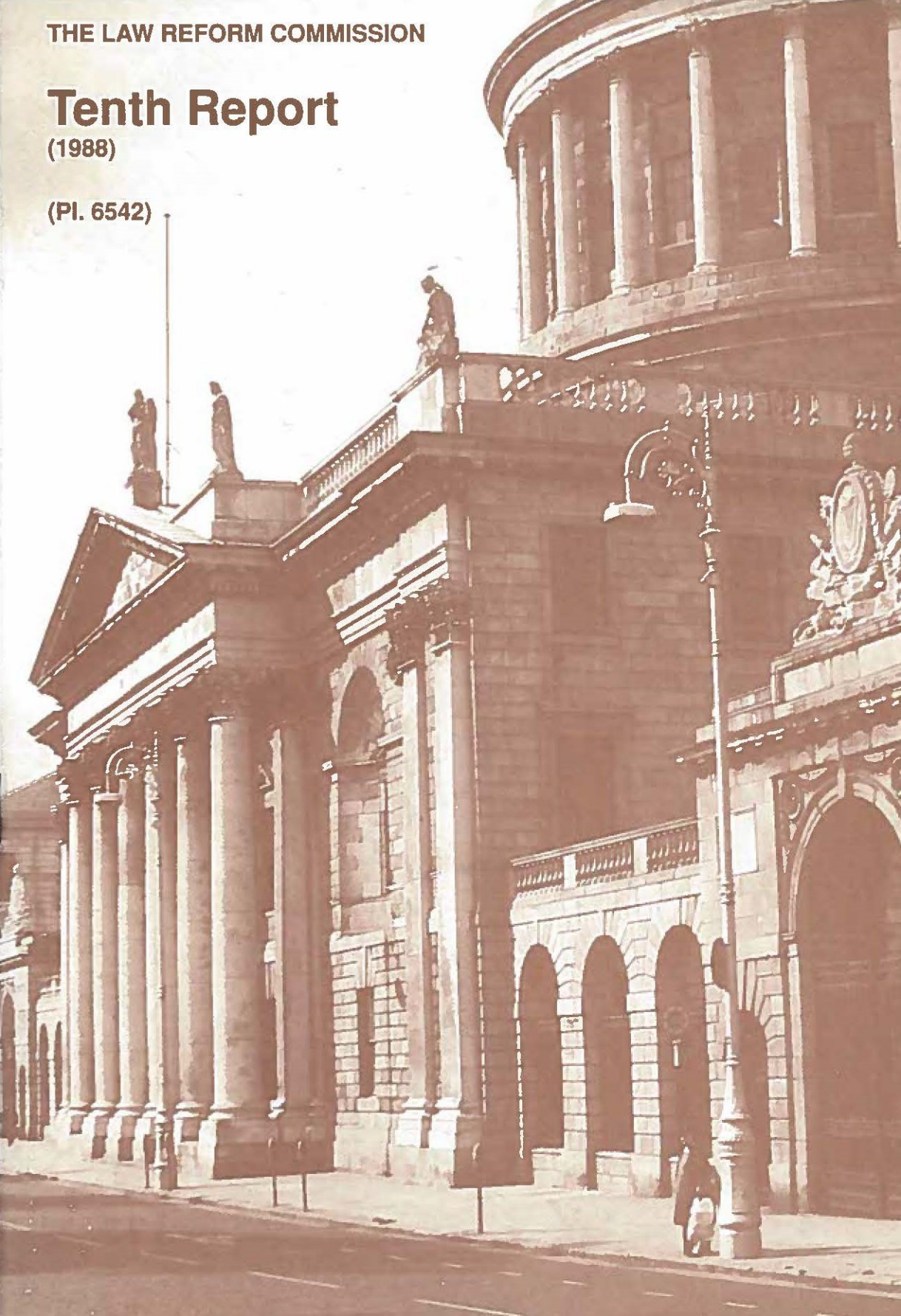


THE LAW REFORM COMMISSION

Tenth Report

(1988)

(PI. 6542)



THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

TENTH REPORT (1988)

IRELAND
The Law Reform Commission
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The Law Reform Commission 1989

First Published

April 1989

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TENTH REPORT OF THE LAW REFORM COMMISSION

1. This Report which covers the period from 1st January, 1988 to 31st December, 1988, 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 1988:

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 Dublin;

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

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

3. Staff

The staff of the Commission currently consists of the Secretary, a Research Counsellor, three Research Assistants and four Clerical Assistants. Mr. William Binchy is Research Counsellor to the Commission. Mr. Frank Ryan is Secretary to the Commission. The three Research Assistants, Ms. Grainne de Burca, Ms. Rachel Hussey and Ms. Una O'Raifeartaigh, joined the Commission in September and October on contracts for one year's service.

4. In April, 1988, Mr. Charles Lysaght's period of secondment from the Department of Foreign Affairs expired. The Commission wishes to record its sincere appreciation of Mr. Lysaght's ten year's work as a Research Counsellor. In addition to his broad legal knowledge, Mr. Lysaght brought to the Commission sagacity and a sense of style which will be irreplaceable.

5. 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. In consultation with the then Attorney General the Commission prepared a programme for the examination of different branches of the law which was approved by the Government. Copies of it were laid before both Houses of the Oireachtas on 4th January, 1977. By 31st December, 1988 the Commission had formulated and submitted to the Taoiseach 27 Reports containing proposals for reform of the law pursuant to recommendations contained in its programme, as well as 11 Working Papers, a Consultation Paper and Annual Reports.

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 its programme, and if so requested, to formulate and submit to the Attorney General proposals for its reform.

6. The Attorney General's Request

On 6th March, 1987, 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 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 injuries 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.

7. Publications

Having published reports in 1987 on the law relating to *Receiving Stolen Goods*, the *Statute of Limitations in Cases of Latent Personal Injuries* and on the *Service of Documents Abroad in Civil Proceedings*,

the Commission published in 1988 a further three reports on topics contained in the Attorney General's request i.e.

Rape and Allied Offences

Malicious Damage

Debt Collection: The Law Relating to Sheriffs

In addition, the Commission published a report on *The Rule Against Hearsay in Civil Cases*, a topic contained in the First Programme.

The Year's Work

8. Rape

The Commission had published a Consultation Paper in November 1987 in order to ascertain the views of as wide a range of persons and interested bodies as possible on this sensitive topic. The Commission received an encouraging number of responses reflecting highly contrasting points of view. Commissioners also interviewed complainants of rape and attended rape trials. In addition, a seminar was held, by invitation, at the Commission's offices which was attended by members of the Dail and Seanad, judges, barristers, solicitors, academic lawyers, doctors, representatives of the Director of Public Prosecutions and the Minister for Justice, members of the Gardai, representatives of Social Workers and of Rape Crisis Centres, Civil Liberties organisations and of various women's organisations and support groups. By all accounts, the seminar was highly successful and it was certainly of the greatest assistance to the Commission in preparing its report. The Commission wishes again to thank all those who sent in submissions and who attended the seminar. The Commission's report was submitted to the Attorney General in May 1988.

9. Malicious Damage

As a further step in its revision of pre-1922 Criminal legislation, the Commission examined the *Malicious Damage Act, 1861* and prepared a Discussion Paper. Unlike the law governing receiving stolen goods, where the law is intrinsically inadequate, the 1861 Act is basically sound and adequate for dealing with the mischief presented by arson and damage to property. The problem is that it is unnecessarily verbose and complex. The Commission decided that simplification was necessary, and that the legislative opportunity should be taken to propose certain new offences and procedural reforms. It followed its new procedure of circulating a Discussion Paper to a small number of experts including judges, barristers, solicitors, academics, members of the Gardai, the DPP's office and the Departments of Justice and of Transport and Communications. The Commission received detailed and helpful commentaries and suggestions from the persons circulated and a meeting was held with a group of them in July 1988 at which proposals for reform were formulated. The Commission's Report on Malicious Damage was submitted to the Attorney General on 15th September, 1988.

10. Debt Collection: The Law Relating to Sheriffs

The Commission set up a working group in 1987 in order to ascertain the legal, administrative and practical problems which were hampering the efficient collection of debts. The members of the group at the outset were the President, Mr Liam de Feu, representing the Irish Trade Protection Association, Mr John Fitzpatrick, Dublin County Sheriff, Mr Tom Maher, representing the Collector-General's Office of the Revenue Commissioners, Mr Desmond Moran, Solicitor and former Dublin County Sheriff, Mr Frank Nowlan, Solicitor, Mr John O'Malley, of Messrs Dun and Bradstreet Limited, Mr Thomas P Owens, County Registrar for Cavan and Mr Charles Lysaght, Research Counsellor to the Commission. Another member of the Commission, Mr John Buckley subsequently joined the Working Group and, on his transfer to other responsibilities, Mr Maher was succeeded by Mr J V Rogers and Mr Patrick Burke.

Having examined various Discussion Papers prepared by Mr Lysaght it was decided that the law relating to sheriffs, which had remained virtually unaltered for some sixty years and which had been identified by the Commission on Taxation in their Fifth Report as giving rise to difficulty, should first be addressed. A report, prepared following several consultations with the working group, was submitted to the Attorney General on 23rd September, 1988. The Commission wishes to renew its thanks to the working group.

11. The Rule Against Hearsay in Civil Cases

In its programme prepared in 1976 and approved by the Government, the Commission pointed out that the revision and codification of the law of evidence, both civil and criminal, had been a subject much discussed for many years in common law countries. It was noted that there seemed to be general agreement as to the desirability of a code or codes of evidence, if such should prove to be practicable. The Commission appreciated, however, that, because of the immensity of the task, it would not be feasible to undertake the preparation of comprehensive codes all at once. Accordingly, it proposed that particular areas of the law should be examined with a view to reform and that the reform should be designed to "fit into an ultimate whole" without the necessity for any subsequent substantial change. Priority would be given to areas where the reforms would simplify and improve court procedures and a number of problems were identified as being particularly suitable for scrutiny.

The Commission completed its work on one of these selected topics in July 1985 when it presented its *Report on the Competence and Compellability of Spouses as Witnesses*. It had already published a Working Paper on another of the topics, *The Rule Against Hearsay*, in April 1980.

When the present members of the Commission took up office in January 1987, progress on its programme, including the section on evidence, was reviewed. It was noted that, although the Working Paper on Hearsay had been in circulation for seven years, only one observation had been received in relation to it. Fresh efforts by the Commission to stimulate a response to this Paper resulted in the

submission of one further observation. The Commission concluded that, in the absence of any express dissent from any of the major recommendations in the Working Paper, it was compelled to assume that there was a general acceptance of the desirability of those proposals. However, it also gave careful consideration to the necessity for any further revisions in these recommendations. The recommendations in the Working Paper were confined to civil cases and the Commission decided to adhere to this position. However, as is pointed out in the body of the Report, it should not be assumed that no changes are required in the criminal law relating to hearsay. Problems attendant on the existing law as it applies to criminal prosecutions have already been addressed in our *Report on Receiving Stolen Property (LRC 23-1987)*. Others will be considered as we proceed with our further examination of inadequacies in the criminal law.

The 1980 Working Paper contained a full statement of the law relating to hearsay and a review of proposals made elsewhere for its reform. The Commission did not consider it necessary to reproduce all this material in a final Report but a chapter on developments subsequent to 1980 was included. Minor changes to the recommendations in the Working Paper were also detailed.

The Commission wishes to thank Mr. Justice Niall McCarthy, Judge of the Supreme Court, and Mr. Eamonn Hall, Solicitor to Bord Telecom Eireann, for their observations which were of great assistance to the Commission. The Commission also wishes again to thank Mr. Charles Lysaght, former Research Counsellor to the Commission, who was responsible for the research which led to the 1980 Working Paper and for drafting that Paper and who contributed generously with advice and assistance to the preparation of this Report after his secondment to the Commission had come to an end. The Report was sent to the Taoiseach on 18th August, 1988.

12. Child Sexual Abuse

The Commission continued its examination of the complex and wide-ranging legal aspects of this subject. The Commission has been assisted by a paper prepared by William Binchy, Research Counsellor, covering *inter alia* comparative legal developments in child sexual abuse.

In July, the Report of the Butler-Sloss Inquiry in the United Kingdom into Child Abuse in Cleveland was also published. The Report and the further literature to which it gave rise were studied.

The Commission's studies necessarily encompass all sexual offences with or among young persons, consensual as well as non-consensual, homosexual as well as heterosexual. For this reason, the implications, if any, of the decision of the European Court of Human Rights in the *Norris* case had to be considered.

Professor Duncan and Mr. O'Leary attended seminars on child sexual abuse in Glasgow and London respectively. Together with Ms. Gaffney, they also met other persons and organisations, including the DPP, representatives of the Gardai and members of the Child Sexual

Abuse Unit in Temple Street Hospital. Ms. Gaffney and Professor Duncan also met a group of parents of abused children.

Mr. O'Leary conducted a survey and prepared a Report for the Commission on all the cases of sexual assault on boys and girls under 17 years registered in the DPP's office in 1986.

The morning session of a seminar on law reform held by the Commission, in Trinity College Dublin on 18th June, was devoted to Child Sexual Abuse. It is hoped to publish a Consultation Paper in the near future and afterwards to hold a seminar as was done in the case of Rape.

13. Conveyancing and Land Law

The working group on Conveyancing and Land Law consisting of John F. Buckley, Commissioner, Miss Justice Carroll, Mary Laffoy, SC, George Brady, SC, Professor James C. Brady, Ernest B. Farrell and Rory McEntee, Solicitors, continued their work on the identification of anomalies in the law and proposals for improvement during the year.

Unfortunately Miss Justice Carroll resigned from the working group in November 1988 following her appointment to the Court of the International Labour Organisation. The working group and the Commission are most grateful to Miss Justice Carroll for her contribution to their work.

The working group completed its consultation process on a number of proposals during the year and it is hoped to include them in a Report which will be published in the Spring of 1989. The topics to be included in this Report will include:

- (a) The reduction of the period for which title to land must be shown under an "open" contract for the sale of land from 40 to 20 years.
- (b) The establishment of a doctrine of partial merger.
- (c) The amendment of section 23 of the Registration of Titles Act in respect of properties formerly affected by tithe charges.
- (d) The evidencing of consents to assignment of leasehold property.
- (e) The establishment or confirmation of the statutory power to partition properties held in joint ownership.
- (f) The imposition of a time limit for proceedings under section 27 of the *Local Government (Planning and Development) Act 1976* in respect of changes of use to property.
- (g) The proposed abolition of the fee-tail estate.

Among the other matters which have been considered by the working group and which it is hoped to include in the Report are:

- (1) The amendment of the rule against perpetuities in so far as it affects easements and other interests in land.

- (2) The amendment of section 45 of the *Land Act 1963* so as to avoid the need for Land Commission consent to the vesting of non-agricultural property.
- (3) The introduction of statutory definitions of certain words which are frequently used in conveyancing documents.
- (4) The clarification of the law relating to the passing of risk attaching to property during the period between a contract for sale and the completion of the sale.
- (5) The introduction of a provision which would preclude the registration of a judgment mortgage from affecting the title to property after a contract for the sale of that property has been entered into.
- (6) The introduction of legislation confirming that the benefit of surety covenants pass with the assignments of the lessor's interest.
- (7) The amendment of the Statute of Limitations so as to prevent an apparently dispossessed owner from claiming that because he had intended to use the lands for a particular purpose the Statute should not operate against him.
- (8) The amendment of section 117 (6) of the Succession Act. *First* to provide for the alteration of the period within which such applications must be brought. It will be proposed to alter the present one year limit by allowing the court a discretion.
Secondly, to extend the operation of the section to intestacies.
- (9) The introduction of a new category of powers of attorney, Enduring Powers of Attorney, which would enable the person appointed Attorney to administer the property covered by the power even though the person who has appointed the attorney has become mentally incapable.
- (10) The introduction of a provision which would effectively validate "conveyances" within the meaning of the *Family Home Protection Act 1976*, which are over six years old but where relevant consents or evidence supporting such consents is not available.

14. Dishonesty

The Commission hopes to complete its review of the law of dishonesty by the end of 1989. By the time this report is published, Mr. William Binchy will have completed a Draft Discussion Paper on larceny, fraud and other offences in the *Larceny Act 1916* apart from receiving stolen goods, upon which the Commission has already reported. The Paper will also review the related offence of forgery. The Paper will be circulated to experts in due course.

15. Seizure of the Proceeds of Crime

There is understandable public concern about the personal wealth and assets accumulated by criminals out of the proceeds of their crimes,

particularly from drug-trafficking. The subject was one of those referred to us for study by the then Attorney General in March 1987. Ms Grainne de Burca is preparing a Discussion Paper in which the feasibility of the legal seizure of criminals' goods will be examined including in particular the Constitutional implications of such provisions and the difficulties in appropriating particular assets to particular crimes. The Commission will circulate the Paper to experts in due course and hope to furnish a Report to the Attorney General within a few months.

16. Retention of Title

In the course of the Commission's researches into various aspects of the law relating to debt collection it was emphasised by sheriffs — particularly those concerned with the greater Dublin area — that the greatest single problem confronting them in executions today is the prevalence of "retention of title" clauses. These clauses provide that the ownership of goods remains in the seller until payment has been made. Their frequent use in modern business conditions means that, when a sheriff effects a seizure, he will often find that the only saleable assets of the debtor consist of goods which are immediately claimed by his suppliers as belonging to them because their bills have not been paid.

The Commission decided to address this topic as a matter of urgency and in the interregnum, between the departure of Mr Lysaght and the appointment of the Research Assistants, were singularly fortunate in engaging the services of an outstanding recent graduate with particular knowledge of the topic, Ms Barbara Maguire, to prepare a Working Paper on the subject for the Commission. She presented her Paper to the Commission in November 1988 and the Commission set up a working group composed of the President, Mr John Buckley of the Commission, Mr Justice Barron, Mr Laurence Crowley, Ms Jane Marshall, Mr Marcus Beresford, Mr John Cooke and Mr Brian Lenihan to study the Paper and advise on the appropriate contents for a Report. It is hoped to report to the Attorney General on the topic within the next few weeks.

17. Hague Conference on Private International Law

Since the Commission was established in 1976 it has with the agreement of the Department of Justice regularly represented Ireland at meetings of the Hague Conference on Private International Law. The former President of the Commission, Mr Justice Brian Walsh, was elected Chairman of the Fourth Commission at the Fourteenth Session of the Conference in 1980 and another Commissioner, the late Mr Roger Hayes, was elected a Vice President of the Conference.

At the Sixteenth Session of the Conference held in the Hague in October 1988, Ireland was represented by the President of the Commission Mr Justice Keane. The Conference adopted a new convention on *The Law Applicable to Succession to the Estates of Deceased Persons*. The principal object of the convention is to ensure, so far as possible, uniform choice of law rules among the States who are parties to the convention (Whether the law of the domicile of a

deceased or the law of his nationality is chosen to govern his succession differs at present from country to country). It is not, in other words, intended to affect the municipal law of the contracting States. Our law, for example, embodied principally in the *Succession Act 1965* and entitling the surviving spouse to a legal right to at least one third of the deceased spouse's estate and enabling the court to make provision for unjustly treated children will remain unaffected by the convention should it be ratified by Ireland. It will, however, introduce a desirable uniformity into the private international law governing succession to estates, a subject which is of growing importance in recent years with the continuing rise in migration between different countries. With the increasing mobility of labour between the different member countries of the European Community, problems for these countries are likely to increase rather than diminish. Traditionally, of course, Ireland has been a country of emigration rather than immigration, but we cannot expect to be immune from the swelling volume of migration between different countries and, in any event, it is generally acknowledged today that the State has a responsibility for those of its citizens who, for whatever reason, decide to make their careers and ultimately their homes in countries overseas. Accordingly, Ireland also has an interest in ensuring that a workable convention on the conflict of law rules applicable to succession is implemented by as many as possible of the member States of the Hague Convention. The Commission is at present at work on a Report on this particular convention for presentation to the Taoiseach.

At the Sixteenth Session, the Conference decided to concentrate on one topic only for the Seventeenth Session, which is to be held in 1993 on the one hundredth anniversary of the establishment of a convention on *Adoption of Children Coming from Abroad*. It is hoped to persuade Third World countries, very few of whom are members of the conference, to participate in the general commission which will do the preliminary work.

There is already a Hague Convention in existence, *Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions* which was concluded in 1965. The Commission began an examination of this convention and of the general topic of the recognition of foreign adoptions in Ireland in 1987, but decided to defer further considerations of the matter until the fate of the Adoption Bill 1987 was known. The constitutionality of the Bill was upheld by the Supreme Court in August 1988 following a reference by the President under Article 26 of the Constitution and the Commission has resumed its consideration of the topic in the light of these developments. The absence of clearly defined rules as to the recognition of foreign adoption decrees is giving rise to some concern having regard to the number of children resident in the State who have been adopted overseas, and these anxieties are likely to increase rather than diminish with the growing number of such adoptions. The Commission has recently completed work on a Discussion Paper which takes account not merely of these aspects of the subject, but also of the Report of the Review Committee on Adoption Services. This Paper has been circulated to interested bodies for their observations.

The Commission wishes to draw attention again to the extremely low level of ratification by Ireland of the various Hague Conventions. Of thirty three Conventions so far adopted by the Conference, only one, that on the *Form of Wills*, has been acceded to by Ireland. Some of these Conventions are of great practical significance to this country, particularly those on *Child Abduction*, *Taking of Evidence Abroad* and *Service of Documents Abroad*, on all of which the Commission has reported. Another, on the *Recognition of Trusts*, would also be of practical interest in Ireland and the Commission hopes to begin work on a Report on that Convention when it has completed work on the Succession Convention.

The Commission is also seeking to maintain its links with two other bodies concerned in this general area, UNIDROIT, the International Institute for the Unification of Private Law, and UNCITRAL, the United Nations Commission on International Trade Law.

18. Seminars

As mentioned above, the Commission held two seminars during the year. The first, on Rape, discussed at paragraph 9 above was a specialised seminar, held to assist us in preparing a particular report and attendance was by invitation only.

The second seminar on "Priorities in Law Reform" was held in Trinity College on 18th June, 1988. The President addressed the seminar on *New Perspectives in Law Reform*. Having discussed the difference between "lawyer's" law reform and "social" law reform and the difficulties inherent in codifying the law, he noted that of the twenty-four Reports then published by the Commission only six had been acted on, even partially, and proceeded to examine ways in which the machinery for law reform might be improved.

The Attorney General replied noting that, until relatively recently, law reform had been left to the courts and lamenting the fact that the Commission was not getting better feedback from organised groups such as trade unions, professional bodies and universities on its proposals.

The seminar then turned its attention to *Child Sexual Abuse and the Law* and was addressed by the distinguished lawyer, Mr. Louis Blom-Cooper, Q.C., on the nature of the problem, statistical information, reporting and investigation, emergency provisions, the Cleveland inquiry and the place occupied by child sexual abuse in the criminal justice system. Professor Duncan replied outlining the manner in which the Commission was approaching the problem and emphasising the importance of ascertaining the proper roles of the criminal law and civil law respectively in addressing it.

The afternoon session was devoted to a symposium on various options for reform of the law of *defamation, privacy and contempt of court*. The participants were Professor Kevin Boyle, Director, "Article 19", Mr. Conor Brady, Editor, "The Irish Times", Dr. Robert Clarke, Statutory Lecturer in Law, U.C.D., Mr. Vincent Finn, Director General, R.T.E., Mr. Marc McDonald, Lecturer in Law, Dublin

Institute of Technology and Mr. Simon O'Leary, Member of the Commission.

19. Proposals for Further Law Reform

The Commission drew up a provisional list of further topics for law reform with a view to all or some of them being referred to the Commission for a report by the Attorney General pursuant to Section 4(2)(c) of the 1975 Act. After meeting the Attorney General and discussing the provisional list, the Commission drew up a final list of topics for reform and forwarded same to him. He has indicated already that he will be referring the law of Defamation to the Commission for a report in 1989.

20. Action taken on Reports of the Commission during 1988

The *Family Law Act 1988* abolished proceedings for restitution of conjugal rights, as recommended by the Law Reform Commission in its *Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983)*.

The *Criminal Law (Rape) (Amendment) Bill 1988* is in substantial accord with the Commission's recommendations on the subject made in its *Report on Rape (LRC 24-1988)*. On the question of the definition of rape, the Bill follows the recommendation of the minority (the President and Mr. O'Leary).

The Judicial Separation Bill and Family Law Reform Bill 1987, a Private Member's Bill, which includes some changes recommended by the Law Reform Commission in its *Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983)*, passed Committee and Report stages in the Dail but was thereafter recommitted to a Dail Special Committee on 29 November, 1988.

The offence of "wandering abroad" in section 4 of the *Vagrancy Act, 1824* was repealed by section 28 of the *Housing Act, 1988*, a reform recommended by the Commission in its *Report on Vagrancy and Related Offences (LRC 11-1985)*.

A Private Member's Bill was introduced by Deputy George Birmingham modelled on a draft scheme proposed by the Commission in its *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1985)*.

