

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

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THIRTEENTH ANNUAL REPORT (1991)

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IRELAND  
The Law Reform Commission  
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*The Law Reform Commission*

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

ARDILAUN CENTRE  
111 ST. STEPHEN'S GREEN  
DUBLIN 2  
IRELAND  
TELEPHONE (01) 715699  
FAX (01) 715316

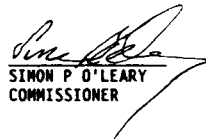
12th June, 1992

Harold A Whelehan Esq., S.C.,  
Attorney General,  
Government Buildings,  
Dublin 2.

Dear Attorney General,

In accordance with section 6 of the Law Reform Commission Act 1975, I have the honour to present the Thirteenth Report (1991) of the Law Reform Commission. It covers the period from 1st January 1991 to 31 December 1991.

Your sincerely,

  
SIMON P. O'LEARY  
COMMISSIONER



*CONTENTS*

	<i>Pages</i>
Letter to the Attorney General	(iii)
Commissioners	1
Staff	1
Functions of the Commission	1
Requests by the Attorney General	2
Reports on Topics in the Commission's First Programme for Law Reform	3
Reports on Topics in Attorney General's Request Reports in 1991	3
 The Year's Work	 3
The Confiscation of the Proceeds of Crime	3
The Civil Law of Defamation	5
The Hague Convention (1989) on the Law of Succession to Estates of Deceased Persons	6
Contempt of Court	8
The Crime of Libel	9
The Indexation of Fines	10
Conveyancing Law and Land Law	11
Passing of Risk	11
Service of Completion Notices	12
Dishonesty	12
 Private International Law	 13
Choice of Law in Tort	13
International Sale of Goods	13
Sentencing	14
Non-Fatal Offences	15
Crimes of Violence and Endangerment	15
Crimes Against Personal Liberty	15
Family Law	16
Insanity	17
Damages	17
 Action taken on Reports of the Commission during 1991	 17
The Statute of Limitations (Amendment) Act 1991	17
The Criminal Damage Act 1991	17
Child Abduction and Enforcement of Custody Orders Act 1991	17
Adoption Act 1991	17

	<i>Pages</i>
Child Care Act 1991	18
Hague Conference on Private International Law	18
UUIIROIT	18
Other International Meetings	18
Retirement of the President	18
List of Law Reform Commission's Publications	19

### THIRTEENTH REPORT OF THE LAW REFORM COMMISSION

1. This Report, which covers the period from 1st January 1991 to 31st December 1991, is addressed to the Attorney General pursuant to section 6 of the *Law Reform Commission Act 1975*.

#### 2. Commissioners

The following were the Commissioners in office in 1991:

The Hon. Mr Justice Ronan Keane, Judge of the High Court, President;

John F. Buckley, Esq., B.A., LL.B., Solicitor;

Professor William Duncan, M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, Trinity College, University of Dublin;

Ms Maureen Gaffney, B.A., M.A. (University of Chicago), Senior Psychologist, Eastern Health Board,  
Research Associate, Trinity College, University of Dublin;

Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

#### 3. Staff

The staff of the Commission consists of the Secretary, a Research Counsellor, four Research Assistants and four Clerical Assistants.

At the start of the year, Mr. Frank Ryan, Barrister-at-Law was Secretary to the Commission. Mr. William Binchy, B.A., B.C.L., LL.M., Barrister-at-Law, is Research Counsellor to the Commission. Ms. Una O Raifeartaigh, B.C.L., Barrister-at-Law, Ms. Elizabeth Heffernan, LL.B., LL.M., Mr. Anthony Whelan, LL.B., LL.M. and Mr. Brian Hutchinson, B.C.L., LL.M., Barrister-at-Law were Research Assistants at the start of the year. They were succeeded by Ms. Suzanne Egan, B.C.L., LL.M., Barrister-at-Law, Ms. Cliona Kimber, LL.B., LL.M., Ms. Julianne O'Leary, B.A., LL.B., Barrister-at-Law and Mr. Oisín Quinn, B.C.L., LL.M. in October.

In the course of the year, Mr. Ryan retired as Secretary to the Commission. Mr. Ryan had been Secretary to the Commission since its establishment and the Commission would wish to record their appreciation of his excellent service. Mr. Ryan was succeeded as Secretary by Mr. John Quirke.

#### 4. Functions of the Commission

The functions of the Commission are to keep the law under review, to undertake examinations and to conduct research with a view to reforming the law, and to

formulate proposals for law reform. After its establishment, the Commission prepared a programme for the examination of different branches of the law, which was subsequently approved by the Government. Copies of it were laid before both Houses of the Oireachtas on 4th January 1977.

In addition to reporting on matters in the programme it is also the function of the Commission, at the request of the Attorney General, to undertake an examination of and to conduct research in relation to any particular branch or matter of law whether or not it is included in the programme, and if so requested, to formulate and submit to the Attorney General proposals for its reform.

By 31st December 1991 the Commission had formulated and submitted to the Taoiseach or the Attorney General 41 Reports containing proposals for reform of the law, and had published 11 Working Papers, 5 Consultation Papers and 12 Annual Reports.

#### **5. Requests by the Attorney General**

On 6th March 1987 the then Attorney General requested the Commission to examine and research certain areas of law and submit to him proposals for reform in relation to the following matters:

- (1) Conveyancing law and practice in areas where this could lead to savings for house purchasers;
- (2) Sexual offences generally, including in particular, the law relating to rape and the sexual abuse of children;
- (3) The law relating to sheriffs, the collection of taxes and debt collection;
- (4) The law relating to compensation in personal injuries cases, including, in particular;
  - (a) provision for periodic payments and the making of provisional awards; and
  - (b) the Statute of Limitations in cases of latent personal injury; and
- (5) The following aspects of criminal law:
  - (a) sentencing policy;
  - (b) indexation of fines;
  - (c) confiscating the proceeds of crime; and

- (d) whether there is a need to revise or up-date the law relating to the various offences which are still mainly governed by pre-1922 legislation, including in particular, the laws relating to dishonesty, malicious damage and offences against the person.

In January 1989, the then Attorney General requested the Commission to undertake an examination of and conduct research and formulate and submit to him proposals for reform in relation to the law of defamation and contempt of court.

**6. Reports on Topics in the Commission's First Programme for Law Reform**  
In 1987, 1988, 1989 and 1990 the Commission published the following Reports on topics contained in the Commission's First Programme:

*Service of Documents Abroad re Civil Proceedings - The Hague Convention;*  
*The Rule Against Hearsay in Civil Cases;*  
*Recognition of Foreign Adoption Decrees; and*  
*Oaths and Affirmations.*

**7. Reports on Topics in Attorney General's Request**

In 1987, 1988, 1989 and 1990 the Commission published the following Reports on topics contained in the Attorney General's request:

*The Statute of Limitations in Cases of Latent Personal Injuries;*  
*Receiving Stolen Property;*  
*Rape and Allied Offences;*  
*Malicious Damage;*  
*Debt Collection: (1) The Law Relating to Sheriffs;*  
*Debt Collection: (2) Retention of Title;*  
*Land Law and Conveyancing Law: (1) General Proposals;*  
*Land Law and Conveyancing Law: (2) Enduring Powers of Attorney;*  
*Child Sexual Abuse; and*  
*Sexual Offences Against the Mentally Handicapped.*

**8. Reports in 1991**

In 1991 the Commission published a report on the following topic contained in the Commission's First Programme:

*The Hague Convention on Succession to the Estates of Deceased Persons.*

In 1991, the Commission published or submitted to the Attorney General a further 6 Reports on the following topics contained in the Attorney General's request:

*Confiscation of the Proceeds of Crime;*

*The Indexation of Fines;*  
*The Civil Law of Defamation;*  
*The Crime of Libel;*  
*Land Law and Conveyancing Law: (3) Passing of Risk from Vendor to Purchaser; and*  
*Land Law and Conveyancing Law: (4) The Service of Completion Notices.*

### ***The Year's Work***

#### **9. The Confiscation of the Proceeds of Crime**

In January, the Commission submitted to the Attorney General a Report on the *Confiscation of the Proceeds of Crime* (LRC 35-1991). The Commission agreed with the conclusions of the Whittaker Committee of Enquiry into the Penal System that it is unacceptable that offenders or their immediate families should be allowed to retain the proceeds of their crimes, whether or not the offenders are given prison sentences. The courts should have the power to ensure the confiscation of assets of this kind.

Two vital considerations inform this Report; the need to "freeze" a suspect's assets at the earliest possible stage and, the fact that it is and always will be virtually impossible to link particular assets with particular crimes.

The Commission proposed:

- (1) That certain offences should be scheduled or designated as offences warranting mandatory confiscation of assets on conviction;
- (2) That a court should have power to freeze the assets of suspects about to be charged;
- (3) That on conviction for a scheduled offence, it should be presumed that all the assets of the person convicted, above a specified value, constitute the proceeds of crime and should be confiscated unless he or she proves otherwise;
- (4) That it should be possible to satisfy a confiscation order by payment of the money value of the assets liable to confiscation;
- (5) That "laundering", i.e., assisting another to enjoy or dispose of the proceeds of scheduled offences, should be an offence;
- (6) That appropriate provision be made to enable the prosecuting authorities to obtain from the court orders:

- (a) to search for assets liable to confiscation;
  - (b) for access to or production of material believed relevant to the investigation of a scheduled offence;
  - (c) to obtain information from financial institutions;
  - (d) to obtain tax information from the Revenue Commissioners;
- (7) That provision be made for the enforcement of the confiscation orders of other countries.

#### **10. The Civil Law of Defamation**

In March, the Commission submitted to the Attorney General a Consultation Paper on *The Civil Law of Defamation*.

The Irish law of defamation is based in the main, on the English common law as it evolved over four centuries. It is in many respects archaic and out of date and the Consultation Paper sought to identify the major areas in which it fails to respond to the needs of modern Irish society.

The publication of the Consultation Paper provoked widespread comment in the media and the Commission also received numerous submissions on its proposals. The Commission held a Seminar at the Law Society's premises in Blackhall Place on 27th April at which the Commission's provisional recommendations were discussed. This Seminar was attended almost exclusively by lawyers and representatives of the media. In assessing the reaction to its provisional recommendations, the Commission was acutely aware that the most detailed and articulate responses predictably came in the main from the media and their representatives. Despite this inevitable imbalance, the Commission has striven to give effect in its final proposals to the sometimes conflicting rights of the citizen to his or her good name and of the rights of all, whether media organs or individuals, to freedom of expression.

The Commission is grateful to all those who contributed to the lively and thoughtful debate which the Consultation Paper provoked.

**11.** In December 1991 the Commission submitted a Report on *The Civil Law of Defamation* (LRC 38-1991) to the Attorney General. The recommendations in the Commission's report include:

- (1) Abolishing the distinction between libel and slander;
- (2) A new definition of defamation;

- (3) A provision that defendants in defamation actions may make payment into court without admission of liability;
- (4) A provision that an apology is not to be construed as an admission of liability and will be taken into account in any award of damages;
- (5) Changing the law of privilege, so as to remove the defence of absolute privilege from communications between members of the Executive as well as communications between spouses;
- (6) A provision for a defence to a claim for general (but not special) damages that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation;
- (7) Placing the burden on the plaintiff to prove that the words complained of were untrue;
- (8) A provision that all issues of fact in defamation actions in both the Circuit Court and the High Court, other than damages, should be determined by juries, subject to the entitlement of juries to make a finding that the plaintiff is entitled to nominal damages only;
- (9) Clarification of the law by providing that the Supreme Court can assess damages on an appeal;
- (10) Introduction of a new remedy of a declaratory judgment providing the plaintiff with a speedy method of correcting a false statement;
- (11) A provision for the obtaining of correction orders and/or declaratory judgments where the defendant has failed to establish the truth of a defamatory allegation of fact;
- (12) A provision for a new cause of action in respect of defamation of the dead; and
- (13) A provision that distributors and printers should be immune from defamation.

**12. The Hague Convention (1989) on the Law of Succession to Estates of Deceased Persons**

At present under Irish rules of private international law, succession to immovable property is determined by the law of the place where the property is situated; the law of the person's domicile generally governs succession to movable property. This approach is in harmony with other common law jurisdictions.

In April the Commission submitted to the Attorney General a Report on *The Hague Convention (1989) on the Law of Succession to Estates of Deceased Persons* (LRC 36-1991). In this Report, the Commission examined the question whether Ireland should ratify the Convention.

The Hague Convention of 1989 favours a novel approach. It seeks to lay down rules of succession governing both movable and immovable property, which involve a delicate balance between nationality and habitual residence. Article 3 of the Convention provides that where at the time of his or her death, the deceased was a national of and habitually resident in one state, then the law of that state governs his or her succession. This will be the situation in the large majority of cases, save in relation to persons who have migrated.

Under the Convention, where the deceased has been resident in a state for at least five years immediately before his or her death and died habitually resident there, then in general, the law of that state governs his or her succession. However in exceptional circumstances, the law of the state of his or her nationality will apply instead, if at the time of the death, he or she was "manifestly more closely connected" with his or her state of nationality. In other cases succession is governed by the law of the state of nationality, unless at the time the deceased was "more closely connected" with another state, in which case the law of the latter state will apply.

Article 5 of the Convention permits testators to designate the law of a particular state as the law governing the whole of their estates, provided that at the time of the designation or death, they are nationals or habitual residents of the state whose law they designate. It also contains detailed provisions (in Chapter III) relating to agreements as to succession (*partes successoraux*), which are a feature of the succession law in several European States, as well as reciprocal wills.

The Convention in Article 24, allows contracting states when satisfying the Convention to make one or more of four reservations. The Commission recommends that Ireland should avail of its entitlement to make a reservation of one only of these reservations (contained in paragraph (1)(d) of Article 24) to the effect that Ireland will not recognise a designation made under Article 5 if:

- (i) Irish law would have been the applicable law (under Article 3) had the designation not been made; and
- (ii) The application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which they would have been entitled under the mandatory rules of Irish law; and
- (iii) the spouse or child is habitually resident in or is a national of Ireland.

Unless Ireland makes this reservation, a testator's designation could have the effect of totally or very substantially depriving the surviving spouse or child of the deceased of an inheritance or family provision to which he or she would have been entitled under the mandatory rules of Irish law. Such a broad power of designation appears fundamentally out of harmony with our Constitution and hence the need to make the recommended reservation if Ireland ratifies the Convention. Subject to this reservation, the Commission recommends that it would be desirable for Ireland to introduce legislation giving effect to its provisions.

### 13. Contempt of Court

The law relating to contempt of court is wide-ranging. Its broad purpose is to protect the administration of justice from improper interference. Contempt of court may be criminal or civil. Criminal contempt includes such matters as contempt in the face of the court (as where a person creates a disturbance in court), scandalising the court (as where an individual publishes scurrilously abusive material about a judge or alleges judicial impropriety), breaches of the *sub judice* rule (as where a newspaper gives details about a defendant's previous convictions while a trial is in progress) and other interferences (such as threatening or bribing a witness). Civil contempt consists of defiance of a court order, whether by positive conduct or by neglect or refusal to obey an injunction.

In July the Commission submitted to the Attorney General a Consultation Paper on *Contempt of Court*. The Consultation Paper sets out the Commission's provisional suggestions for changes in the law. The proposals are not final; they are intended to stimulate the widest public debate possible.

The law of contempt of court is largely based on the English common law as it evolved over several centuries. In some respects it may be considered archaic and out of touch with modern thinking on such matters as freedom of expression and the right of an individual to a fair trial.

The Commission's examination of the present law led to the provisional conclusion that changes are required over a wide area. The provisional recommendations include:

- (1) The retention of a journalists' obligation to give evidence and to answer questions;
- (2) The abolition of the rule that scandalous abuse of the judiciary constitutes contempt by scandalising;
- (3) The restatement of the *sub judice* rule so that it should apply (with regard to proceedings that are active) to any publication which creates a risk, other than a remote one, that the course of justice in the proceedings in question

will be seriously impeded or prejudiced;

- (4) A provision for a defence of reasonable necessity to publish (so that, for example, a warning to the public that a multiple killer was at large would not render the publisher liable for an offence);
- (5) It should not be a defence to *sub judice* contempt that the offending material was published incidentally to discussion of public affairs;
- (6) The retention of imprisonment as a sanction in civil proceedings;
- (7) A provision that the exercise of the coercive function of civil contempt should not include a fixed term of imprisonment;
- (8) Legislation dealing with the respective roles of judge and jury should not be introduced;
- (9) A provision that disturbing a tribunal should constitute an offence;
- (10) A provision that improperly influencing or attempting to influence a tribunal in the determination of any issue which it may have to decide should be an offence;
- (11) A provision that bribing a witness in proceedings before a tribunal should be an offence;
- (12) A provision that intimidating a witness with respect to evidence which he or she may give in proceedings before a tribunal should be an offence; and
- (13) A provision that taking or attempting to take reprisals against a witness who has given evidence in the proceedings before a tribunal should be an offence.

A seminar was held with invited experts at the Commission's premises on 2nd November 1991 at which some of the more sensitive provisional recommendations were discussed and criticisms aired in a forthright and stimulating fashion. The Commission hopes to publish its report in 1992.

#### **14. The Crime of Libel**

In Ireland libel is still a crime, as well as a civil wrong. It is rarely prosecuted, but its survival in our law raises important questions of principle. The law of criminal libel affects what may be said about the organs and officials of State, about the administration of justice, about religion and religious institutions and about individuals, whether public or private. It may also circumscribe what may be read

or viewed on grounds of taste and morality.

This is because the law relating to the crime of libel embraces not merely defamatory statements, but also those which the law regards as blasphemous, obscene or seditious. There are also important Constitutional considerations, since the publication of blasphemous, seditious or indecent matter must be punished as a criminal offence under Article 40.6.1(i)

In August the Commission published a Consultation Paper on *The Crime of Libel*. This Consultation Paper considers whether any elements of the crime of libel should remain in Irish law and, if so, how they should be defined.

The Commission's examination of the present law led it to the provisional conclusion that much of it is obsolete and of no relevance to modern society. Such aspects of it as serve any useful purpose are clearly in need of reform. The response to the Consultation Paper was very limited, in contrast to the wide range of views and discussion provoked on the civil law of contempt.

In December, the Commission forwarded its Report on the Crime of Libel (LRC 41-1991) to the Attorney General. The recommendations include:

- (1) The abolition of seditious and obscene libel;
- (2) A re-examination of existing laws dealing with censorship and of the relevant provisions of the *Offences Against the State Act 1939*;
- (3) The inclusion in any proposals for a revision of the Constitution of the abolition of the crime of blasphemy;
- (4) In the event of the crime of blasphemy being retained in our law, its re-definition so as to encompass insults to religions other than Christianity;
- (5) The re-definition of defamatory libel so as to impose stringent "burden" of proof on the prosecution; and
- (6) Miscellaneous amendments to the law of defamatory libel so as to eliminate or modernise various anachronistic provisions.

#### **15. The Indexation of Fines**

An inevitable consequence of the absence of regular and systematic law reform is the fact that the monetary penalties, fixed when offences were originally created, are apt to become eroded by inflation sometimes to the point of irrelevance. Many penalties have been fixed for over fifty years in respect of offences prosecuted daily in the Courts and it tends to be demoralising for the Courts to be tied to such insignificant

sanctions in imposing sentence.

In October the Commission submitted to the Attorney General a Report on *The Indexation of Fines* (LRC 39-1991). The need to update all penalties, to link them to an index and to maintain their value constant was obvious. The Report explores how this might be done and examines different approaches.

The Commission also took the opportunity to explore the feasibility of introducing a variable, means-related, fines system such as has been introduced in other countries.

Among the Commission's recommendations were:

- (1) The adoption of a standard fines system;
- (2) The adoption of the Consumer Price Index as the appropriate index for a standard fine system;
- (3) The establishment of up to five categories or bands of fine values extending retrospectively to embrace equivalent bands of fine values for earlier periods (so that a band with a present maximum of £100 would include fines of up to £5 created in the period 1915-44, of up to £10 from 1945-64 and so on); and
- (4) The regular updating of category levels by statutory instrument.

#### **16. Conveyancing Law and Land Law**

The continuing work of the Working Group on this area resulted in two further Reports, under one cover, which were submitted to the Attorney General in December 1991.

##### **Passing of Risk**

The Third Report concerns *The Passing of Risk from Vendor to Purchaser* (LRC 39-1991), the question being when the risk of damage to the property should pass from the vendor to the purchaser. The examples of the sort of damage with which the Report is concerned are fire, flooding caused by burst pipes, vandalism etc. Historically property was, in the absence of any special agreement, at the risk of the purchaser once the contract for sale became effective. A purchaser is not, of course, normally entitled to occupy the property prior to completion of the sale and is therefore not in a position to take steps to protect the property against damage. A purchaser also has difficulty in getting insurance on a property where the purchase has not been completed or the purchaser has not gone into occupation.

The Commission recommends that the risk should only pass to the purchaser on

completion of the sale or when a purchaser goes into possession in advance of completion of the sale. It also recommends that where there has been substantial damage to the property a purchaser should not be obliged to complete. It recommends the introduction of procedures for establishing whether damage is substantial or not and for the ascertainment of compensation to the purchaser where the damage is not substantial and the purchaser is obliged to complete. Finally, the Commission recommends that parties should not be entitled to contract out of the proposed legislation in the case of residential property where vacant possession is being given.

#### 17. Service of Completion Notices

The Fourth Report deals with the *Service of Completion Notices* (LRC 40-1991), the entitlement of a vendor to require a purchaser who is in delay to complete the sale.

Unless the proposed date for completion has been agreed to be, or is deemed to be, a binding one a vendor is obliged to serve a notice requiring a delaying purchaser to complete, usually before the expiry of a 28 day period. Some concern exists following a decision of the Supreme Court in the case of *Viscount Securities Ltd v Kennedy* that a vendor might be required to vacate the property and/or pay off any mortgage before being entitled to serve a completion notice.

The Commission recommends that a vendor should be able to serve a completion notice even though vacant possession could not be delivered, and a mortgage remained in place, at the date of service of the notice.

While both of these topics are addressed in the current edition of the Law Society standard conditions of sale, a vendor is not bound to abide by the standard conditions particularly in a auction situation. Accordingly, the Commission feels that it is preferable that these issues should be dealt with by amendment of the law rather than the parties should have to rely on the provisions of individual contracts.

A report on further general proposals was prepared in the course of the year and it is hoped to publish it in 1992.

#### 18. Dishonesty

In April 1991 a lengthy Discussion Paper was circulated to lawyers, Gardai, academics, financial institutions, accountants and Government Departments, seeking views on the Commission's provisional recommendations. Included were provisional recommendations relating to:

- (1) The creation of new and simplified offences of theft, fraud and false accounting;
- (2) Making theft of information an offence;

- (3) The creation of offences relating to dishonest use of:
  - (a) Computers,
  - (b) Money dispensing machines,
  - (c) Cheque and credit cards;
- (4) Modernising the law of Forgery and Counterfeiting;
- (5) A broadening of Garda access to search warrants;
- (6) An increase in Garda powers to obtain information about fraud;
- (7) A preference for the allocation of more resources to the Garda Fraud Squad rather than the establishment of a Serious Fraud Office; and
- (8) Subject to the constitutional rights of the accused, election for trial venue by the prosecution.

The response from the experts was initially slow and disappointing. The Paper was approximately 470 pages long and the issues complex. An extension of time for observations produced a few more but in general, responses were disappointing from the point of view of quantity. Happily, the quality of responses received was generally excellent and helpful.

A Seminar with the experts was held in September 1991 to elicit further responses and discuss controversial issues arising and the responses received. The Seminar was well attended and the discussion was thorough, practical and very helpful to the Commission. The Commission hopes to publish its report in 1992.

## **19. Private International Law**

### **A. Choice of Law in Tort**

During the year, the first draft of a Discussion Paper on this topic was completed. The Commission are studying the draft document as time permits with a view to formulating provisional proposals for reform. While priority is being given to other topics, it is hoped to circulate a Discussion paper to experts in 1992.

### **B. International Sale of Goods**

In July 1991, a Discussion Paper examining the question whether Ireland should accede to the *United Nations (Vienna) Convention on the International Sale of Goods 1980* was completed and circulated to experts. The Paper examined the present law in Ireland on the subject, the provisions of the Convention and the implications of its practical application.

Within the next few years, forty to fifty states will be covered by the Convention, whether by accession, ratification or signature. Within the European Community, in July 1991, of Ireland's eleven fellow members five were parties, namely Denmark, France, Germany, Italy and Spain. While the Netherlands was about to become a member and Belgium, Greece and the United Kingdom were taking steps to join.

The fact that the Convention has been in force for less than four years renders the process of assessment a difficult one. For example, in its brief lifetime, the Convention has generated hardly any caselaw. This fact might be thought to indicate that the operation of the Convention has not been contentious and has led to little dispute to date. Equally, it might suggest that traders in the contracting states have made frequent use of the facility of contracting out of its provisions. Arguably, it might therefore be preferable to postpone any decision on accession for some time.

The concept underlying the convention is an admirable one. By providing a uniform law of sales, it removes much of the recourse to foreign law which traders, lawyers and judges are currently obliged to undertake. Of the two possible methods of establishing uniformity and predicability in international sales, the concept of a uniform substantive law is preferable to an approach based solely on uniformity of the rules of conflict of laws. Uniformity in choice of law alone would render decisions as to the applicable law a good deal more predictable. Yet it would not obviate the need to get to grips with the provisions of a foreign law.

Nevertheless, in the context of a review of the Convention, the Commission was very much concerned with the possibility of reforming Irish law. A subsidiary objective of the Convention is that it may act as a vehicle for the reform of domestic law. A uniform law is, by its nature, the product of international compromise and while some provisions may clarify domestic uncertainties and lacunae, others may have the opposite effect. In considering whether to recommend accession, the Commission accordingly gave particular thought to the extent to which the provisions of the uniform law represent an improvement on the existing state of Irish law.

The Commission's provisional recommendation was to accede to the Convention.

#### **20. Sentencing**

The Commission noted that a clear statement of the matters properly to be taken into account in sentencing convicted persons is closely dependent on the policy governing the sentencing of offenders first being clearly articulated. The Commission, therefore, concluded that the primary matter to be dealt with was the formulation of a coherent sentencing policy, which, once in place, would indicate what matters ought properly be taken into account in sentencing.

A Discussion Paper is near completion and should be ready for submission in the near future.

**21. Non-Fatal Offences**

A Discussion Paper was circulated to experts in November 1991. The Commission's provisional recommendations include:

**A Crimes of Violence and Endangerment**

- (1) The abolition of the offences of assault and battery at common law, to be replaced by a single statutory offence of assault;
- (2) Provision that assault should be triable summarily only;
- (3) The creation of an offence of intentional or reckless assault causing harm;
- (4) The creation of an offence of intentional or reckless assault causing serious harm;
- (5) The introduction of an offence of harassment;
- (6) For the purposes of assault and all other proposed offences of violence or endangerment which are capable of being consented to, the adoption of a simple statutory definition of consent;
- (7) The abolition of the common law defence of necessary defence, and replacing it with a new statutory defence to the use of force;
- (8) The enactment of the following offence of endangerment:
 

"A person is guilty of an offence if he or she intentionally or recklessly engages in conduct which creates a substantial risk of death or serious injury to another person",
- (9) The abolition of the common law offence of public nuisance, without replacement;
- (10) The abolition of the common law offence of affray, to be replaced by a statutory offence; and
- (11) The enactment of a new statutory offence of torture;

**B Crimes Against Personal Liberty**

- (1) The abolition of the felony of kidnapping; and
- (2) The enactment of a new statutory definition of false imprisonment.

The Commission hopes to Publish a Report on Non-fatal Offences in 1992.

## 22. Family Law

In its first programme, the Commission said that:

"In examining the various aspects of family law the Commission will consider the question of the best type of judicial or courts structure or structures appropriate to deal with the different matters which fall under the general heading of family law."

The Commission considered that this was by far the most important of the remaining aspects of the subject which had not been dealt with by the Commission. It was, accordingly, decided to prepare a series of Working Papers on a number of different aspects of the subjects which would be considered by an ad hoc advisory committee. The principal areas which it was decided to cover in the project were:

- (a) The organisation of business and possible unification of jurisdiction in family law matters;
- (b) Pre-trial and trial procedures and court atmosphere;
- (c) The selection and training of personnel, including judges and practising lawyers;
- (d) Support services and the linkage between judicial and other mechanisms for resolving family disputes; and
- (e) Whether a specialised family court is desirable or feasible.

The advisory committee which met throughout the year, consists of the following:

Professor Duncan and Ms. Gaffney, Commissioners,  
Cormac Corrigan Esq., B.L.,  
His Honour Judge Matthew Deery,  
District Justice Thelma King,  
Ms. Catherine McGuinness, S.C.,  
Frank Murphy Esq., Solicitor,  
The Hon. Mr. Justice Francis D. Murphy, and  
Ms. Muriel Walls, Solicitor.

The Commission are most grateful to the external members of the advisory committee for the generosity with which they have given of their time and expertise in assisting in this important project. It is hoped to publish a Consultation Paper in 1992.

**23. Insanity**

In the first programme, among the items the Commission proposed to examine in the criminal law were the mental element in crime and criminal responsibility, including such matters as intoxication, necessity, duress and age. Central to any consideration of the mental element in crime is the question of insanity and the Commission has commenced researches into the law relating to insanity and to intoxication, a closely related topic.

**24. Damages**

Among the topics the then Attorney General requested the Commission to examine was that of the law relating to compensation in personal injuries cases including:

- (a) provision for periodic payments and the making of provisional awards; and
- (b) the Statute of Limitations in cases of latent personal injury.

The Commission having already reported on the latter (implemented in the *Statute of Limitations (Amendment) Act 1991*), commenced research on the former in 1991 with particular reference to the periodic payment of damages.

**Action taken on Reports of the Commission during 1991**

**25. *The Statute of Limitations (Amendment) Act 1991***

The Act amends and extends the *Statute of Limitations 1957*, by making new provisions as regards the date from which the period of limitations is to run in respect of actions for certain personal injuries. The Act substantially enacts the recommendations in the Commission's *Report on Personal Injuries* (LRC 21-1987).

**26. *The Criminal Damage Act 1991***

The Act amends the law relating to offences of damage to property and is in substantial accord with the Commission's recommendations in its *Report on Malicious Damage* (LRC 26-1988).

**27. *Child Abduction and Enforcement of Custody Orders Act 1991***

The Act implements the substance of the Commission's recommendations in its *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985).

**28. *Adoption Act 1991***

The Act provides for the recognition of certain adoptions effected outside the State and amends and extends the *Adoption Acts 1952 - 1988*. The Act implements many of the recommendations made by the Law Reform Commission in its *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989).

**29. *Child Care Act 1991***

The Act provides for the care and protection of children and related matters. The Act implements the recommendations regarding care proceedings made by the Law Reform Commission in its *Report on Child Sexual Abuse* (LRC 32-1990). In particular, section 15 of the Bill regarding interim orders has been amended (see section 17 of the Act) according to the Commission's recommendations. The Commission's proposals on the taking of evidence are to be dealt with in the *Criminal Evidence Bill 1992*. Significant among the recommendations not followed as yet, is that relating to mandatory reporting.

**Hague Conference on Private International Law**

Professor Duncan continued to act as a representative of Ireland at the Special Commission on Inter-Country Adoption of the Hague Conference on Private International law. He has been appointed by the Commission as a member of the Drafting Committee for the Convention. More than fifty States are represented at the Special Commission, as well as a number of non-governmental organisations.

**UNIDROIT**

Mr. Buckley participated in two meetings of inter governmental experts engaged in the preparation, under the auspices of UNIDROIT, of a Convention relating to the stealing or illegal exportation of cultural objects, in Rome.

**Other International Meetings**

Mr. O'Leary was the Irish speaker at an International Conference on Fraud in the EC held in Rotterdam.

**Retirement of the President**

In the course of the year the President of the Commission, Mr. Justice Keane, informed the Government he did not wish to be re-appointed. His four colleagues were honoured with re-appointment to the Commission and wish to record their appreciation of his inspiring, energetic and innovative leadership, the breadth of his legal knowledge and his skills as an editor and writer. The Commission hopes it can maintain to some degree, his style and standard in its Reports and Papers.



