Sale of Goods Act* s 2 (goods): the position as regards price is less clear with other necessities - see para 3.7 above.

⁶⁹ *Sale of Goods Act* s 2 (goods); *Howard v Digby* (1834) 2 Cl & Fin 634: 6 ER 1293. The supply must be made in such circumstances that payment becomes a debt, and not for instance by way of benevolence - *In re Rhodes* (1890) 44 Ch D 94. It is irrelevant that the person supplied is known to be of unsound mind.

⁷⁰ Early statements that contracts with persons of unsound mind are void have given way to the modern doctrine. For historical accounts see W G H Cook *Mental Deficiency and the English Law of Contract* (1921) 21 Col L Rev 424; M Brown *Can the Insane Contract?* (1933) 11 Can B Rev 600; G H L Fridman *Mental Incompetency* (1963) 79 LQR 502. Powers of attorney and other deeds may be exceptions to the general rule: these may be void under the doctrine of non est factum: *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1904) 1 CLR 243, special leave denied [1904] AC 776 (being the first instance of application from the High Court of Australia to His Majesty in Council), as explained in *Gibbons v Wright* (1954) 91 CLR 423.

⁷¹ *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599; *Tremills v Benton* (1892) 18 VLR 607. The contract binds even if wholly executory - *York Glass Co Ltd v Jubbs* (1925) 134 LT 36.

⁷² The law does not prescribe any fixed standard of sanity, so that the mental capacity required is relative to the particular transaction - *Gibbons v Wright* (1954) 91 CLR 423, 437.

this.⁷³ If both elements are established, relief by way of rescission in equity is available⁷⁴ on the ground that "it is a fraud to induce any person to enter into a contract which she does not understand".⁷⁵ The equitable doctrine was subsequently absorbed into the common law⁷⁶ so that it can be said, on the narrow point of capacity to contract, that common law and equity are at one,⁷⁷ although presumably the relief available in equity is more extensive.

5.32 The position on mental incapacity as stated above means that, if a party to a contract is not aware that the other is unable to understand the nature of the transaction, the contract cannot be assailed on the ground of mental incapacity. It has recently been established⁷⁸ that this is so even if the contract can be described as "unfair".⁷⁹ As has however been pointed out⁸⁰ cases on the narrow issue of capacity do not give the full measure of equity's relief for persons of unsound mind. Thus even the recent Privy Council case⁸¹ leaves open the possibility of avoiding a contract on the independent grounds of equitable fraud or unconscionability, which are equally available to a sane person.⁸² In granting that relief, the mental infirmity of one party, even if it does not amount to an inability to understand the

⁷³ The onus in both matters is on the person seeking to avoid the transaction - *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599.

⁷⁴ *Addison v Dawson* (1711) 2 Vern 678: 23 ER 1040 (a case which today could be decided on grounds of undue influence and unconscionability - the solicitor of the lunatic "had gotten him into his power, and kept him from his friends"); *Evans v Blood* (1746) 3 Bro PC 632: 1 ER 1543. In a decision to exercise the jurisdiction, restoration of the status quo ante is clearly an important factor - *Niell v Morley* (1804) 9 Ves Jun 478: 32 ER 687; *Price v Berrington* (1851) 3 Mac & G 486: 42 ER 348.

⁷⁵ *Harrod v Harrod* (1854) 1 K & J 4, 7: 69 ER 344, 346 per Page Wood VC. The case concerned marriage.

⁷⁶ G H L Fridman *Mental Incompetency* (1963) 79 LQR 502, 511 citing *Gore v Gibson* (1845) 13 M & W 623: 153 ER 260 (a case of intoxication) and *Molton v Camroux* (1848) 2 Exch 487: 154 ER 584 affd (1849) 4 Exch 17: 154 ER 1107. See also the earlier nisi prius cases of *Sentance v Poole* (1827) 3 Car & P 1: 172 ER 295 and *Dane v Viscountess Kirkwall* (1838) 8 Car & P 679: 173 ER 670. In the latter the plaintiff sued in assumpsit for use and occupation of a dwelling house. The jury clearly favoured an 'equitable' solution: the foreman asked whether, if they found for the plaintiff, they could reduce the amount. Patteson J replied: "I think not." Verdict was for the defendant.

⁷⁷ See dicta referred to by A H Hudson *Mental Incapacity in the Law of Contract and Property* [1984] Conv 32, 34 fn 14.

⁷⁸ The contrary view derives support from *Molton v Camroux* (1848) 2 Exch 487, 502-503: 154 ER 584, 590; (1849) 4 Exch 17, 19: 154 ER 1107, 1108 and *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, 603 per Lopes LJ, was expressly left open by Sargent LJ in *York Glass Co Ltd v Jubb* (1925) 134 LT 36, 43-44, and was regarded as unsettled in *Gibbons v Wright* (1954) 91 CLR 423, 444.

⁷⁹ *Hart v O'Connor* [1985] AC 1000 (PC), on this point disapproving *Archer v Cutler* [1980] 1 NZLR 386; see also *Tremills v Benton* (1892) 18 VLR 607. For support of the New Zealand approach see A H Hudson *Mental Incapacity Revisited* [1986] Conv 178, 182-185.

⁸⁰ Consistently by A H Hudson: *Some Problems of Mental Incompetence in the Law of Contract and Property* (1961) 25 Conv 319, 321-325; *Mental Incapacity in the Law of Contract and Property* [1984] Conv 32, 34-36, *Mental Incapacity Revisited* [1986] Conv 178, 185-186.

⁸¹ *Hart v O'Connor* [1985] AC 1000.

⁸² Id at 1027.

nature of the transaction, is often an important element.⁸³ Giving this jurisdiction due weight, one modern text⁸⁴ virtually assimilates law protecting persons of unsound mind with doctrines of unconscionability and undue influence: the same may be said of the law governing contracts made by intoxicated persons.⁸⁵ Why the law for minors should be so different from that for persons of unsound mind is not clear.⁸⁶ what can be said is that the law for persons of unsound mind, based in equity on the remedy of rescission, appears to work satisfactorily.

5.33 The Commission considers that a court should have power to rescind a contract where the special defence of minority is raised. The remedy allows the minor to escape liability, but also protects the interests of the other party to the contract to a certain extent: the court will seek to place both parties in the position they were before the contract was made.⁸⁷ The difficulty that the other party to a contract with a minor has, under the present law, of obtaining restoration of money or property has already been noted:⁸⁸ use of the remedy of rescission, with its normal requirement of restoration of the *status quo ante*,⁸⁹ will go far to remedying this gap.

(iii) *Bars to rescission*

5.34 The equitable remedy of rescission may be barred in certain situations, and the bars should continue to apply, subject to modification, with respect to contracts made by minors. The bars to rescission are discussed under the headings:

Inability to effect restitution

Protection of third parties

Affirmation

⁸³ For a wealth of illustration see Sheridan 75-78; A H Hudson *Some Problems of Mental Incompetence in the Law of Contract and Property* (1961) 25 Conv 319, 321-325; *Mental Incapacity in the Law of Contract and Property* [1984] Conv 32, 34-36; *Mental Incapacity Revisited* [1986] Conv 178, 185-186.

⁸⁴ Greig and Davis 793-794.

⁸⁵ Id 795; Sheridan 78-80. For Australasian examples see *Brusewitz v Brown* [1923] NZLR 1106 (undue influence); *Blomley v Ryan* (1956) 99 CLR 362 (unconscionability); and *Adenan v Buise* [1984] WAR 61 (both).

⁸⁶ Possibly it was, and is, easier to establish minority than unsoundness of mind, and there were more cases, so that doctrines for the former were more fully developed. It is also easier for the other party to a contract to know of or suspect minority, so the law could more readily take the view that someone dealing with a young person should bear the risk of that person being under the age of contractual liability.

⁸⁷ This does not fully protect the position of the other party who, if the contract were fully binding, could expect to be placed, by way of damages, in the same position as if the contract had been performed

⁸⁸ See para 3.13 above..

⁸⁹ The Commission recommends below that complete restoration should not always be a prerequisite for rescission in cases concerning minors: see at para 5.35.

Lapse of time

* **Inability to effect restitution**

5.35 In a case between adults, for instance involving misrepresentation, both sides must have made or be able to make restitution before rescission can occur.⁹⁰ Rescission is possible so long as the property to be restored has retained its substantial identity,⁹¹ even though there has been deterioration or depreciation,⁹² the court having considerable scope to do what is practically just,⁹³ particularly where there has been fraud.⁹⁴ In appropriate cases an order for compensatory payments may be made.⁹⁵ Where minors are involved, the contract should normally be rescinded pursuant to the special defence of minority only if the minor can make restitution according to these rules. This requirement protects the interests of the other party to the contract. In exceptional cases, the special need for protection of minors may justify even greater flexibility, and inability to effect restitution should therefore not be an absolute bar to relief. Cases may arise where, as between adults, inability to effect restitution would be a bar to relief, but where a minor should nevertheless be granted rescission. Similarly in cases where restitution would between adults be accompanied by orders for payment of money, the court may consider that such an order should not be made against a minor. Inability to restore arising through the minor's deliberate act, or created by the minor in order to defeat the other party, should be a factor to be considered, but should not necessarily bar all relief. Similarly inability to restore arising after majority is achieved should not itself be a bar.

* **Protection of third parties**

5.36 As between adults, the equitable right to rescind is lost if the effect of rescission would be to deprive a third party of property acquired before rescission.⁹⁶ Thus if a buyer of goods

⁹⁰ *Clarke v Dickson* (1858) El, Bl & El 148: 120 ER 463 (a case of fraud brought at common law, where the requirement of restoration was more strictly applied than in equity); *Newbigging v Adam* (1886) 34 Ch D 582 affd sub nom *Adam v Newbigging* (1888) 13 App Cas 308.

⁹¹ *Armstrong v Jackson* [1917] 2 KB 822.

⁹² *Newbigging v Adam* (1886) 34 Ch D 582 affd sub nom *Adam v Newbigging* (1888) 13 App Cas 308; *Alati v Kruger* (1955) 94 CLR 216.

⁹³ *Erlanger v New Sombrero Phosphate Co* (1878) LR 3 App Cas 1218; 1278-1279 per Lord Blackburn; *Hulton v Hulton* [1917] 1 KB 813, 821 per Swinfen Eady LJ; *Alati v Kruger* (1955) 94 CLR 216, 223-224 per Dixon CJ, Webb, Kitto and Taylor JJ.

⁹⁴ *Spence v Crawford* [1939] 3 All ER 271; *Alati v Kruger* (1955) 94 CLR 216.

⁹⁵ *Brown v Smitt* (1924) 34 CLR 160. For a flexible use of the powers of the court, in a case of undue influence, see *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428.

⁹⁶ *Babcock v Lawson* (1880) 5 QBD 284 - "a very plain case" per Bramwell LJ at 286.

obtains a voidable title only, for example because of misrepresentation, and resells to a purchaser who takes *bona fide* for value and without notice, the original seller cannot rescind.⁹⁷ This is also the position under the present law with respect to the category of contracts not binding on minors unless ratified: indeed, in jurisdictions where certain contracts are made absolutely void by statute, courts have nevertheless held that the third party purchaser who traces title through such a contract is secure.⁹⁸ Situations of this nature often present themselves as a dilemma: which one of two innocent parties must suffer? Where one of those parties is a minor, cases may occur where the fairest solution will involve depriving the third party of title, particularly where all three are before the court. Suppose for example that Boris sells goods worth \$8 on credit to Maurice (a minor) for \$10, and Maurice, after achieving majority, resells to Doris for \$5. Maurice spends the \$5 and does not pay Boris. Boris sues Doris to recover the goods, and Doris joins Maurice as third party. The fairest solution may be to revest title in Boris, subject to Boris repaying \$10, \$8 of which should be used to satisfy Doris' claim against Maurice. In the result both Boris and Doris will be restored to their previous positions. Maurice will have paid out \$10 and have had the benefit of only \$7, but that loss stems from the bad bargain with Doris made after majority.⁹⁹

5.37 Such cases will be exceptions; usually, because all three parties are not before the court, or for other reasons, justice will require that the third party should not be deprived of title. Even so, the exceptional case should be provided for, so that acquisition of property by a third party should not be an absolute bar to relief by way of rescission in favour of a minor, nor prevent the court from depriving the third party of title, if that conduces to a result which is just and equitable to all parties.

5.38 In other areas of the law rescission has sometimes been refused because the effect would be to prejudice third parties, although it cannot be said that property rights are directly affected. It follows from the above that, if one of the parties is a minor, rescission should be possible here also. For example, between adults an allotment of shares induced by fraudulent misrepresentation cannot be rescinded once liquidation has commenced because, it is said, creditors would be adversely affected by reduction of the capital available to pay the debts of the company.¹⁰⁰ If the problem were not fraudulent misrepresentation, but minority, it might

⁹⁷ *White v Garden* (1851) 10 CB 919; 138 ER 364; see now *Sale of Goods Act 1895* s 23.

⁹⁸ See para 4.33 above.

⁹⁹ This solution can be contrasted with that found in *Hall v Wells* [1962] Tas SR 122 where, in a broadly similar situation, the original seller lost title, and presumably was unable to sue the minor for the price.

¹⁰⁰ *Oakes v Turquand* (1867) LR 2 HL 325.

be that as between minor and creditors the former should be protected by having the allotment rescinded and claiming with the creditors in the liquidation. This solution is not possible under the existing law which, despite its objective of protection, allows a minor to whom shares have been allotted to repudiate if the company is not in liquidation, but does not grant return of the amount paid because there has been no total failure of consideration.¹⁰¹

* **Affirmation**

5.39 Under the doctrine of affirmation the right to rescind a contract, for example because of misrepresentation, will be lost if a party, knowing of the existence of the right,¹⁰² nevertheless deliberately chooses to be bound by the contract.¹⁰³ Affirmation is a manifested election to continue with the contract, and once made cannot be revoked.¹⁰⁴ Because of the element of choice to be bound, affirmation by minors should be subject to the same law as governs minors' contracts. An affirmation which is not prejudicial to the minor's best interests should prevent a subsequent attempt to rescind which is prejudicial, but since relief will be available if affirmation is prejudicial to the minor's best interests, affirmation during minority cannot be an absolute bar to relief. Affirmation after majority is achieved is discussed below.¹⁰⁵

* **Lapse of time**

5.40 Lapse of time prior to majority should not be a bar to relief, again on the basis that no act or omission of a minor should be an absolute bar to the granting of rescission. Lapse of time after majority is considered below.¹⁰⁶

¹⁰¹ See *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, where the plaintiff apparently lost both shares and money.

¹⁰² Mere rumours will not suffice - *Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 112; but knowledge may be inferred from receipt of definite information - *Scholey v Central Railway Co of Venezuela* (1868) reported at (1870) LR 9 Eq 266n.

¹⁰³ See generally Treitel 294-296; Chitty 252-253 para 453; Lindgren Carter and Harland 354-356 paras 1138-1140; Greig and Davis 868-871.

¹⁰⁴ *Clough v London and North Western Railway Co* (1871) LR 7 Exch 26, 34-35.

¹⁰⁵ Paras 6.11-6.14.

¹⁰⁶ Paras 6.16-6.17.

(iv) Restoration of property

5.41 In some cases it may not be possible to restore the *status quo ante* at all, as where property acquired by a minor has been resold or exchanged, or possible only if accompanied by monetary compensation,¹⁰⁷ as where property acquired has been damaged. A court may nevertheless think it appropriate that property be restored, or that property or money identified as representing property acquired be restored.¹⁰⁸ The court should have power so to order.

5.42 A similar power has been recommended¹⁰⁹ or granted¹¹⁰ in some other jurisdictions. In the recent United Kingdom legislation¹¹¹ it is the only new power given the court, and is further confined to being available only to the other party to a contract as plaintiff against the minor as defendant, and not vice versa. The Law Commission Report preceding the United Kingdom Act did not address the question of restoration to minors,¹¹² and its recommendation on restoration by minors¹¹³ is thus confined because the relief to be provided was seen as an extension of the existing equitable power to order restitution to the other party where the minor has been fraudulent.¹¹⁴ By contrast, the Law Reform Committee of South Australia, by a majority, specifically rejected change of the rules regarding restoration of property by a

¹⁰⁷ Monetary compensation is considered separately at paras 5.44-5.47 below.

¹⁰⁸ A power to order a minor to restore property already exists where the minor has been fraudulent, and possibly extends to the proceeds of sale of that property - Working Paper No 2 19 para 1.42.

¹⁰⁹ Lacey Report 82 para 307 (by minor), 82-83 para 310 (to minor); Alberta Report 28-29; British Columbia Working Paper 48; British Columbia Report 31; South Australia Report 7 (minority), 8 (majority - to minor); Law Commission Working Paper 60-62 paras 6.9-6.10 (to minor); Law Commission Report 15 paras 4.21-4.22 (to minor); Tasmania Working Paper Recommendation 4.2, see also Recommendation 9.1 (by minor: in both Recommendations, where the contract is enforceable); Ireland Contracts Report 109-110; Ontario Contract Report 204.

¹¹⁰ New South Wales Act s 37(5) and (6); South Australia Act s 7 (to minor); British Columbia Infants Act s 16.3; United Kingdom Act s 3(1) (by minor). There has always been such power under Scots law where a contract is challenged for nullity or reduced for minority and lesion - Scotland Memo 39-40 para 2.41, 38 para 2.39, which favours retention of this power under both its preferred and its second options - Scotland Memo 173-174 para 5.79, 192 para 5.102, 194-195 para 5.104. The Scotland Report, however, recommends application of the general rules of Scots law concerning unjustified enrichment to the void or voidable transactions of minors, with the result that both parties would come under an obligation to restore; if one is unable to do so, the other is released from any obligation of restitution as well - Scotland Report 17-18 paras 3.34-3.36, 37-38 para 3.111.

¹¹¹ United Kingdom Act s 3(1).

¹¹² The discussion of this matter in the Law Commission Working Paper is bound up with the question of re-opening of executed contracts: see 100-111 paras 8.1-8.15. On this issue the Law Commission's provisional recommendation was that there be no power in a court to re-open except where, in effect, the transaction was unconscionable - 111 para 8.15. In its Report the Law Commission did not pursue the topic of re-opening of executed contracts - 17 para 5.2.

¹¹³ Law Commission Report 15 paras 4.21-4.22.

¹¹⁴ The Law Commission Report at 15 para 4.21 assumes that restoration will be made in exercise of a general equitable jurisdiction of the court, and hence that there will be other discretionary powers, for instance to refuse an order to restore if the minor is willing and able to pay, not the agreed price, but some other reasonable price, and perhaps on terms. The Commission feels that it is safer to specify that the court will have power to alter contractual terms, and has so recommended at paras 5.27-5.29 above.

minor,¹¹⁵ but recommended that the court have discretion to order restitution to a minor where a contract is properly avoided.¹¹⁶ That recommendation has been implemented.¹¹⁷ This Commission is of the view that the power should not be confined to orders against minors only, or to orders in favour of minors only: situations may arise where justice requires that either party restore property to the other, either as the only relief granted, or as part of a full or partial restoration of the *status quo ante*.

(v) *Recovery of money paid*

5.43 Under existing law recovery by a minor¹¹⁸ or by an adult¹¹⁹ of money paid is possible, but only where there has been a total failure of consideration. The existing remedy is therefore limited, and cases have arisen where it has been refused, although a better solution may have been to permit recovery, subject to restoration of benefits in whole or part.¹²⁰ In other cases courts have allowed recovery where there has been no *total* failure of consideration, but the benefit received has been comparatively small.¹²¹ Such cases can be regarded as symptomatic of the court's desire to do substantial justice despite the apparently inflexible rules of the existing law.¹²² The Commission is of the view that, if circumstances are appropriate, recovery of money should be possible notwithstanding that there has been no total failure of consideration, and from as well as by the minor. Orders that a minor pay money are discussed below.¹²³

(vi) *Compensation and payment of money*

5.44 Where a contract has been rescinded on some equitable ground, an order for payment of money is sometimes necessary to restore the *status quo ante*.¹²⁴ In cases concerning

¹¹⁵ South Australia Report 7.

¹¹⁶ Id 8.

¹¹⁷ South Australia Act s 7.

¹¹⁸ Working Paper No 2 9-10 para 1.21; 10-11 para 1.23; 15 para 1.32.

¹¹⁹ The law is not as clear for an adult as for a minor; id 10-11 para 1.23; 16 para 1.35.

¹²⁰ *Holmes v Blogg* (1818) 8 Taunt 508; 129 ER 481 as limited in *Corpe v Overton* (1833) 10 Bing 252; 131 ER 901; *Valentini v Canali* (1889) 24 QBD 166. *Pearce v Brain* [1929] 2 KB 310 is similar, although there the claim was for return of property exchanged, rather than money.

¹²¹ *Everett v Wilkins* (1874) 29 LT 846; *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589. See also Sutton 76-79.

¹²² For discussion of the predominant Canadian approach, based on restitution, to recovery of money paid by a minor, see J D McCamus *Restitution of Benefits Conferred Under Minors' Contracts* (1979) 28 U of NBLJ 89, 99-103.

¹²³ Paras 5.44-5.47.

¹²⁴ It is recommended above that a court have power to order restoration - see para 5.33.

minors, it may be appropriate to order payment for interim use of property, or compensation for deterioration or even improvements.¹²⁵ The court should have power to order such payments to be made.¹²⁶

5.45 A question which has troubled other bodies concerned with reform is whether it is proper that payment of compensation should be ordered where a minor has acquired non-necessary property on credit, sold the property, dissipated the proceeds, and refused to pay the price.¹²⁷ In such a case the general policy of the Latey Report would result in monetary compensation being paid by the minor.¹²⁸ The Law Commission in its Working Paper thought this outcome was not satisfactory,¹²⁹ arguing that it was tantamount to enforcement of the contract, leaving any protection of the minor to the uncertain operation of a relieving power to be vested in the court. The Law Commission did however tentatively recommend that a minor who retained goods should return them, and that if goods were disposed of with the purpose of defrauding the supplier, the minor should be obliged to pay the purchase price, or possibly a reasonable price.¹³⁰ In its Report the Law Commission continued of the view that a minor should be obliged to restore property retained¹³¹ but sought to achieve this objective by extending the equitable doctrine of restitution in cases of fraud to cases where, without fraud, a minor refused to pay for goods obtained on credit.¹³² The Law Commission envisaged that that doctrine would extend, in cases where the minor had sold goods so obtained, to requiring the minor to pay over the price received or such part thereof as was still retained.¹³³ The Law Commission however specifically reversed its earlier view that a minor who had resold goods in order to defeat the original seller's claim for their return, and had dissipated the proceeds, should be obliged to pay the equivalent of the original purchase price or the value of the goods.¹³⁴ In the result the new United Kingdom Act, while permitting

¹²⁵ Such payments can be ordered as part of the remedy of rescission for misrepresentation - see *Brown v Smitt* (1924) 34 CLR 160.

¹²⁶ Power to order compensatory payments in connection with minors' contracts is recommended in Latey Report 82-83 paras 309-310; Alberta Report 28-29; British Columbia Working Paper 48; British Columbia Report 31; South Australia Report 7 (minority); Tasmania Working Paper Recommendations 4.2, 9.1 (where the contract is binding or enforceable); Ireland Contracts Report 109-110; Ontario Contract Report 204 and granted by New Zealand Act s 7(1); New South Wales Act s 37(4); British Columbia Infants Act s 16.3.

¹²⁷ In addition to Latey Report and Law Commission Working Paper and Report discussed in the text, see Ontario Report 51; Scotland Memo 73-74 para 3.14, 186-189 paras 5.96-5.99, 212-213 para 5.123.

¹²⁸ Latey Report generally 80-82 paras 300-309, more specifically 82 para 307.

¹²⁹ Law Commission Working Paper 44-45 para 4.17, 47-48 paras 4.11-4.14.

¹³⁰ Id 60-62 paras 6.9-6.10.

¹³¹ Law Commission Report 14 para 4.18.

¹³² Id 15 paras 4.21-4.22.

¹³³ Id 35 para 3 (explanatory note to Clause 3 of the Draft Bill).

¹³⁴ Id 15-16 para 4.23.

recovery of property acquired by the minor, or any property representing that original property,¹³⁵ by implication excludes the concept of compensatory payments altogether. Contrary to the final view of the Law Commission, this Commission considers that the court should have power, if it thinks fit, to order that compensation be paid in this kind of situation. The amount to be paid, and whether the amount provides full or only partial compensation, should be left to the decision of the court in the light of all the circumstances. A minor may have squandered the proceeds of sale, but still have adequate resources to make compensation.

5.46 Some comments on compensatory orders appear to go close to arguing that orders to pay money should not be made against minors at all.¹³⁶ Such orders are of course possible under existing law:¹³⁷ indeed a minor may be made bankrupt.¹³⁸ No doubt a court will hesitate before ordering a minor to pay money, but such an order should not be impossible.

5.47 A further difficult question is whether compensation could be ordered even though the minor has received no benefit. The Commission believes this should be possible. An instructive case is *Roberts v Gray*.¹³⁹ Roberts, a professional billiards player, contracted with Gray, a minor, to undertake a world tour with the latter and his father, playing exhibition matches. Roberts expended time and money organizing the tour, but Gray subsequently declined to proceed with the contract. Lord Alverstone CJ concluded that the contract was enforceable, apparently as being analogous to a beneficial contract of service¹⁴⁰ and the jury assessed the damages at 1500 pounds, being presumably their estimate of Roberts' expenditure in preparing for the tour.¹⁴¹ The Latey Report¹⁴² regarded this case as setting a precedent which it would rather not see followed, but it may be that in the circumstances the outcome was fair.¹⁴³ A similar result could be achieved under the Commission's proposals:

¹³⁵ United Kingdom Act s 3(1).

¹³⁶ Ontario Report 51; Law Commission Report 15-16 para 4.23.

¹³⁷ A reasonable price must be paid for necessaries sold and delivered: *Sale of Goods Act 1895* s 2.

¹³⁸ *Bankruptcy Act 1966* (Cth) s 7(1A); McDonald Henry and Meek *Australian Bankruptcy Law and Practice* (5th ed looseleaf by C D Darvall and N T F Fernon) 13 para 39, 76/1-77 para 197.

¹³⁹ [1913] 1 KB 520.

¹⁴⁰ An alternative reading is that it was a contract for a necessary, namely education. Text writers classify the case variously: with Treitel 411, 413 compare Cheshire Fifoot and Furmston 414-415; in Australia with Greig and Davis 763 compare Lindgren Carter and Harland 246 para 816.

¹⁴¹ Roberts had claimed 6000 pounds. Damages for breach of contract can compensate for expectation loss: it may however be that the jury thought that no profit would be made from the tour.

¹⁴² At 83-84 para 314.

¹⁴³ Gray's refusal may have been based on his own commercial advantage. There is some hint in the report that he refused to proceed because there was disagreement as to the kind of billiard balls to be used: possibly he had another sponsorship deal.

the contract could be held to be prejudicial to the best interests of the minor, and the court could order compensation in full or part for expenses thrown away.

4. EXECUTED CONTRACTS

5.48 It is likely that a great many of the contracts actually made by minors are of comparatively small value, and executed as soon as made.¹⁴⁴ Under the existing law little or no relief is available to the minor here,¹⁴⁵ because of rules relating to recovery by a minor of money or property, which in general require that, in order to recover, the minor should have received no consideration or value.¹⁴⁶ It may be that the law, by this means, achieves a measure of finality,¹⁴⁷ certainty¹⁴⁸ and security of property,¹⁴⁹ perhaps at the expense of full protection of minors. The limited resources available to minors to make such contracts¹⁵⁰ will usually mean that no great damage will be done to minors' interests, even by unnecessary or improvident contracts, and the very fact of saving and spending cash will provide a check on thoughtless or impulsive contracting.¹⁵¹ It may therefore be that, in the interest of achieving a similar balance of interests, the Commission's recommendations as to relief should likewise not extend to executed contracts.

5.49 The reason for not extending relief to executed contracts is that the advantages thereby gained,¹⁵² in a considerable range of contracts, would outweigh the occasional cases¹⁵³ where the minor suffered disadvantage such that the court would grant relief. This is cold comfort to those minors in fact disadvantaged: moreover, it may be doubted whether reputable traders would alter their patterns of trading with minors because of a newly-introduced rule permitting a reopening of executed contracts. If the possibility of reopening affected trading habits, it would probably do so only in important, large value contracts, where caution on the part of trader and minor can only be commended.

¹⁴⁴ See paras 3.25 and 3.28 above.

¹⁴⁵ Ibid.

¹⁴⁶ See para 3.13 above.

¹⁴⁷ See para 4.25 above.

¹⁴⁸ See para 4.28 n 70 above.

¹⁴⁹ See para 4.31 above.

¹⁵⁰ See para 3.25 above.

¹⁵¹ See para 4.15 above.

¹⁵² Essentially that the finality, certainty and security of property thereby achieved would encourage traders to deal more freely with minors, and would reduce litigation.

¹⁵³ The existing law giving protection to consumers will provide an adequate solution in many cases of objectively bad bargains - see para 3.26 above.

5.50 Of those who have considered the matter with a view to reform, most have recommended that any relief to be granted to a minor should be available whether or not the contract has been executed. The Latey Report¹⁵⁴ was perhaps prepared to leave the matter open, but the Alberta Report,¹⁵⁵ British Columbia Working Paper¹⁵⁶ and Report,¹⁵⁷ Tasmania Working Paper,¹⁵⁸ Ireland Contracts Report¹⁵⁹ and Ontario Contract Report¹⁶⁰ had little doubt, and the New Zealand and New South Wales Acts draw no distinction between executed and executory contracts. The Law Commission Working Paper strikes the only discordant note. After considering the matter at length,¹⁶¹ and pointing out¹⁶² that it is one thing to frustrate people's expectations, another to disturb the basis of concluded transactions, the Working Paper provisionally recommended¹⁶³ that reopening of an executed contract should be possible only where the other party had taken advantage of the minor's lack of knowledge and experience, and induced a transaction which has caused hardship to the minor.¹⁶⁴ The Law Commission Report¹⁶⁵ did not pursue the matter, and the consequent legislation contains no provision. Having given the matter careful consideration, the Commission has concluded that its recommendations should apply to all contracts, whether executed or not.

¹⁵⁴ 83 para 312.

¹⁵⁵ 34.

¹⁵⁶ 52-53.

¹⁵⁷ 33-34.

¹⁵⁸ Recommendation 3.4.

¹⁵⁹ 113.

¹⁶⁰ 206.

¹⁶¹ 100-111 paras 8.1-8.15.

¹⁶² 102-103 para 8.5.

¹⁶³ 111 para 8.15.

¹⁶⁴ The Working Paper noted *ibid* that this may already be the law.

¹⁶⁵ 17 para 5.2.

Chapter 6

EFFECT OF COMMISSION'S PROPOSALS

6.1 This chapter examines briefly the likely impact of the Commission's proposals on the various categories of contracts with minors which have developed under the present law.

1. CONTRACTS FOR NECESSARY GOODS

6.2 Under existing law,¹ if necessary goods are sold and delivered to a minor, a reasonable price must be paid. What is necessary depends on the situation of the minor. It may be that the contract must also be beneficial. There is doubt as to whether the goods must be necessary at the time of sale only, or at the time both of sale and of delivery, and further doubt as to whether the minor is bound contractually or because supplied: in the former case a minor could in theory be sued for damages for non-acceptance, but not in the latter.

6.3 Under the Commission's proposals² all contracts with minors will be binding, subject to the general law and to the special defence based on minority. A contract for goods which the minor needs, at a reasonable price and on reasonable terms, and for which the minor can or will be able to pay, is not likely to be held to be prejudicial to the best interests of the minor, but if any dispute arises, the contract will be assessed in light of the minor's situation and all other circumstances, at the time of the hearing. If no relief is given, the contract will bind the minor, and damages may be awarded, but if the contract is prejudicial to the minor, the court may reform the bargain by for instance ordering that only a reasonable price be paid, or by severing or altering unreasonable terms. In light of this, section 2 of the *Sale of Goods Act 1895* will be unnecessary so far as it applies to minors, and should be amended by deleting references to an infant or minor.

¹ The existing law of minors' contracts is fully stated in Working Paper No 2 1-22 paras 1.1-1.50, and in paras 3.5-3.15 above. No further references will be given for summaries of the existing law given in this chapter.

² The Commission's proposals are fully set out in ch 5 above. No further references to that chapter will be given in this.

2. CONTRACTS FOR OTHER NECESSARIES

6.4 The analysis and comparison for this category is the same as for necessary goods except that, since section 2 of the *Sale of Goods Act 1895* applies only to goods, it is not relevant here.

3. CONTRACTS OF SERVICE

6.5 Analysis and comparison for this category is again similar to that for necessary goods, but with some small differences. Under existing law it is clear the contract must be beneficial overall: this is assessed as at the time the contract was made. The minor is bound in contract, and can be sued for damages. Under the Commission's proposals the contract will be assessed in the light of the minor's situation and all other circumstances, at the time of the hearing. As the court may take into account developments since the time of contracting, it may the more readily conclude, if such be the case, that the contract was prejudicial to the minor's best interests. If the contract is to be enforced damages will be awarded; if not, the court may make some other appropriate order.

6.6 The three kinds of contracts described above are binding under existing law, and are likely to continue so under the Commission's proposals. In one respect a minor may have less protection than at present: it will be clear, where previously doubtful, that the minor is liable on the contract, and hence conceivably in damages for breach. The Commission believes its proposals will effect several improvements on the existing law. The contractually binding nature of contracts in these three categories will be clearly established. If a dispute arises, it will be unnecessary for the court initially to allocate the contract into one of the categories: borderlines will not cause trouble, hence the court can go directly to the issue whether the contract is prejudicial to the minor's best interests. In appropriate cases a prejudicial contract may be preserved by being reformed.

4. CONTRACTS BINDING UNTIL REPUDIATED

6.7 Under the Commission's proposals all contracts with minors will be binding: hence this much criticised category will lose its identity. Its disappearance will effect a simplification of the law. The basic concept of the category is however reflected in the Commission's proposals, under which contracts with minors will bind, subject to the special

defence of minority.³ Issues relating to whether the defence can be lost by lapse of time⁴ or other events⁵ occurring before majority have been discussed above. The question remains whether the right to raise the defence should be lost, as is the right to repudiate contracts in this category under the existing law, by lapse of time after majority. This question is discussed below,⁶ together with the applicability of doctrines of affirmation and estoppel.⁷

5. CONTRACTS NOT BINDING UNLESS RATIFIED

6.8 Under existing law a contract will fall into this residual category because of a decision that it is not in one of the categories of binding contracts, and is not one of the kinds of contracts which are binding until repudiated. The Commission's proposals bypass this process of categorization, and allow a court to go directly to the issue of whether the contract is prejudicial to the best interests of the minor. It is here that the greatest change in the legal position occurs: contracts which under existing law would not bind will now be binding, but subject to the special defence based on minority.

6.9 It is difficult to assess the actual effect that the change would have on the legal liability of minors. It may well be that most contracts made by minors fall within one of the existing categories of contracts binding on minors. Of the contracts which fall outside those categories, some may be unenforceable by reason of undue influence, unconscionability or some other doctrine of the general law, and others may be such that the special minority defence proposed by the Commission will operate. In the event, there may be few contracts which would not bind the minor under the existing law, but would bind under the Commission's proposals. Whatever the number, the important point is that the Commission's proposals ensure that a contract will not be enforced if it is prejudicial to the minor's best interests.

6.10 Since under the Commission's proposals all contracts by minors will be binding, subject to a special defence based on minority, the question remains whether that defence can be lost at some point after majority is achieved. Although the distinction between the two

³ The difference is that, under the Commission's proposals, the minor will not have a right to repudiate, and will only succeed on the special defence if the court is satisfied that the contract was prejudicial to the minor's best interests.

⁴ See para 5.40 above.

⁵ See paras 5.35-5.39 above.

⁶ Paras 6.16-6.17.

⁷ Paras 6.11-6.14.

categories of contracts valid unless repudiated and not binding until ratified will have become irrelevant, issues of repudiation and ratification must be addressed. The defence of minority, including in that term an action by a minor seeking relief, should cease to be available in some only of the circumstances in which the equitable remedy of rescission would be lost. These circumstances were discussed above, but in this context further discussion of two is warranted. These are affirmation and lapse of time.

(a) Affirmation

6.11 The concept of affirmation is basic to the law; a person who knowingly makes a choice between two incompatible rights should be bound by that election. In the existing law of minors' contracts the doctrine of ratification bears some similarity to an election to affirm in the context of rescission in equity. In both cases a person, knowing of a right to avoid a contract or liability thereon, deliberately chooses to be bound. Under the Commission's proposals ratification strictly speaking is an inappropriate word, as all contracts with minors are binding, subject to the special defence of minority. Whatever word is used, the concept should still apply; an adult who made a contract while still a minor should be bound by an election to surrender any rights to relief based on minority.

6.12 The whole of the law relating to election, as developed in other areas of contract law, is capable of applying and should apply to contracts made by minors. That law allows for express affirmation, and also for affirmation by conduct,⁸ for instance by continuing to take the benefit of the contract.⁹ The kind of knowledge required before a party can be held to have elected to affirm is being developed through the cases. The trend of authority¹⁰ is that, to be held to have affirmed, a person must have knowledge not only of the facts giving rise to the alternative rights,¹¹ but also that the facts do give rise to a choice between alternatives.¹²

⁸ See generally Treitel 294-296; Chitty 252-253 para 453; Lindgren Carter and Harland 356 para 1140; Greig and Davis 869.

⁹ *Kennard v Ashman* (1894) 10 TLR 213 (staying on and paying rent under a lease); *Scholey v Central Railway Co of Venezuela* (1868) reported at (1870) LR 9 Eq 266n (paying a call and accepting a dividend on shares); *Sharpley v Louth and East Coast Railway Co* (1876) 2 Ch D 663 (continuing to act as a shareholder).

¹⁰ There is as yet no definitive review by the High Court of Australia of the doctrine of election - *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 54 ALR 337, 363 per Fitzgerald J (damages varied on appeal on another point (1984) 6 ATPR 45, 646).

¹¹ *Khoury (M & S) v Government Insurance Office of New South Wales* (1984) 54 ALR 639.

¹² *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1942) 65 CLR 603. There may be a distinction between a right to terminate arising outside the contract, for instance for fraudulent misrepresentation (as to which see *Coastal Estates Pty Ltd v Melevende* [1965] VR 433) and

This will be particularly important with contracts made by minors; without that safeguard, erstwhile minors might be in danger of affirming by conduct, without realizing that they were thereby losing a right to rely upon the defence of minority.

6.13 There is some authority to suggest that even where there has been no election a party may be estopped¹³ from pursuing one of the alternatives, usually that which permits escape from the contract. In the context of the remedy of rescission of a contract, estoppel will arise where one party, not knowing of the right to rescind, exercised rights under the contract adversely to the other party, so that the other party would suffer detriment if the contract were subsequently rescinded.¹⁴ The gist of estoppel is the harm that would result to the other party if the representation were withdrawn. The Commission sees no reason why the doctrine should not apply even to one who has only just achieved majority, so as to prevent reliance on the defence of minority in respect of a contract made during minority.

6.14 Affirmation and estoppel being basic and well-known concepts, there may be no need to legislate for them in the context of minor's contracts. Even so, the Commission considers that, to avoid any doubt, legislation should recognise that the general law of election and estoppel will apply to contracts made during minority. No attempt need be made to spell out details; this would make the legislation too complicated, and restrictive of judicial decision and development. The Commission also sees no need of special provisions for affirmation and estoppel in the context of minors' contracts, such as that any affirmation or representation creative of an estoppel must be in writing. Under *Lord Tenterden's Act 1828*¹⁵ section 5 any ratification of a contract made during minority will not be binding unless it is in writing signed by the person ratifying. Although there is little authority on the section, or its equivalents in other jurisdictions, it has been criticised for its obscurity.¹⁶ Other reformers have seen little need for ratification to be in writing,¹⁷ and section 5 (or its local equivalent)

one conferred by contract. On this distinction, and election generally, see *Sargent v A S L Developments Ltd* (1974) 131 CLR 634, 641-645 per Stephen J; 655-658 per Mason J.

¹³ *Coastal Estates Pty Ltd v Melevende* [1965] VR 433; *Peyman v Lanjani* [1985] Ch 457: see also discussion in Greig and Davis 869-870, 1258-1259.

¹⁴ *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 443 per Scholl J, 453 per Adam J.

¹⁵ *Statute of Frauds Amendment Act 1828* (UK).

¹⁶ Treitel 425-428; Cheshire and Fifoot *Law of Contract* (4th Aust ed by J G Starke and P F P Higgins) 425-426 para 1527; Queensland Working Paper 2; Queensland Report 5; South Australia (Statute of Frauds) Report 9-10.

¹⁷ The Latey Report 78-79 paras 292-293 and 89 paras 337-339 (see also Tasmania Working Paper Recommendation 10), in recommending repeal of the *Infants Relief Act 1874* (UK), made no mention of a requirement of writing. The Law Commission Working Paper 116 para 9.8 was of the view that a minor should not be permitted to ratify at all, but in its Report (11-12 para 4.8) the Law Commission, encouraged by comment on the Working Paper reverted to the view expressed in the Latey Report, and

has been abolished in England and Wales,¹⁸ New South Wales¹⁹ and Queensland.²⁰ Since by virtue of the Commission's proposals ratification itself will become otiose, section 5 of Lord Tenterden's Act should be repealed in Western Australia.

6.15 Some proposals for reform have included a procedure whereby notice may be served on an adult requiring that an election be made in respect of a contract made during minority, with provision that the contract will bind unless there is election to the contrary within a specified period.²¹ The object of the procedure is to enable the other party to be relieved of uncertainty as to whether minority will be raised as a defence, or whether the contract will continue to bind, or be repudiated or ratified. The Commission sees no need for statutory machinery of this nature in connection with its proposals. Cases where the other party needs to resolve the uncertainty of whether the special defence based on minority will be raised, or action brought for relief, are likely to be rare. In those cases which do occur, an estoppel is likely to arise in favour of the other party, and in any event a non-statutory notice inquiring as to the erstwhile minor's intentions with regard to the contract is likely to have the effect of provoking election: if it does not, such notice will often form part of the circumstances giving rise to an affirmation by conduct or estoppel. The Commission regards the existing law as providing adequate solutions to the problems which may arise.

specifically (12 para 4.9(a)) recommended against a requirement of writing. The New Zealand Report 16 para 52, Alberta Report 35, British Columbia Working Paper 53-54 and Report 34-35, Ireland Contracts Report 135 and Ontario Contract Report 203 all recommended that ratification be possible but made no mention of writing, although the Ontario Contract Report 203 did recommend other provisions designed to ensure that affirmation is a conscious, positive act. Scotland Memo 189-190 para 5.100, 204-205 para 5.115, in concluding for retention of the doctrines of adoption of void transactions and homologation of voidable transactions, considered the common law, which had no formal requirement, to be satisfactory, and Scotland Report 18 para 3.37, 42 para 3.127 recommends retention of the common law rule in these areas, with confirmation of the requirement of knowledge of the right to challenge the transaction. In 1975 the South Australia (Statute of Frauds) Report 10 recommended repeal of *Lord Tenterden's Act 1828 s 5*, but in 1977 the South Australia Report 7-8 favoured retention of the requirement of writing, and on its recommendation a more intelligible version of *Lord Tenterden's Act 1828 s 5* has been enacted in the South Australia Act s 4.

¹⁸ *Lord Tenterden's Act 1828 s 5* was expressly repealed in the United Kingdom by *Statute Law Revision Act 1875* (UK): its replacement, *Infants Relief Act 1874* (UK) s 2, is repealed by United Kingdom Act s 4(2).

¹⁹ New South Wales Act s 3 and First Schedule.

²⁰ *Statute of Frauds 1972* (Qld) s 3 and Schedule Part I, itself repealed by *Property Law Act 1974* (Qld) s 3(2) and 6th Schedule Part III.

²¹ Alberta Report 34-35 (with two dissentients) (30 days); British Columbia Working Paper 54-55 (60 days); British Columbia Report 34-35 (60 days); Ontario Contract Report 204 (30 days). The recommendation of the British Columbia Report has been enacted in British Columbia *Infants Act* s 16.9.

(b) Lapse of time

6.16 There is authority in the general law that lapse of time without more does not constitute, but may be evidence of, affirmation.²² Authority also suggests, at least in cases of innocent misrepresentation, that lapse of time may of itself preclude a party from subsequently rescinding a contract.²³ This doctrine may be linked specifically to the equitable nature of the remedy of rescission, and hence not be directly relevant to the special defence based on minority, which will have a statutory base. Legislation should provide that the defence of minority may be lost by lapse of time after majority is achieved, in the same circumstances as the equitable remedy of rescission, if arising at the time of majority, would be lost.

6.17 It was suggested above²⁴ that if all minors' contracts became binding as proposed by the Commission, the special category of contracts valid unless repudiated would fall away. In this category repudiation, to be effective, must be within a reasonable time after attainment of majority. Under existing law that time may elapse, and the contract become binding, even though the erstwhile minor is unaware of the right to repudiate, or does nothing to affirm the contract or create an estoppel. The bare statement of the rule invites the broad comment that it was developed because it is relatively simple to apply, and promotes finality. In many of the decided cases, however, there are elements of election,²⁵ estoppel²⁶ and protection of third party rights,²⁷ although it may be going too far to suggest the rule itself is simply a compendious statement of the effect these doctrines inevitably produce on the contracts within the category, many of which create continuing obligations. The emergence of the category in the present law confirms the Commission's view that lapse of time after majority

²² *Clough v London and North Western Railway Co* (1871) LR 7 Exch 26, 35; *Allen v Robles* [1969] 1 WLR 1193.

²³ *Leaf v International Galleries* [1950] 2 KB 86.

²⁴ Para 6.7.

²⁵ *In re Blakely Ordnance Co (Lumsden's Case)* (1868) LR 4 Ch App 31 (selling some shares after majority); *In re Constantinople and Alexandria Hotel Co Ebbett's Case* (1870) LR 5 Ch App 302 (remaining on the register of shareholders; attempting to sell shares); *Davies v Beynon-Harris* (1931) 47 TLR 424 (paying rent).

²⁶ *Goode & Bennion v Harrison* (1821) 5 B & Ald 147 106 ER 1147 (former partner may become liable for debts of the firm incurred when of age on the basis of 'holding out').

²⁷ In *Carter v Silber* [1892] 2 Ch 278 affd sub nom *Edwards v Carter* [1893] AC 360 there was a strong factor that, if the settlor had repudiated promptly after coming of age (thereby depriving the beneficiaries) his father would in turn have altered his will, which left property to the son, but destined for the settlement. Clearly the case did not turn on this point - see *Carnell v Harrison* [1916] 1 Ch 328, 339 per Cozens Hardy MR - but it was an element: id 340 per Phillimore LJ. See also Kay LJ in *Carter v Silber* [1892] 2 Ch 278, 288-289 repudiating any suggestion that the doctrine he is applying rests on acquiescence or waiver or election.

should be a ground for loss of the special defence of minority it has proposed. The Commission is further of the view that a rule about lapse of time is capable of applying satisfactorily to all contracts, not merely those now in the category of contracts valid until repudiated. As applied for instance to contracts induced by misrepresentation, the doctrine is sufficiently flexible to take account of the nature of the contract and all the circumstances of the case.²⁸

6.18 Some proposals for reform²⁹ have included a statutory period, usually one year, after majority, on expiry of which contracts made during minority will be fully binding, unless previously repudiated. A provision of this nature is said to promote finality: a drawback is said to be that relief from disadvantageous contracts may become unavailable through inadvertence, with the other party perhaps refraining from provoking action until the time has expired. Instances where absence of such a statutory period causes hardship are likely to be rare, and the doctrine of lapse of time, which in the Commission's recommendation³⁰ should apply to the special defence based on minority, is sufficiently flexible to cover all problems that might arise. Accordingly the Commission does not recommend that provision be made in legislation for a specific period, on expiry of which the special defence based on minority would be lost.

6. CONTRACTS WHICH ARE ABSOLUTELY VOID

6.19 There is authority for contracts with minors being held absolutely void under the present law in two situations; where the minor lacks understanding of the nature of the transaction, and where the transaction is strongly prejudicial to the minor. In both situations the minor would clearly be entitled to relief under the Commission's proposals, either through application of existing equitable doctrines, or because the contract was prejudicial to the minor's best interests. Some development of this category of contracts may have been prompted by the unsatisfactory relief available if the contract is merely voidable, in either

²⁸ Cheshire Fifoot and Furmston 279-280; Chitty 253-254 para 454. Some of the cases cited by Chitty on shares acquired as a result of misrepresentation are not dissimilar on their facts from those cited in this paragraph on shares acquired by a minor.

²⁹ Alberta Report 34-35; British Columbia Working Paper 54-55; British Columbia Report 34-35; Ontario Contract Report 204. For implemented reform see New South Wales Act ss 31, 38; British Columbia Infants Act s 16.2(1)(d). In Scots law any action of reduction for minority and lesion must be commenced before the expiry of four years after majority: Scotland Memo 31-32 para 2.32. In discussing its second option Scotland Memo 211-212 para 5.122 proposed that any right of reduction of contracts made by 16 and 17 years olds should subsist for three years from majority - that is, until the age of 21: Scotland Report 37 para 3.109 so recommends.

³⁰ See paras 6.16-6.17 above.

sense of the word as used in the existing law: if a contract is absolutely void, the parties are able to recover their money or property. The wide relief powers available under the Commission's proposals should ensure that a court can reach a satisfactory result in these cases. The Commission's proposals thus achieve a simplification of the existing law through the disappearance of a separate category of contracts absolutely void, without detriment to the protection of minors which development of that category was designed to give.

Chapter 7

OTHER MATTERS

7.1 A number of issues or proposals, only some of which are directly affected by the Commission's recommendations for reform, are discussed in this chapter. They are

Married Minors

Grants of Capacity

Prior Approval of Contracts

Subsequent Approval of Contracts

Guarantees

Torts

Quasi-contract

Estoppel

Mistake as to Age

Agency

Two Minors

Since the Commission's general proposals extend the field of contractual activity in which minors can engage, these matters become of less importance here than in the proposals of some other bodies which have considered reform.

1. MARRIED MINORS

7.2 A question which has frequently been raised in the context of reform of the law of minors' contracts is whether, on marriage, a minor should gain full contractual capacity.¹ The

¹ New Zealand Report 910 paras 33-38; British Columbia Working Paper 50-52 (majority); British Columbia Report 32-33 (minority); Tasmania Working Paper Recommendation 7.1; Ireland Age Working Paper 19-21 paras 2.39-2.45 and Ireland Age Report 10 paras 19-21 were in favour of giving full contractual capacity to minors on marriage. Lately Report 75 para 276 (majority), 155 para 593 (minority); Ontario Report 27; Alberta Report 33-34; British Columbia Working Paper 51 (minority); British Columbia Report 32 (majority); South Australia Report 6; Law Commission Working Paper 126-127 paras 10.17-10.20 opposed the concept. Scots law already has a doctrine of forisfiliation of both spouses on marriage (Scotland Memo 25-27 paras 2.24-2.25; *Law Reform (Husband and Wife) (Scotland) Act 1984* (UK) s 3) and the Memo assumed that this would continue to be the law if those above the age of 16 were to be subject to legal disability (Scotland Memo 167 para 5.71 n 2: the Memo had previously

question was referred to in the Commission's Working Paper² as a reform which had been effected in New Zealand,³ and was more fully considered⁴ as a potential measure of reform in Western Australia. The Commission sees no reason to change its tentative view⁵ that no such measure should be adopted.

7.3 Arguments usually presented in favour of this reform are that married minors have reached a certain level of maturity and need to be able to enter a greater range of contracts, that the community accepts that marriage brings with it all the responsibilities of adulthood, that marriage itself produces a greater sense of responsibility and that in some other areas of the law marriage removes certain disabilities or creates certain capacities.⁶ It has also been pointed out⁷ that, as the age of majority is in any case arbitrary, no philosophical principle is violated by granting contractual capacity to married minors, if the balance of convenience so suggests. Arguments against the proposal are that the sense of responsibility arising from marriage makes the minor more, not less, in need of protection, that marriage creates no greater commercial judgment, and that the proposal is itself discriminatory against unmarried minors. The fear expressed by the Latey Committee⁸ that minors might marry prematurely in order to gain contractual capacity appears now to be lessened⁹ with the reduction of the general age of capacity to eighteen.¹⁰

7.4 The Commission's proposals render the full range of contracts binding on minors, married or not, but subject to the possibility of relief. The argument that married minors'

recommended abolition of forisfiliation for those under 16 - id 156 para 5.59, 162 para 5.64). Forisfiliation does not however confer full capacity, as transactions are still susceptible to reduction for minority and lesion (id 25 para 2.24). In discussing modernisation of the doctrine of forisfiliation, Scotland Memo 171-172 paras 5.76-5.77 envisages no change to this aspect of forisfiliation if by marriage. Scotland Report 33-34 paras 3.93-3.96, however, recommends abolition of the doctrine of forisfiliation.

² Working Paper No. 2 39-40 para 1.94.

³ New Zealand Act s 4. Since publication of Working Paper No 2 a similar reform has been implemented in Ireland, following the Ireland Age Report recommendation at 10 para 21 - *Age of Majority Act 1985* (Ire) s 2(1)(b).

⁴ Working Paper No 2 65-66 paras 3.36-3.40.

⁵ Id 66 para 3.40.

⁶ The Ireland Age Working Paper 20-21 para 2.43 and Ireland Age Report 8-9 para 16 referred also to the constitutional recognition of the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptive rights, antecedent and superior to all positive law. From this it could be argued that no legal impediments or obstructions should be placed in the way of young married persons solely on the ground of age.

⁷ British Columbia Working Paper 51-52; British Columbia Report 33.

⁸ Latey Report 75 para 276. A similar objection was presented in the South Australia Report 6, the age of majority then being 18.

⁹ This point is also made in Law Commission Working Paper 127 para 10.18.

¹⁰ *Age of Majority Act 1972*.

contractual needs are greater than those of unmarried minors is thus partially met. It may be that the possibility of relief being granted will discourage some from contracting with married minors, but the Commission does not believe removal of that relief is warranted.

2. GRANTS OF CAPACITY

7.5 This proposal is that an appropriate court or tribunal be given power on application to grant capacity to individual minors, either to make all kinds of contracts, or only contracts within a limited class.¹¹ An important justification, or example, is that particular minors are capable of and should be permitted to engage in trading or small business activities. The proposal has particular force in those recommendations for reform where the underlying philosophy is to render contracts unenforceable against minors,¹² or enforceable only if newly introduced tests are satisfied,¹³ but it has also found its place in the New South Wales Act,¹⁴ the thrust of which is towards general enforceability of civil acts, including contracts,¹⁵ which are of benefit to the minor.¹⁶ More generally, therefore, the proposal may be seen as recognising the arbitrariness inherent in basing capacity to contract on age alone, and providing a mechanism whereby maturity and judgment become the determinants.

7.6 Difficulties associated with the proposal include selection of an appropriate forum, determination of the criteria on which the forum should base its judgment, ensuring the assembly of sufficient materials on which a decision should be based, the danger of a lack of full testing of issues if an application is unopposed and the familial divisiveness that may arise if the application is opposed by parents or relatives. Some of these difficulties are administrative; underlying others is a reluctance to remove legal protection. In the proposals¹⁷ and implemented reforms¹⁸ which the Commission has studied, usually the forum

¹¹ See Working Paper No 2 62 para 3.28-3.29 where, after brief discussion, the Commission expressed the tentative view that a procedure for grants of capacity should be introduced.

¹² As in British Columbia Working Paper 60-64; British Columbia Report 38-41; Ireland Contracts Report 144; Ontario Contract Report 206. Other recommendations with similar philosophies have however rejected the proposal - New Zealand Report 11-12 paras 39-44; Lacey Report 75 para 276; Law Commission Working Paper 119-120 para 10.3.

¹³ As in the Alberta Report 39-40.

¹⁴ S 26.

¹⁵ "Civil act" is defined as including a contract in New South Wales Act s 6(1)(a).

¹⁶ New South Wales Act s 19.

¹⁷ New South Wales Report 86 Appendix G paras 22-24 (Notes on Proposed Bill); Alberta Report 39-40; British Columbia Working Paper 60-64; British Columbia Report 38-41; Ireland Contracts Report 144-146; Ontario Contract Report 206. Reform concerning this matter in Scotland is bound up with the existing concept in Scots law of forisfiliation, which gives capacity to enter transactions subject to the possibility of reduction for minority and lesion - see Scotland Memo 25-28 paras 2.24-2.27. Under both its preferred and second options, Scotland Memo considered that forisfiliation should be abolished for

is the equivalent of a Supreme Court judge;¹⁹ the criterion is that a grant of capacity would be of benefit to the minor;²⁰ application is by or on behalf of the minor but no other person; and the procedure does not require official intervention.²¹

7.7 The Commission's general proposals go far towards allowing any minor, within limitations to which the other party to the contract should be sensitive, wide contractual freedom. No doubt a residual uncertainty remains for the other party as to whether the minor might not successfully claim relief on the ground that the contract is prejudicial to the minor's best interests,²² but the Commission believes that that very uncertainty may promote a sound business practice of taking especial care when dealing with someone who appears comparatively young. Moreover, the casual customer is unlikely to call for the court order which grants capacity, while the regular dealer is much in the position of one seeking approval of a specific contract.²³ In those jurisdictions which have introduced the reform there is no documented evidence²⁴ that it is used or useful, even where minors' general capacity to contract is more limited than it would be if the Commission's proposals were adopted. The Commission can see no particular harm in providing for grants of capacity, but on balance does not recommend adoption of this particular reform in Western Australia.

those under 16 - id 156 para 5.59, 162 para 5.64. In case a modernised version of forisfamiliarity should be thought useful under its second (or any other) option for those over 16, Scotland Memo 167-173 para 5.71-5.78 gave consideration to reform of the doctrine itself: Scotland Report 33-34 paras 3.93-3.96 however recommends abolition of the doctrine altogether.

¹⁸ New South Wales Act s 26; British Columbia Infants Act s 16.4.

¹⁹ Scotland Memo 169-170 para 5.74 gave consideration to emancipation by parental declaration. A suggested difference between this and judicial emancipation was that the former should not, but the latter might, preclude reduction of transactions for minority and lesion - id 171-172 paras 5.76-5.77. The matter is not pursued in Scotland Report 33-34 paras 3.93-3.96.

²⁰ New South Wales Act s 26(3); Ontario Contract Report 206; the British Columbia Infants Act s 16.4(2) adds that the court must be satisfied that the minor is not in need of the protection offered by law to minors in matters relating to contract. In Scotland Memo 168 para 5.71 the suggested criterion is whether it would be "reasonable for the applicant to enter transactions on his own behalf".

²¹ Under the British Columbia Infants Act s 16.4(4) notice must be served on the Public Trustee and the guardian of the minor (other than the guardian ad litem) unless the court otherwise orders. The Ireland Contracts Report 146-147 recommended that the court may take into account (among other matters) the wishes, where they can reasonably be obtained, of the guardian or guardians of the minor.

²² See para 5.2 above.

²³ On this matter see para 7.9 below, where the Commission does not recommend adoption of a procedure for approving minors' contracts in advance.

²⁴ By one account, the experience in South Africa, which has had provision for grants of capacity since 1972, is that applications are very rare and would only be made in very unusual circumstances - communication from a member of the South African Law Commission to the Law Reform Commission of British Columbia.

3. PRIOR APPROVAL OF CONTRACTS

7.8 The proposal here is for machinery to enable a contract, one party being a minor, to be approved in advance. The main justification is that this gives the other party an assurance of enforceability, which is seen to be particularly valuable for important contracts,²⁵ although sometimes the device is also seen as giving minors access to a greater range of contracts. Details for consideration include the appropriate forum (and whether this should vary according to the value of the contract) and rights of appeal, whether all contracts or only specific contracts should be capable of validation, criteria for approval, whether approval relates to capacity only or whether it also prevents other defences such as undue influence or unconscionability from being raised, procedures for ensuring that the forum has all relevant information and the general role of parents and guardians (as possible approval-givers, or as applicants, interveners or appellants). Solutions to these questions vary in reforms proposed²⁶ or adopted,²⁷ but usually parental consent is not seen as sufficient;²⁸ the decision maker is

²⁵ In California and New York reforms have been introduced allowing for validation of contracts in the fields of entertainment and professional sport: *California Civil Code* s 36; *Arts and Cultural Affairs Law 1983* (NY) s 35.03.

²⁶ Latey Report 75 para 276; New South Wales Report 86 Appendix G paras 23-25 (Notes on the Proposed Bill); Alberta Report 37-39; British Columbia Working Paper 64-69; British Columbia Report 40-42; South Australia Report 8; Tasmania Working Paper Recommendations 5.1-5.2; Ireland Contracts Report 144-147; Ontario Contract Report 206. Reform of Scots law here is closely tied to existing doctrines relating to pupils and minors, and their tutors and curators, and to possible options for reform. Scotland Memo 157 para 5.60, 162-163 para 5.65 saw no need of parental approval of the transactions of those under 16, if its preferred or second option were adopted. For purposes of its second (or some other) option, Scotland Memo 207-211 paras 5.118-5.121 considered whether, for 16 and 17 year olds, a reform should be introduced whereby parental consent, or judicial ratification, would have the effect of excluding the right to reduce a contract for minority and lesion. Scotland Report 33-34 paras 3.93-3.96, 40 paras 3.119-3.120 recommends against any rule whereby binding effect is given to contracts of a young person made with parental consent, but at 42-44 paras 3.128-3.133 does recommend introduction of a procedure for judicial approval of contracts entered into by 16 and 17 year olds.

²⁷ New Zealand Act s 9; New South Wales Act s 26; British Columbia Infants Act s 16.5. In addition to its procedure for approval of contracts, the New South Wales legislation has provisions whereby a certificate may be obtained in respect of the disposition of property by or to a minor, the effect of certification being to render the disposition presumptively binding on the minor - New South Wales Act ss 28, 29. These provisions were not included in the Proposed Bill which formed part of the New South Wales Report, and were not discussed in that Report.

²⁸ Latey Report 75 para 276; Law Commission Working Paper 123-124 paras 10.9-10.10 (the Working Paper provisionally concluded that a procedure was unnecessary for either small or large transactions); Ireland Contracts Report 144-145. The New Zealand Report 11-12 paras 40-44, after noting that a procedure already existed whereby approval for a particular contract could be sought from a Magistrate's Court, canvassed but rejected a suggestion that a court might be empowered to delegate to some outside person (in practice likely to be a parent) the authority to approve contracts to be made by a particular minor. The Ontario Report 28 similarly rejected the suggestion that a young person could be given capacity to make particular transactions on parental approval. The New Zealand Act s 9(3) does however allow the Court to refer an application to inter alia a guardian of the minor, and British Columbia Infants Act s 16.5(2) provides, and Ireland Contracts Report 146-147 recommends, that consideration be given to the wishes of parents or guardians. On the other hand, the Scotland Memo 207-209 paras 5.118-5.119 expressed no concluded opinion on parental consent as excluding the right to reduce transactions of 16

sometimes an official such as the Public Trustee,²⁹ or the equivalent of a Local Court magistrate,³⁰ although for large transactions is likely to be the equivalent of a Supreme Court judge,³¹ and the criterion is benefit to or interest of the minor.³² In its own Working Paper³³ the Commission canvassed the issues fully, and expressed the tentative view that provision should be introduced whereby minors would be bound by contracts up to a value of \$500 made with the written consent of a parent or guardian, with applications also being possible to the Local Court or District Court within their jurisdictional limits, or to the Supreme Court.

7.9 Arguments for and against prior approval of contracts are similar to those for grants of capacity, certainty for parties being balanced against the complication of a new procedure. Evidence about use of like procedures is sparse.³⁴ As with grants of capacity, the Commission believes that reduction of the age of majority to 18 has greatly diminished any need for this reform, and that its own recommendations, if adopted, would further reduce that need: indeed, the Commission believes that its proposals, whereby any contract will bind but relief

and 17 year olds for minority and lesion: Scotland Report 40 paras 3.119-3.120 recommends against this possibility.

²⁹ British Columbia Working Paper 65; British Columbia Report 40-41; British Columbia Infants Act s 16.5. The Alberta Report 38-39 originally recommended that a Family Court judge should have jurisdiction where the consideration given by the minor did not exceed \$2,500, with a Supreme Court judge having jurisdiction where the consideration exceeded that amount. After publication of the British Columbia Report, the Alberta Institute of Law Research and Reform reconsidered, and prepared a supplementary report recommending that in that Province also the Public Trustee have power to approve contracts - letter to Assistant Director of Legal Research and Analysis, December 1976.

³⁰ New Zealand Act s 9; New South Wales Act s 27 (value below \$750); Tasmania Working Paper Recommendation 5.1 (value within jurisdiction of a Commissioner of the Court of Requests). By the South Australia Act s 6(3)(b) application to a local court of full jurisdiction may be made as an alternative to application to the Supreme Court. Where application can be made to an official or to a lower court, there is usually provision for further application to a higher court, which may substitute its own decision - New South Wales Act s 26(6); British Columbia Infants Act s 16.5(5). Scotland Report 44 para 3.133 recommends that court approval be sought by summary application in the sheriff court: the sheriff's decision would be final.

³¹ New South Wales Act s 27 (presumably of value of \$750 and above, as a court of petty sessions has jurisdiction below that amount); South Australia Act s 6 (presumably as an alternative to a local court of full jurisdiction: the Act does not refer here, as it does in s 7, to any jurisdictional limit); British Columbia Infants Act s 16.4 (again presumably as an alternative to the Public Trustee, who is subjected to no jurisdictional limit); Tasmania Working Paper Recommendation 5.1 (Master of the Supreme Court). The Ireland Contracts Report 145 recommended jurisdiction in the District Court where the consideration or value does not exceed 2500 pounds, in the Circuit Court up to 15000 pounds and in the High Court to an unlimited extent, and the Ontario Contract Report 206 recommended jurisdiction in a court.

³² New South Wales Act s 27(5)(b); British Columbia Infants Act s 16.5(1); Ontario Contract Report 206; Scotland Memo 209-210 para 5.120. In Scotland Report 43 para 3.132 the recommended criterion is whether a reasonably prudent adult, acting in the same circumstances, would enter the transaction. The criterion is linked to the recommended grounds on which a court may set aside a transaction entered into by 16 and 17 year olds - see Scotland Report 35-36 paras 3.103-3.106. The British Columbia legislation spells out matters to which the decision-maker should give consideration - British Columbia Infants Act s 16.5(2) - and the Ireland Contracts Report 146-147 recommends similarly.

³³ Working Paper No 2 59-62 paras 3.19-3.29.

³⁴ New Zealand has had its procedure since 1951: initially it seems to have been little used, but by the 1960s it was being much more freely resorted to - New Zealand Report 5-6 paras 19-22. The age of majority was of course 21.

will be available if the contract is prejudicial to the minor's best interests, properly places on the other party the responsibility for ensuring that the minor's interests are considered.³⁵ Furthermore, the Commission has already recommended³⁶ that the question whether relief should be granted because a contract is prejudicial to the minor's best interests should be tested, not at the time of contracting, but at the time action is brought. To permit subsequent, or indeed prior, approval of contracts would create an inroad into this recommendation. For these reasons the Commission does not recommend provision for prior approval of contracts.

4. SUBSEQUENT APPROVAL OF CONTRACTS

7.10 Some reforms providing for prior approval of contracts also allow approval to be given after the contract has been made.³⁷ Arguments for and against such provision, and details of implementation, are similar to those in relation to prior approval, and for the same reasons the Commission does not recommend provision along these lines.

5. GUARANTEES

7.11 In the United Kingdom, prior to the passage of the United Kingdom Act in 1987,³⁸ a guarantee by an adult of a loan to a minor did not bind the guarantor. The crucial decision was *Coutts & Co v Browne-Lecky*³⁹ which held that, a loan to a minor being absolutely void under section 1 of the United Kingdom *Infants Relief Act 1874*, any dependent obligation such as a guarantee was equally void.⁴⁰ This decision led to the practice of taking indemnities

³⁵ The Law Commission noted that most contracts for which approval was sought would be for employment, hence binding even under the existing law if generally for the minor's benefit. There was a danger that potential employers would draft contracts less in the minor's favour and try to have the draft approved: if approved it would bind; if not it could be redrafted. Meanwhile the minor, whose principal consideration would be to end up with a concluded contract, would be unlikely to raise with the court difficulties about the contract proposed by the potential employer - Law Commission Report 20 para 5.8(c).

³⁶ Paras 5.22-5.24 above.

³⁷ New Zealand Act s 6(2) (dealing also with relief); New South Wales Act s 30 (dealing also with affirmation after attainment of 18 years of age, or by a personal representative); British Columbia Infants Act s 16.5: see also Ontario Contract Report 206. The South Australia Report 6 specifically rejected the concept on the ground that it renders the status of all contracts uncertain at the time of their making, and the South Australia Act makes no provision for it: likewise, the Ireland Contracts Report 146 said that it would create uncertainty and confusion, and would qualify significantly the restitutionary principle. The Scotland Report 43 para 3.130 also recommends against subsequent approval, considering it more appropriate to rely directly on the procedure for setting aside.

³⁸ See United Kingdom Act s 2.

³⁹ [1947] KB 104.

⁴⁰ The decision should apply directly to a guarantee of the minor's obligations under any contract, such as a sale of non-necessary goods, rendered "absolutely void" by the statute. Guarantees are however most commonly given in respect of loans.

(said, unlike guarantees, to be independent of any principal obligation)⁴¹ from adults in respect of minors' obligations.

7.12 The decision in *Coutts & Co v Browne-Lecky*,⁴² and the artifice to which it has led, have been generally condemned.⁴³ Unless modified by local case-law⁴⁴ or statute,⁴⁵ the rule continues to apply in those jurisdictions where the United Kingdom *Infants Relief Act 1874* or its equivalent forms part of the law. Proposals for reform universally recommend reversal of the effect of the case,⁴⁶ even in those jurisdictions which have never had the legislation on which it turns.⁴⁷ The decision itself does not apply directly in Western Australia, where there is no equivalent of the United Kingdom *Infants Relief Act 1874*, and where loans to minors are not absolutely void, although not binding unless ratified. It has however been held, by parity of reasoning, that if the minor does avoid a contract which is voidable, the guarantor is discharged from liability.⁴⁸ The whole issue was considered by the Commission in its

⁴¹ The distinction between guarantees and indemnities is drawn in *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828.

⁴² [1947] KB 104.

⁴³ For example see E J Cohn *Validity of Guarantees for Debts of Minors* (1947) 10 Mod L Rev 40; M P Furmston *Infants' Contracts - La Nouvelle Vague?* (1961) 24 Mod L Rev 644. J Steyn *Guarantees: The Co-extensiveness Principle* (1974) 90 LQR 246, 251-254 does not condemn, but is gently critical.

⁴⁴ As in British Columbia - *First Charter Financial Corporation Ltd v Musclow* (1974) 49 DLR (3d) 138.

⁴⁵ Strictly speaking the decision in *Coutts & Co v Browne-Lecky* [1947] KB 104 depends for its force on the *Infants Relief Act 1874* (UK) s 1, or its equivalent, making the principal obligation "absolutely void". Some reforming statutes both repeal the legislation and reverse the effect of the case - New Zealand Act ss 19, 10; British Columbia Act s 2, British Columbia Infants Act s 16.6; United Kingdom Act ss 4, 2. In New South Wales and South Australia, where there has never been legislation based on the *Infants Relief Act 1874* (UK), legislation reverses the effect of the case - New South Wales Act s 47; South Australia Act s 5.

⁴⁶ Lately Report 94 paras 360-362; New South Wales Report 88 Appendix G para 39 (Notes on Proposed Bill) (rather laconically); Alberta Report 41-42; British Columbia Working Paper 70-71; British Columbia Report 43; South Australia Report 8; Law Commission Working Paper 134-135 para 11.13; Law Commission Report 13 paras 4.14-4.15; Tasmania Working Paper Recommendation 6.1; Ireland Contracts Report 156; Ontario Contract Report 208; Tasmania Report 14. In Scots law a guarantee of a contract which is void or voidable on account of a pupil's or minor's incapacity has always been fully valid and enforceable: Scotland Memo 230 para 5.141 proposes no change in the law and Scotland Report recommendations do not affect the rule - Scotland Report 40 para 3.120 n 3.

⁴⁷ Alberta, New South Wales, Ontario, South Australia.

⁴⁸ *Land and Homes (WA) Ltd v Roe* (1936) 39 WALR 27. The contract concerned a sale of land by instalments, hence was in the category of contracts valid unless avoided, but the reasoning of the case applies equally to contracts not binding unless ratified. The decision can also be justified on the ground, which appears faintly in the judgment, that the purchaser having repudiated was, regardless of minority, not liable for instalments, hence the guarantor likewise was not liable - see *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, a case referred to in argument but not cited in the judgment.

Working Paper,⁴⁹ the Commission being tentatively of the view⁵⁰ that an adult guarantor of a minor should be liable to the same extent as if the principal debtor⁵¹ were an adult.

7.13 The Commission adheres to its view that an adult guarantor should be able to be bound in respect of a minor's undertaking, even though the minor is not bound. The possibility of binding the adult may be a critical factor in the other party's decision whether or not to contract with the minor; moreover, the guarantor is in a better position to assess whether or not the contract is an appropriate one for the minor to make, and as between guarantor and creditor should be made to bear the loss that arises if it is not. This result can be achieved by the adult entering an obligation in the nature of an indemnity, which in this context may require no more than specifying that the obligation is an independent undertaking, to be binding whether or not the minor is bound.⁵² The importance, where the principal debtor is a minor, of adding qualifying words of this nature to a contract calling itself a "guarantee" may not always be appreciated: consequently, if there is any danger that the intention of the parties might be defeated by a failure to use some technical language, the Commission is of the view that the law should be clarified. In essence, the question is whether, if the Commission's recommendations were implemented, qualifying words would be necessary.

7.14 Under the Commission's proposals loans to minors would be binding, subject to the possibility of relief through the general law, or by virtue of a defence of minority personal to the minor.⁵³ The law on the availability to the guarantor of defences open to the principal debtor, such as arise from misrepresentation or undue influence, is not clear. If the principal debtor takes the opportunity to avoid the contract, it seems the guarantor's liability is likewise discharged.⁵⁴ If however the principal debtor does not use the defence, opinions are divided as to whether the guarantor may raise it.⁵⁵ The Commission makes no recommendations on

⁴⁹ Working Paper No 2 19-20 paras 1.43-1.44; 70 paras 3.50-3.51.

⁵⁰ Id 72 para 3.51.

⁵¹ Working Paper No 2 refers to a debt because the contract in *Coutts & Co v Browne-Lecky* [1947] KB 104 was one of loan: as a matter of principle the Commission's view should be taken as extending to guarantees of all kinds of obligations.

⁵² See for example *Alliance Acceptance Co Ltd v Hinton* (1964) 1 DCR (NSW) 5 where the promise contained the operative words "I . . . hereby guarantee" but also provided that "I further agree that my liability to you shall not be impaired by reason of the said hirer being an infant".

⁵³ See para 5.2 above.

⁵⁴ O'Donovan and Phillips 188. The same result is achieved under the present law where a contract is voidable because of minority and the minor does avoid: id 186-187; *Land and Homes (W A) Ltd v Roe* (1936) 39 WALR 27.

⁵⁵ O'Donovan and Phillips 188-190.

these matters which should, if at all, be looked at as part of a general review of the law of guarantees. The uncertainty about these defences may however affect the special defence of minority.⁵⁶ To avoid any doubt, therefore, the Commission recommends that legislation should provide that the liability of a guarantor of a minor shall not be affected by any relief which is or could be given to the minor on the ground that the principal obligation is prejudicial to the best interests of the minor.

7.15 Two final points should be made. Under general law a guarantor who pays the debt has a right to be indemnified by the principal debtor.⁵⁷ The right arises in the absence of a contract between guarantor and debtor for indemnity,⁵⁸ but may be confirmed by contract.⁵⁹ In respect of a guarantor of a minor, the right of indemnity which would arise if the minor were of full age should be subject to the principles which apply to contracts made by minors.⁶⁰ To the extent that the right of indemnity rests on an express or implied contract between guarantor and minor, that contract will thus be governed by the recommendations of this Report; where the minor did not request the guarantee, the general law itself ensures that an indemnity will only arise "where the guarantor was compelled by some necessity to incur the obligation and where it was just and reasonable in all the circumstances for him to be reimbursed".⁶¹ No doubt the guarantor may be exposed to liability which cannot be recouped, if the guarantor is forced to pay the debt in full but the minor is granted relief in respect of the claim for indemnity, but that danger is faced by any person dealing with a minor.⁶²

⁵⁶ The view has been advanced that where a contract is voidable on the ground of minority or other incapacity, but the principal debtor does not avoid, the guarantor cannot raise the defence - id 187 citing J Steyn *Guarantees: The Co-extensiveness Principle* (1974) 90 LQR 246, 258-259, who suggests the outcome may turn on whether or not the guarantor knew of the disability of the principal debtor. It would seem to follow *a fortiori* that the same would apply where minority does not render a contract voidable, but merely enables the minor to seek relief.

⁵⁷ Rowlatt 134; O'Donovan and Phillips 445-446: 20 Halsbury para 211.

⁵⁸ Rowlatt 134; O'Donovan and Phillips 445-446. The claim for indemnity is then for money paid to the use of the principal debtor, and rests on an implied promise. Where the principal debtor does not request the guarantee, the right of indemnity will only arise in limited circumstances - id 446-447.

⁵⁹ Id 445, 446.

⁶⁰ The same recommendation is made in Alberta Report 41-42; British Columbia Working Paper 71; British Columbia Report 43; Ireland Contracts Report 156. Law Commission Working Paper 135 para 11.13; Law Commission Report 13 para 4.13; Ontario Contract Report 208 use the slightly different formulation that the minor's liability to indemnify should be enforceable only to the extent that the principal obligation is enforceable, but the effect is the same.

⁶¹ O'Donovan and Phillips 447 (footnote omitted).

⁶² The guarantor will be no better off under the doctrine of subrogation, which allows a guarantor who has paid the debt in full to enforce against the debtor the principal obligation, and all securities, priorities and remedies, which the creditor could have enforced against the debtor prior to that payment - O'Donovan and Phillips 502-503; 20 Halsbury para 193. Subrogation would be to whatever claim the creditor had against the minor, and it is unlikely that there would be relief against the claim for indemnity where there was no relief against the creditor's claim against the minor.

7.16 The Lately Report,⁶³ concerned more with the lack of appreciation by guarantors of the serious nature of the transaction than with the lack of indemnity, proposed that a guarantee of a minor's contract should not be binding unless signed by the guarantor in a space containing a warning that the guarantee could result in a personal legal liability to pay the debt. Under the *Credit Act 1984* s 140 (1) the guarantor of a regulated contract, where the debtor is a minor, is liable under the guarantee to the same extent as if the debtor were not a minor.⁶⁴ That provision does not however apply unless, when the contract of guarantee was made, it included a prominent statement immediately above or below the place where the guarantor signed, to the effect that a person who enters a contract of guarantee in respect of the obligations of a debtor who is not a minor may not have a right to recover from the debtor amounts that the guarantor is liable to pay under the contract.⁶⁵ This statutory warning accurately reflects the Commission's recommendation⁶⁶ on a guarantor's right of indemnity against a minor, and the Commission's recommendations thus accord with the *Credit Act 1984*. Although a statutory warning has been deemed necessary for transactions falling within the *Credit Act 1984*, the Commission sees no need of a warning of this nature for guarantees not falling within the scope of that Act.

6. TORTS

7.17 On general principles, a minor is liable for torts committed, unless lacking any requisite mental capacity.⁶⁷ A problem arises where plaintiff and minor defendant are also in a contractual relationship. As mentioned above,⁶⁸ under the present law the rules which prevent certain contracts from being contractually enforced against a minor are supported by a supplementary rule whereby an action in tort, which would if permitted achieve substantially the same result as an action in contract, is equally barred. If however the tort can be seen as sufficiently unconnected with the contract, the tort action may succeed, even though the tort could not have occurred if the contract had not existed: the distinction between cases where the tort is or is not sufficiently unconnected is notoriously difficult to draw. Acceptance of

⁶³ 95 paras 365-366.

⁶⁴ The Commission's recommendation that an adult guarantor of a minor's undertaking should be able to be bound even although the minor may obtain relief from the principal obligation thus already operates for many of the credit contracts which minors are likely to make.

⁶⁵ *Credit Act 1984* s 140(2).

⁶⁶ Para 7.15 above.

⁶⁷ See generally Harland ch 13.

⁶⁸ Para 3.10, referring to Working Paper No 2 18-19 paras 1.40, 1.41.

the Commission's recommendations may reduce the number of cases,⁶⁹ but the question remains whether a similar rule preventing actions in tort should operate in support of such relief as a court may be prepared to grant on the basis that the contract is prejudicial to the minor's best interests.⁷⁰

7.18 The question of liability in tort connected with a contract has provoked different responses from those who have considered reform of the law of minors' contracts.⁷¹ The South Australia Report,⁷² by making no comment, favours retention of the existing law; the Law Commission Report⁷³ did not pursue the matter: statutes implementing those Reports⁷⁴ introduce no change. Likewise, the New Zealand Act retains the common law rule,⁷⁵ as does the British Columbia Infants Act⁷⁶ following the British Columbia Report,⁷⁷ and the Tasmania Working Paper⁷⁸ is to similar effect. The Ireland Contracts Report⁷⁹ also favours retention of the rule, but emphasises that its restitutionary principle for minor's contracts will afford the other party adequate protection, even in cases of misrepresentation as to age. In direct contrast the New South Wales Act⁸⁰ abolishes the doctrine by providing that a minor may be liable in tort whether or not the tort is connected with a contract or the cause of action for the tort is in substance a cause of action in contract. The Ontario Contract Report⁸¹ recommended likewise, but with two limitations with respect to damages resulting from a false representation of age: first, liability would only arise where the representee had reasonable grounds to believe that the representation was true; secondly, liability would not arise by reason only of the fact that the minor had signed a standard form document containing an assertion of full age or of contractual capacity. The Alberta Report⁸² also recommended abolition of the rule, but with one exception: a minor was not to be liable in deceit for

⁶⁹ The thrust of the Commission's recommendations is that minors should generally be liable in contract, so there will be less need to consider a tort action.

⁷⁰ On this relief, see paras 5.2, 5.12-5.47 above.

⁷¹ Although the general proposals for reform may differ radically, tort liability is always an issue whenever some form of relief, on the ground of minority alone, is proposed.

⁷² At 6-7.

⁷³ At 17-18.

⁷⁴ South Australia Act; United Kingdom Act.

⁷⁵ At least as regards liability in tort for procuring a contract by means of fraudulent representations - New Zealand Act s 15(4). The Act has effect as a code on the contractual capacity of minors and on contracts entered into by minors - s 15(1) - but makes no specific provision as respects other torts.

⁷⁶ S 16.8.

⁷⁷ 35-38. The preliminary recommendation in the British Columbia Working Paper was similar, except that a majority was of the view that a minor should be liable where the tort was deceit as to the minor being of full age - British Columbia Working Paper 57-58.

⁷⁸ Recommendation 8.2.

⁷⁹ 152-155.

⁸⁰ S 48.

⁸¹ 209-210.

⁸² 37.

inducing a contract, where the tort took the form of a misrepresentation that the minor was of full age. The Latey Report⁸³ and Law Commission Working Paper⁸⁴ favoured yet another approach: both recommended that, where tort and contract were connected, the minor should be liable if the tort was deceit, but should not be liable for any other kind of tort. To the view that the minor should be liable in deceit the Latey Report added one exception, that is, where the deceit was as to age.⁸⁵

7.19 This Commission in its Working Paper⁸⁶ favoured the approach taken in the British Columbia Report.⁸⁷ The Commission also favoured the recommendation made in that Report that a court exercising discretionary powers to grant relief should take into account any misrepresentation as to age practised by the minor,⁸⁸ subject to two provisos: that the minor shall not be held to have induced the other party to enter the contract by means of a fraudulent representation as to age unless that party had reasonable grounds for believing that the misrepresentation was true; and that signature by the minor of a standard form declaration of full age should not of itself be regarded as having induced the contract.⁸⁹

7.20 Cases in which an action in tort has failed on the ground that it is an attempt to enforce what is in substance a contractual liability against a minor fall into two main groups. The first group comprises contracts where the contractual obligation, expressed or implied, is to observe a particular standard of care. Some cases concern bailments:⁹⁰ the same problem could also arise where a minor undertakes to provide work or services, and fails to take sufficient care or perform with the appropriate degree of skill.⁹¹ Here the contractual and tortious liabilities are identical. If, the Commission's recommendations being applied, the minor succeeds in persuading a court that relief against the contractual obligation should be given on the ground that the contract is prejudicial to the minor's best interests, it could be said that that judgment should not be frustrated by the plaintiff casting the action in tort rather

⁸³ 91-93 paras 350-355.

⁸⁴ 128-130 paras 11.1-11.4.

⁸⁵ Latey Report 92-93 paras 352-354.

⁸⁶ Working Paper No 2 68-69 para 3.46.

⁸⁷ British Columbia Report 37-38.

⁸⁸ Id 37. Fraud, whether or not as to age, is also a factor to be taken into account in the New Zealand Act s 15(4), and under New South Wales Act s 37(2) a court may confirm a civil act which was induced by a fraudulent misrepresentation by a minor of age or of any other matter affected the capacity of the minor to participate in the act.

⁸⁹ See now British Columbia Infants Act s 16.3(4).

⁹⁰ *Jennings v Rundall* (1799) 8 TR 335; 101 ER 1419; *Fawcett v Smethurst* (1914) 84 LJKB 473.

⁹¹ The issue is unlikely to arise, because many of these contracts will be enforceable as being made pursuant to a profession, or as part of a beneficial contract of service.

than in contract. The proposition can however be reversed: the minor should not escape obligations in tort which the law would normally impose, merely because they are also the subject of a contractual promise. On balance, the Commission is of the view that where contract and tort liabilities are the same, the minor should be held liable in tort notwithstanding the existence of the contract.⁹² If the other party attempts by contract to impose any greater liability,⁹³ the Commission's recommendations as to minors' contracts generally will of course apply.

7.21 In the second group are cases where the minor has induced⁹⁴ the making of a contract by a fraudulent representation, usually⁹⁵ but not necessarily⁹⁶ of age. In these cases an action in deceit⁹⁷ has failed, because of the connection between tort and contract. Success in an action for deceit would not, however, necessarily be the same as enforcement of the contract, because the measures of damages in deceit and in contract differ. The gist of the action in deceit is that the plaintiff has been induced to make a contract by fraud and should be compensated for loss resulting from having made the contract. Damages are measured by the difference between what has been received and what was paid. In contract, the action is to obtain what has been promised, and damages are measured by the difference between what has been received and what was promised. In the case of a loan to a minor these amounts

⁹² This does not necessarily mean that the minor would be liable as would an adult. With torts involving trespass to the person and possibly other intentional torts it appears that, to be liable, a child must be able to understand the nature of the action, although lack of understanding that the action is wrong, or of the seriousness of the consequences, does not excuse: Fleming 22; Trindade and Cane 36, 207. In the case of negligence, however, a child is only expected to conform to the standard appropriate for normal children of similar age and experience - Fleming 103-104 - although an adult standard is required of a child who engages in dangerous adult activities - *ibid*; Trindade and Cane 339-340. The same applies in cases of alleged contributory negligence of the child - Fleming 259-261; Trindade and Cane 339-340.

⁹³ As was alleged, but not proved, in *Fawcett v Smethurst* (1914) 84 LJKB 473, where the bailor stated that he only allowed the defendant to take the car bailed on the condition that it should be at his risk.

⁹⁴ If the other party knows that the representation is untrue, there is no inducement and hence no possibility of recovery - *Nelson v Stocker* (1859) 4 De G & J 458: 45 ER 178.

⁹⁵ *Johnson v Pie* (1665) as reported 1 Keb 913: 83 ER 1317; *R Leslie Ltd v Sheill* [1914] 3 KB 607. See also *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch 422: 156 ER 180 (representation by a married woman that she was unmarried).

⁹⁶ *Grove v Nevill* (1664) 1 Keb 778: 83 ER 1238 (affirmation of ownership of goods sold); *Howlett v Haswell* (1814) 4 Camp NP 118: 171 ER 38 (affirmation of soundness of a horse sold); *Green v Greenbank* (1816) 2 Marsh 485: 17 RR 529 (affirmation of soundness of a horse exchanged). See also *Wright v Leonard* (1861) 30 LJCP 365 (representation by a married woman that certain bills had been accepted, made to induce the plaintiff to discount the bills).

⁹⁷ Under the old system of pleading, where the declaration was in contract only, it was held to be too late to introduce fraud by way of replication to a plea of minority - *Bartlett v Wells* (1862) 1 B & S 836: 121 ER 924; *De Roo v Foster* (1862) 12 CBNS 272: 142 ER 1148.

may be very similar,⁹⁸ but where for instance property has been sold there may be no damages in deceit if, despite the fraud, the property is worth the amount paid for it.⁹⁹

7.22 The Commission believes that the measure of damages available in deceit, which in effect restores the pre-contractual position, is likely to serve as a guide for a court considering what relief, in an action on the contract, should be given under the Commission's recommendations to a minor who has induced that contract by fraud. The amount to be awarded on strict application of tort principles may however exceed the amount a court would give in exercise of its jurisdiction to grant relief to minors.¹⁰⁰ As in the first group of cases, the Commission sees no reason why the other party should be deprived of the full measure of damages for deceit, where the minor's fraud has taken the form of inducing the other party to enter a loss-producing contract with the minor, rather than some other loss-producing activity. The Commission is mindful of the often expressed fear that to allow actions in tort in these circumstances would operate to deprive minors of the protection they enjoy under the law.¹⁰¹ This fear postulates that fraud can always¹⁰² or easily¹⁰³ be established against a minor, but the mere fact that a minor is in trade,¹⁰⁴ or trades in goods¹⁰⁵ or shares¹⁰⁶ without any express representation of age, does not constitute fraud. As to the use of standard forms, the Commission believes that, having regard to the requirements for establishing fraud,¹⁰⁷ the existing law is adequate to ensure that minors will not be held to have been fraudulent where commonsense would dictate otherwise, and that no special provisions are needed to define

⁹⁸ The plaintiff should recover interest at the agreed rate in contract, but not necessarily in deceit.

⁹⁹ See generally *Holmes v Jones* (1907) 4 CLR (Pt 2) 1692, 1715-1717 per Isaacs J.

¹⁰⁰ In British Columbia Report 36 the view was expressed that the best relief available to an adult party who frames the action in deceit would rarely exceed the best relief available under that Commission's recommendation.

¹⁰¹ The earliest comment may be that found in *Johnson v Pye* (1665) as reported 1 Sid 258: 82 ER 1091: "infants...ne serront lie p ceux [torts] q sound in deceit, car si serront tous les infants in Anglitterre serront ruine".

¹⁰² *Johnson v Pie* (1665) as reported 1 Keb 913, 914: 83 ER 1317 per Twisden J: "Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract". See also *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch 422, 429: 156 ER 180, 183 per Pollock CB: "If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for this (sic) is not a contract of any kind which a feme covert could make, whilst she knew her husband to be alive, that could not be treated as a fraud".

¹⁰³ In modern times the danger is that parties habitually dealing with young people may employ a standard form containing an affirmation of full age - Latey Report 92 para 353; Alberta Report 36; British Columbia Working Paper 58; British Columbia Report 37; Scotland Memo 178-182 paras 5.85-5.89, 202-203 para 5.113 and Report 41 para 3.124 (in the slightly different context of whether a fraudulent misrepresentation of age should continue to render the transaction fully binding on the minor); Ontario Contract Report 210. For a legislative solution see British Columbia Infants Act s 16.3(4).

¹⁰⁴ *Miller v Blankley* (1878) 38 LT 527.

¹⁰⁵ *Ex parte Jones In re Jones* (1881) 18 Ch D 109.

¹⁰⁶ *Stikeman v Dawson* (1847) 1 De G & Sm 90: 63 ER 984.

¹⁰⁷ See generally G Spencer Bower and A K Turner *The Law of Actionable Misrepresentation* (3rd ed 1974) ch 11.

what would not, or what would, constitute fraud. In conclusion, therefore, the Commission recommends that minors should be as liable in tort as are adults, whether or not any tort is directly or indirectly connected with a contract made by the minor.

7. QUASI-CONTRACT

7.23 A problem very similar to that relating to tort arises where the other party seeks to make a minor liable, not in contract, but in quasi-contract, for instance in an action for money had and received to the use of the other party, or for a consideration which has totally failed. As with tort, there can be recovery where circumstances giving rise to the action are regarded as sufficiently unconnected with the contract,¹⁰⁸ but not otherwise.¹⁰⁹ For the same reasons as apply in the case of actions in tort, the Commission recommends that, where applicable, actions in quasi-contract should lie against a minor whether or not the action is connected with a contract made by the minor.

8. ESTOPPEL

7.24 A minor who induces a contract by a false representation as to age cannot be estopped from pleading infancy to an action on the contract.¹¹⁰ It has also regularly been held that neither at law nor in equity does a misrepresentation of this nature make the minor liable on

¹⁰⁸ *Bristow v Eastman* (1794) 1 Esp 172: 170 ER 317; *Re Seager Sealey v Briggs* (1889) 60 LT 665; *Peters v Tuck* (1915) Tas LR 30. In *Re Seager* action was brought on a promise, supported by a charge, to make good defalcations, but Kay J held that the minor could originally have been made liable in tort. In *Bristow v Eastman* the defendant was apprenticed to the plaintiff; in *Re Seager* the defendant was a journeyman butcher: apart from the question of personal liability of an apprentice (as to which see para 4.5 n 11 above) the contract was in both cases therefore possibly binding on the minor.

¹⁰⁹ *R Leslie Ltd v Sheill* [1914] 3 KB 607. In *Cowern v Nield* [1912] 2 KB 419 the claim in quasi-contract was referred for a new trial on the issue of fraud, apparently because only if there was fraud could the action succeed, on the basis that it would then in substance be *ex delicto*. The result has been criticised: P S Atiyah *The Liability of Infants in Fraud and Restitution* (1959) 22 Mod L Rev 273, 282; D C Pearce *Fraudulent Infant Contractors* (1968) 42 ALJ 294, 301; Treitel 433; R Goff and G Jones *The Law of Restitution* (3rd ed 1986) 432-434. In *Thavorn v Bank of Credit & Commerce International S A* [1985] 1 Ll R 259 the contract was of the most tenuous nature. An adult had deposited money to the credit of a minor, who at that stage knew little or nothing about it. Finding out about the deposit later, the minor succeeded in having it transferred to a current account, and lost much or all of it in gambling. The adult recovered from the bank, which failed in a counterclaim against the minor. Lloyd J held that, having regard to *R Leslie Ltd v Sheill* [1914] 3 KB 607, it would be absurd to hold that a minor can be sued for money paid under a mistake of age, whereas payment induced by fraud could not be recovered.

¹¹⁰ The point is made at para 3.10 above. See also *Levene v Brougham* (1909) 25 TLR 265; *Watson v Campbell (No 2)* [1920] VLR 347.

the contract.¹¹¹ The Commission recommends no change in the law here: the action being in contract, the Commission's recommendations should apply.

9. MISTAKE AS TO AGE

7.25 The Alberta Report,¹¹² alone of the Reports and Working Papers studied by the Commission, gave consideration to the question whether its recommendations should apply if the other party was not aware that the minor had not reached the age of majority, either through mere ignorance, or having been misled by the minor. The conclusion was that they should.¹¹³ Where a representation of full age has been made, the Commission has already recommended¹¹⁴ that its proposals should apply to any action on the contract. Where no representation has been made, but the other party believes the minor to be of age, any relief for the other party could only arise from the general law relating to mistake in contract. The Commission is not aware of any case where relief specifically on these grounds has been sought,¹¹⁵ let alone granted. The Commission considers that its recommendations should apply, notwithstanding a mistake as to age, but sees no need of legislation on the matter.

10. AGENCY

7.26 The interaction between the law of agency and the rules governing contracts made by minors has not yet been fully elaborated in the cases. In its Working Paper¹¹⁶ the Commission

¹¹¹ *Bartlett v Wells* (1862) 1 B & S 836: 121 ER 924; *De Roo v Foster* (1862) 12 CBNS 272: 142 ER 1148; *Miller v Blankley* (1878) 38 LT 527; *R Leslie Ltd v Sheill* [1914] 3 KB 607; *Watson v Campbell (No 2)* [1920] VLR 347. *Ex parte The Unity Joint Stock Mutual Banking Association In re King* (1856) 3 De G & J 63: 44 ER 1192, which appears to be contrary, is distinguishable - see *R Leslie Ltd v Sheill* [1914] 3 KB 607, 615-617 per Lord Sumner, 624 per Kennedy LJ, 628 per A T Lawrence J. The position with a defence of *coverture* was the same as for minority: *The Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch 422: 156 ER 180. In Scots law a contract induced by a minor's fraud is binding on the minor - Scotland Memo 28-29 paras 2.27-2.29. Scotland Memo 178 para 5.84 expressed no provisional view on whether this should continue to be the law for those under 16 in its preferred or second options, but did recommend its continuance if 16 and 17 year olds were to remain under disability in its second (or any other) option - id 200-202 paras 5.111-5.112. Scotland Report 16-17 paras 3.29-3.32 recommends that fraudulent misrepresentations of age should not render the (otherwise void) transactions of under 16 year olds binding on them, but does recommend with respect to 16 and 17 year olds (id 40-41 paras 3.121-3.123) that fraudulent misrepresentation of any material fact (not merely age) which induces the other party to enter the transaction should have the effect of barring the minor from challenging the transaction.

¹¹² 36.

¹¹³ *Ibid.* Two members dissented on the point of applicability where the minor had lied about age.

¹¹⁴ Para 7.22 above.

¹¹⁵ Attempts have been made to argue that the minor, by trading but keeping silent, has in effect made a fraudulent representation of age - *Stikeman v Dawson* (1847) 1 De G & Sm 90: 63 ER 984; *Miller v Blankley* (1878) 38 LT 527; *Ex parte Jones In re Jones* (1881) 18 Ch D 109.

¹¹⁶ Working Paper No 2 20-21 paras 1.45-1.47.

set out the law and the views of writers in the area, and formed the tentative view¹¹⁷ that some clarification if not change to the common law would be achieved by express enactment.¹¹⁸ The provisions favoured in the Working Paper give a synthesis of case-law and comment that, with one exception,¹¹⁹ probably represents the existing law. That representation, in turn, is a logical application of recognised agency principles to the special rules for minors. Thus a minor can contract with another party through an agent, but the contract so made will have no greater binding effect than if made by the minor personally. Similarly a minor may by contract appoint or be appointed agent, but that contract will be governed by the same rules as apply to any other contracts made by minors: a contractual appointment by a minor of an agent would bind the minor if the agent were providing services which could be regarded as a necessary, or the contract was ancillary to a beneficial contract of service or analogous contract; an appointment of a minor would bind if it fell in the category of beneficial contracts of service or contracts analogous or ancillary thereto. The possible contractual liability of a minor agent for an undisclosed principal, or for breach of warranty of authority, is also governed by the law for minors' contracts. In this state of the law (so far as it may be known) the Commission's recommendations require no specific provision for agency issues: to the extent that these issues involve contract, normal contractual principles will apply, subject to the special defence based on minority.

11. TWO MINORS

7.27 Where two minors have entered into a contract it would be inappropriate that a court should consider whether or not the contract would be prejudicial to the best interests of both minors. In the ordinary course the court would consider, on the application of a minor seeking to be relieved of the obligation, whether or not the contract as it stands is prejudicial to that minor's best interests. The best interests of the other contracting party, whether adult or minor, would be considered only in the context of the remedy, being a fair, just and reasonable solution to the problem.¹²⁰

¹¹⁷ Id 70-71 para 3.52.

¹¹⁸ Similar, though more limited, recommendations are to be found in Alberta Report 42-43 and Ontario Contract Report 207-208. New South Wales Report 19 Appendix A paras 13-14 noted some of the law on minors and agency, and New South Wales Act s 46 makes express provision for anyone under the age of 21 to appoint or act as an agent.

¹¹⁹ It appears settled that a minor cannot create a valid power of attorney: the Commission proposed reversal of this rule.

¹²⁰ The objective of relief is set out at para 5.25 above.

Chapter 8

SUMMARY OF RECOMMENDATIONS

1. Subject to the other recommendations of the Commission, any contract to which a minor is a party should bind all parties to the contract.

Paragraphs 5.3-5.4

2. The rules of the common law and of equity, so far as they are not inconsistent with the other recommendations of the Commission, and in particular the rules relating to the law of principal and agent and the effect of undue influence, unconscionability, mistake, or other invalidating cause, should apply to any contract to which a minor is a party.

Paragraphs 5.5-5.11, 7.25-7.26

3. The *Sale of Goods Act 1895* section 2 should be amended by deleting references to an infant or minor.

Paragraph 6.3

4. Where a minor is a party to a contract the court should, at the instance of the minor only, be able to grant relief where the court is satisfied that the contract viewed as a whole is, at the time of judgment, prejudicial to the best interests of the minor.

Paragraphs 5.12-5.47

5. The objective of the court in granting relief should be to do what is fair, just and reasonable in all the circumstances of the case.

Paragraph 5.25

6. The court should be able to grant relief in one or more of the following forms:

- (a) The court should be able to delete or alter terms of the contract and enforce the contract as so modified.

Paragraphs 5.27-5.29

The court should be able, but not required, to offer the other party to the contract a choice between enforcement of the contract as modified, and such other relief as the court may be prepared to grant.

Paragraph 5.29

- (b) The court should be able to rescind the contract and restore the *status quo ante*.

Paragraphs 5.30-5.40

The court should be able to grant this relief notwithstanding that -

- (i) *complete restoration of the status quo ante* cannot be effected;

Paragraph 5.35

- (ii) third parties may be deprived of title to property or otherwise prejudiced thereby;

Paragraphs 5.36-5.38

- (iii) the minor has affirmed the contract before achieving majority;

Paragraph 5.39

- (iv) there has been a lapse of time between the contract and the application for relief, the applicant being still a minor.

Paragraph 5.40

- (c) The court should be able to order restoration, by either or both parties, of property acquired by means of the contract, or of property or money representing property so acquired.

Paragraphs 5.41-5.42

- (d) The court should be able to order repayment, by either or both parties, of money paid pursuant to the contract, notwithstanding that there has been no total failure of the consideration for which the money was paid.

Paragraph 5.43

- (e) The court should be able to order payment, by either or both parties, of money by way of compensation or otherwise.

Paragraphs 5.44-5.47

- (f) The court should be able to order such payment notwithstanding that

- (i) the minor no longer retains any benefit received under the contract;

Paragraph 5.45

- (ii) the minor received no benefit under the contract.

Paragraph 5.47

- 7. The court should be empowered to grant all or any of the above forms of relief notwithstanding that the contract has been fully executed.

Paragraphs 5.48-5.50

- 8. Where the applicant is no longer a minor, the right to relief should be capable of being lost by events occurring after majority and constituting, according to the rules of the general law -

- (a) affirmation of or election to be bound by the contract;

Paragraphs 6.11-6.12, 6.14

- (b) estoppel;

Paragraphs 6.13-6.14

- (c) lapse of time between attainment of majority and the application for relief.

Paragraph 6.16

- 9. *Lord Tenterden's Act 1828* section 5 should be repealed.

Paragraph 6.14

10. The liability of the guarantor of a minor should not be affected by any relief which is or could be given to the minor on the ground that the principal obligation is prejudicial to the best interests of the minor.

Paragraphs 7.11-7.14

11. The liability of a minor to indemnify any guarantor of the minor's obligations should be governed, as applicable, by the rules governing any other contractual liability of the minor, or by the rules of the general law.

Paragraph 7.15

12. The liability of a minor in tort should not be affected by the tort being connected with a contract to which the minor is a party.

Paragraphs 7.17-7.22

13. The liability of a minor in quasi-contract should not be affected by that liability being connected with a contract to which the minor is a party.

Paragraph 7.23

14. A minor who induces a contract by a misrepresentation of age or some other misrepresentation of capacity to enter that contract should not be estopped, in an action on that contract, from seeking relief under these recommendations.

Paragraph 7.24

C W OGILVIE, *Chairman*

R L LE MIERE

M E RAYNER

G SYROTA

J A THOMSON

10 May 1988

Appendix

PERSONS AND BODIES WHO COMMENTED ON WORKING PAPER

NO 2

Mr D W Chantler LLB Barrister at Law

Dr Carol R Deller MA MBB Chir DA

Family Planning Association of Western Australia (Inc)

Law Reform Committee of The Law Society of Western Australia

Law School Minors Contracts Group No 1

Law School Minors Contracts Group No 2

Law School Minors Contracts Group No 3

Mr J Stephens