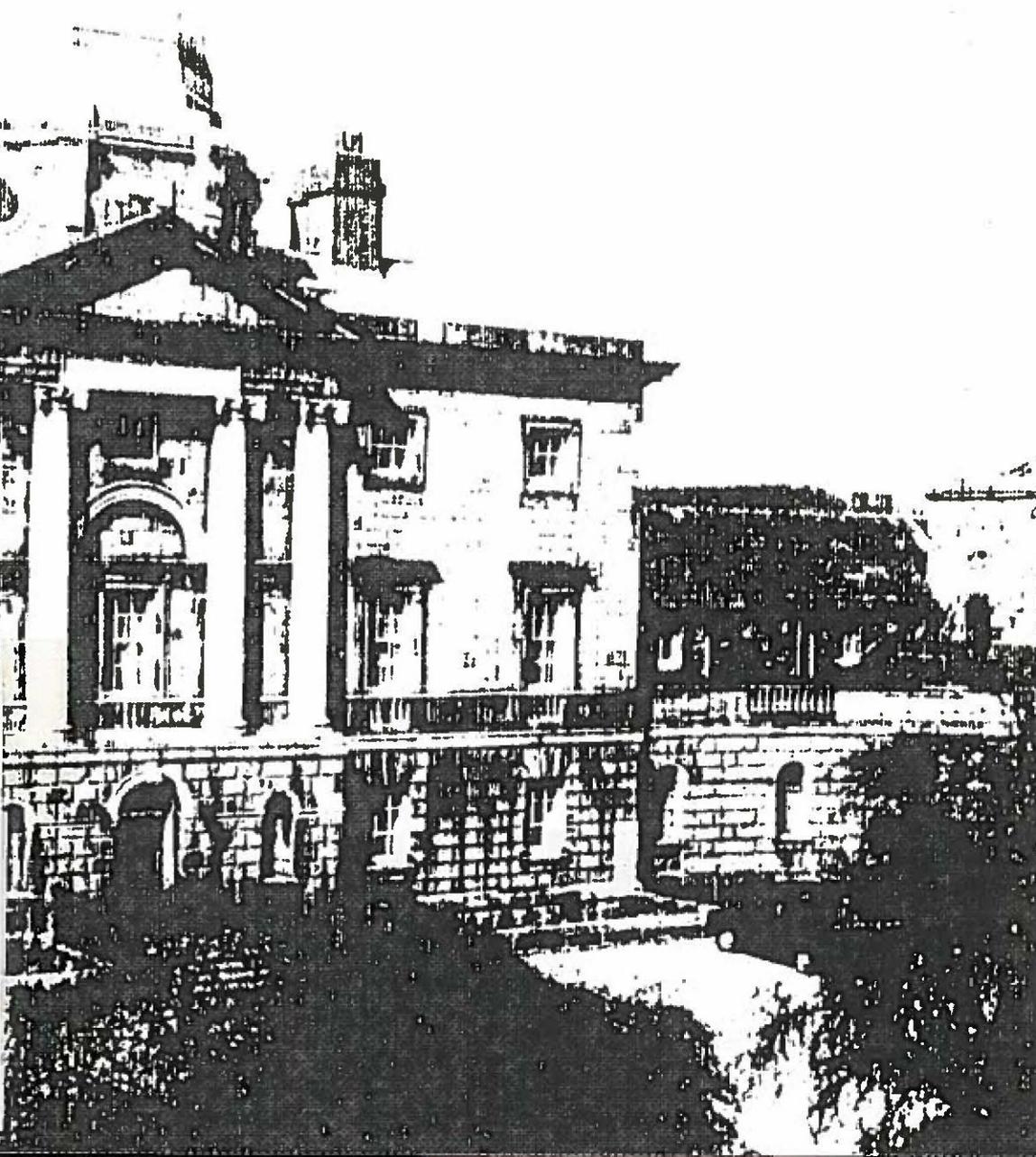


THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

TWELFTH REPORT (1991)



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IRELAND
The Law Reform Commission
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**TWELFTH REPORT OF THE LAW REFORM
COMMISSION**

1. This Report, which covers the period from 1st January 1990 to 31st December 1990, 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 1990:

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 at present of the Secretary, a Research Counsellor, four Research Assistants and three Clerical Assistants. Mr. Frank Ryan is Secretary to the Commission. Mr. William Binchy is Research Counsellor to the Commission. Ms. Una O'Raiheartaigh, B.C.L., 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 are Research Assistants.

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

By 31st December 1990, the Commission had formulated and submitted to the Taoiseach and the Attorney General 34 Reports containing proposals for reform of the law, as well as 11 Working Papers, 2 Consultation Papers and Annual Reports.

5. Requests by Attorneys General

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.

In January 1989, the present 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 Attorney General's Request

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

Receiving Stolen Property
The Statute of Limitations in Cases of Latent Personal Injuries
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

In 1990 the Commission published a further two Reports on topics contained in the Attorney General's request:

Child Sexual Abuse
Sexual Offences Against the Mentally Handicapped

The Year's Work

7. Child Sexual Abuse

In August the Commission submitted to the Attorney General a Report on *Child Sexual Abuse* (LRC 32-1990). It embodies the results of an examination of, and research in relation to, legal problems arising in this area, together with the Commission's proposals for reform.

8. In the course of its lengthy examination of the topic dealt with in the Report, it became obvious to the Commission that the issues raised were by no means confined to the criminal law, but extended over a wide area of law, both civil and criminal. Its examination proceeded on the basis that no single source should be exclusively relied upon from which to derive general findings about the nature of child sexual abuse and the precise requirements of law reform. The approach throughout the Report is to adopt a balanced interdisciplinary perspective. Recognising that a solid foundation of fact was a prerequisite to the reform of the law in relation to child sexual abuse the Commission endeavoured, within the financial and practical means at its disposal, to obtain as much basic and applied data on child sexual abuse as possible. As well as collecting relevant research information, the Commission

sought opinions and endeavoured to gain some practical experience on such matters as the credibility of children as witnesses and children's reactions to court involvement. It also attempted to identify the practical problems experienced by victims and their families, as well as by health and social workers, the Gardai, the Director of Public Prosecutions and the courts. To this end, it supplemented its research into substantive and comparative law reform by consultations with practitioners in the areas of health, child care and law enforcement, as well as with the families of some victims of child sexual abuse. It also received a number of letters from individuals directly affected by child sexual abuse and briefs from professional associations and other interested groups.

9. The results of the research were contained in a Consultation Paper published by the Commission on *Child Sexual Abuse* in August 1989. A wide range of written submissions was received relating to various aspects of the Consultation Paper and, in addition, a Seminar was held at the Law Society premises in Blackhall Place on 25th November 1989 which was attended by 124 people, including judges, lawyers, doctors, psychologists, social workers, officers of the Departments of Health and Justice and of various health boards, and representatives from the offices of the Director of Public Prosecutions and the Chief State Solicitor's Office.

10. Some features of the proposals contained in the report require special mention. It has already been indicated, in paragraph 5, that, while the Attorney General's reference to the Commission was of "sexual offences generally", emphasis was placed on rape and the sexual abuse of children. It became obvious, however, to the Commission at an early stage that no sensible proposals for the reform of the substantive criminal law in the area of child sexual abuse could be formulated unless it was prepared to undertake an examination of the entire law relating to what might be broadly described as consensual sexual activity. That in turn led the Commission to examine the present state of the law as to consensual homosexual offences in the light of the decisions of the Supreme Court¹ and of the European Court of Human Rights in *Norris*.²

11. In the context of the civil aspects of the problem, particular attention was given in the Report to the provisions of the Child Care Bill 1988 which, at the time of the presentation of the Report to the Attorney General, had completed its committee stage in Dail Eireann. A number of proposals in the Commission's Consultation Paper on the subject, published in 1989, had already been embodied in the Bill during its progress through the Oireachtas. The Commission also, however, recommended in the Report appropriate amendments which it considered might usefully be made to the Bill.

12. The Commission's recommendations on the subject are wide-ranging.

1 [1984] IR 36.

2 Eur Court HR, *Norris* judgment of 26 October 1988, Series A No. 142.

Among the more significant are the following:

- (a) the imposition of a legal obligation on doctors, psychiatrists, psychologists, health workers, social workers, probation officers and teachers to report cases of suspected child sexual abuse;
- (b) conferring on the District Court power to authorise a health board to arrange for the medical examination and other assessment of a child where the level of suspicion of abuse is sufficiently high;
- (c) the extension of the remedies of barring orders and protection orders so far as concerns those eligible to seek and those liable to be made the object of these orders;
- (d) the creation of an exclusion order, to apply in an emergency situation, as an alternative to an emergency care order;
- (e) reformulation of sexual offences relating to consensual activity with young persons;
- (f) the creation of a new offence of "child sexual abuse" or "sexual exploitation" to replace the present offence of "indecent assault with consent";
- (g) the repeal of sections 61 and 62 of the *Offences Against the Persons Act 1861* and section 11 of the *Criminal Law (Amendment) Act 1885* and the application of the proposed offence of "child sexual abuse" to homosexual as well as heterosexual activity;
- (h) the retention of the criminal prohibition of anal penile penetration of boys and girls up to the age of 17;
- (i) with regard to the law of evidence (*inter alia*):
 - (i) making the test of competency of children that of the capacity to give an intelligible account of events that have been observed;
 - (ii) dispensing with the requirement placed on the judge to warn a jury before they convict on the sworn evidence of a child, and the requirement of corroboration of the unsworn evidence of the child;
 - (iii) rendering expert evidence admissible as to competence and as to children's typical behavioural and emotional reactions to sexual abuse;
 - (iv) using closed circuit television (or, if unavailable, a screen) where the witness in a case of child sexual

- abuse is under 17;
- (v) using in trials on indictment the video-recorded deposition in the District Court of a witness under 17;
- (vi) the admission in evidence of a video-recorded interview with a child recorded out of court by an appropriate person (e.g. an appropriately qualified child examiner, a doctor, a psychologist, a Ban Garda or a social worker), provided the child is made available for cross-examination;
- (vii) the appointment of an examiner, in a child sexual abuse prosecution, on the application of the DPP, for special reasons, the function of the examiner being to channel to the child the questions of the defendant or counsel or solicitor in cross-examination;
- (viii) dispensing with the preliminary examination in the District Court in cases which are not being dealt with summarily, while reserving to the accused the right to a preliminary examination by the court of trial of the issue as to whether there is a *prima facie* case;
- (ix) the entitlement to use anatomical dolls and other demonstrative aids to testimony.

13. Sexual Offences Against the Mentally Handicapped

In our Report on *Sexual Offences Against the Mentally Handicapped* (LRC 32-1990) submitted to the Attorney General in September, we recommend the replacement of the existing criminal offence by an indictable offence, committed by a person who has unlawful sexual intercourse with another person who has mental handicap or suffers from mental illness which in either case is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation. We recommend that it should also be an offence punishable on indictment to commit acts of anal penetration or to engage in other exploitative sexual activity with persons with such mental handicap or mental illness.

We recommend that, in prosecutions for these offences, once it is proved that the complainant was suffering from the relevant degree of mental handicap or mental illness at the time of the alleged offence, it should be presumed until the contrary is shown that the accused was aware of that fact. A person would not be guilty of the offence if he did not know, and had no reason to suspect, that the complainant was suffering from mental handicap or mental illness. None of the acts of vaginal sexual intercourse, anal penetration or other proscribed sexual activity referred to should constitute an offence where both participants are suffering from mental handicap or mental illness as defined, unless the acts in question constitute a criminal offence by virtue of some other provision of the law.

We go on to recommend that there should continue to be higher penalties

where the relevant offences are committed by persons in charge of, or employed in, mental institutions or where the accused person had the care or charge of the other participant. The definition of "mental institution" in the Mental Treatment Act 1945 should be expanded so as to include residential centres and community based residences. In the case of persons with mental handicap, the requirement as to giving evidence on oath or affirmation should be the same as for all other witnesses. Where appropriate, however, the court should satisfy itself that the person with mental handicap is capable of giving an intelligible account of events which he or she has observed. There should be no requirement of corroboration.

In the Report we recommend that any special legislative arrangements facilitating the giving of evidence by children by the use of closed circuit television, video recordings and skilled examiners should apply also in cases of sexual offences against persons with mental handicap or suffering from mental illness.

In the case of the proposed offences we recommend that the maximum sentence should be imprisonment for any term not exceeding 7 years. Where s254 of the Mental Treatment Act 1945 applies, the maximum sentence should be imprisonment for any term not exceeding 10 years. The consent of the Director of Public Prosecutions should be required before prosecutions are initiated. There should be no 12 months time limit (as under present law) within which prosecutions must be brought.

14. Oaths and Affirmations

In our Report on *Oaths and Affirmations* (LRC 34-1990) submitted to the Taoiseach in December, we recommend that the oath should be abolished for witnesses and jurors and for deponents submitting affidavits in all proceedings, civil and criminal. Any juror or any other person who at present may be required to take an oath in judicial proceedings should be required instead, before giving evidence, whether *viva voce* or by deposition or affidavit, or before acting as a juror or in any other capacity in judicial proceedings, to make a solemn statutory affirmation.

We go on to recommend that, in both criminal and civil proceedings, the court should be able to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm where the court is satisfied that the children are competent to give evidence. A similar test of competence to give evidence should be adopted in the case of persons with mental handicap.

15. Conveyancing and Land Law

The Working Group on Conveyancing and Land Law continued their work on the identification of anomalies in the law and proposals for improvement during the year. The Working Group consists of John F. Buckley,

Commissioner, Mary Laffoy, S.C., George Brady, S.C., Professor James C. Brady, Ernest B. Farrell, Rory McEntee, Patrick Fagan and Tom O'Connor, Solicitors, Ms Deborah H Wheeler, B.L. and Ms M.G. Miller, B.L.

Among the other topics which the Working Group is studying are:

1. 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.
2. The abolition of the requirement that certain documents effecting the transfer of land be executed under seal.
3. The question of the jurisdiction of a planning authority over land below high water mark.
4. The nature of the interest in property which rests in a purchaser after completion of a contract to purchase the land.
5. The procedure for appeals under section 19 of the Registration of Title Act 1964.
6. The obligations of a vendor wishing to serve a notice compelling a delaying purchaser to complete the purchase of land in the light of the decision in *Viscount Securities Ltd v Kennedy* (Supreme Court, unreported, 6th May 1986).
7. The abolition of the requirement for words of limitation for conveyances of unregistered land.
8. Some anomalies arising from section 78 of Landlord and Tenant Act 1980.
9. The introduction of the doctrine of a Parliamentary Conveyance where an owner's right to recover has been barred by the Statute of Limitations.
10. Clarification of the Statute of Limitations as it applies to the barring of the interest of beneficiaries' personal representatives.

The Commission intend to publish Reports on these matters in 1991. They are most grateful to the external members of the Working Group for their valuable contribution to the Commission's work in this area.

16. Defamation

In January 1989 the Attorney-General requested the Commission to examine and make recommendations upon the law of defamation. Work was begun on a Consultation Paper on the Civil Law of Defamation which continued throughout the year. The preparation of this Paper involved an extensive review of the legal authorities, examination of reform proposals in other jurisdictions, and consultation with representatives of the Irish media, printing and publishing industries, including visits to the premises of daily and evening newspapers. Submissions from the public were received following an invitation by the Commission placed in a number of daily newspapers. The Commission planned to publish the Consultation Paper early in 1991 and to hold a public seminar shortly thereafter. Their final Report to the Attorney

General will be submitted later in 1991.

17. Criminal Libel

The Commission interpreted the Attorney General's reference of the law of defamation as including criminal libel. Work on the topic was begun in December 1989 and continued throughout the year. The Commission intend to publish a Consultation Paper on the subject in the immediate future. It will cover the four common law categories of criminal libel - defamatory, seditious, blasphemous and obscene libel. It will be followed by a Report containing the Commission's final recommendations later in 1991.

18. Contempt of Court

Work on tentative proposals for reform of the law relating to contempt of court, which was also referred to us by the Attorney-General in January 1989, is at a very advanced stage. The Commission intends to publish a Consultation Paper on the subject in the immediate future, to be followed by a Report, containing the Commission's final recommendations, later in 1991.

19. Seizure of the Proceeds of Crime

The Commission continued their examination of the feasibility of seizure of the proceeds of crime during the year. A number of most helpful comments and suggestions were received on the Discussion Paper which had been circulated in December 1989. A meeting was held at the Commission's offices at which a number of these experts attended. The meeting considered the policy issues raised in the Discussion Paper and was of the greatest assistance to us in preparing our final proposals. These were due to be submitted to the Attorney General early in 1991.

20. Dishonesty

Work continued on the preparation of a Discussion Paper on the law relating to larceny, fraud and other offences contained in the *Larceny Act 1916* as well as the related offence of forgery. It was planned to circulate this Paper among a number of experts in 1991, to hold a meeting of the experts shortly thereafter and to submit final proposals to the Attorney General before the end of 1991.

21. The Rule against Hearsay in Criminal Cases

In its *Working Paper on the Rule against Hearsay* (No. 9 of 1980) and subsequent *Report on the Rule against Hearsay in Civil Cases* (LRC 25-1988), the Commission confined its provisional and final recommendations to the operation of the rule in respect of civil cases. Having regard to the special considerations which apply to criminal proceedings, in particular to the standard of proof beyond reasonable doubt which demands that convictions

be sustained only on the basis of evidence of undoubted reliability; it was decided that separate consideration and consultation be given to the rule against hearsay in criminal cases

A Draft Discussion Paper on the Rule against Hearsay in Criminal Cases, incorporating those parts of the Working Paper which were specifically directed to criminal proceedings and providing for a summary of provisional recommendations, was accordingly completed in September 1989. Pending the completion of certain additional research, however, this Paper has not as yet been circulated to experts for comments. The Commission intends to have completed this research by the end of 1991.

22. Family Law

In its first programme, the Commission said that it proposed to examine a number of aspects of this subject which, of course, covers a very wide area. The Commission has already submitted Reports on:

- (1) Criminal Conversation, Enticement and Harboursing of Spouses or Children, Loss of Consortium, Seduction of Children, Matrimonial Property and Breach of Promise of Marriage (March 1981).
- (2) Illegitimacy (September 1982).
- (3) The Age of Majority, The Age for Marriage and Some Connected Subjects (April 1983).
- (4) Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (November 1983).
- (5) Divorce a Mensa et Thoro and Related Matters (December 1983).
- (6) Nullity of Marriage (October 1984).

The programme says 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 subject 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;
- (e) whether a specialised family court is desirable or feasible.

This list was not, however, intended to be exhaustive: any other matters which appeared to be relevant would be examined in due course.

The advisory committee, which held its first meeting towards the end of 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 Frank Murphy
 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 was planned to continue the preparation, study and discussion of the Working Papers during 1991 with a view to publishing a Consultation Paper to be followed by a final Report before the end of 1991.

In connection with the question of judicial training, the President attended as an observer a Seminar held in London in October introducing English judges, magistrates and others to the new Children Act in that jurisdiction. The Commission is grateful to Lord Justice Glidewell and Mr PG Taylor, Chairman and Administrator respectively of the Judicial Studies Board in the United Kingdom, for making the necessary arrangements.

23. Offences against the Person

A Discussion Paper on non-fatal offences against the person, covering crimes of violence, endangerment and crimes against personal liberty, was completed and will be circulated to experts shortly. It will be followed by a Report containing the Commission's final recommendations on the subject.

24. Indexation of Fines

This subject was one of those referred to us for examination by the then Attorney General in March 1987. Work was begun and substantially completed during the year on a Discussion Paper to be circulated among experts. It contains the Commission's provisional proposals for the introduction of a scheme of indexation of fines which will ensure that the value of monetary penalties is not diminished by inflation.

25. Sentencing Policy

Research was begun on a draft Consultation Paper on this subject, which was also referred to us for examination by the then Attorney General in March 1987. The Commission intends to publish a Consultation Paper shortly to be followed by a Report later in 1991.

26. Private International Law

During the course of the year, the Commission continued its work on a number of topics of private international law. A Consultation Paper was prepared on the *Hague Convention on the Law of Succession to Estates of Deceased Persons* and was circulated to a number of experts. It was planned to submit the Commission's final Report on the subject to the Taoiseach early in 1991.

Work is also continuing on a draft Discussion Paper on the *International Sale of Goods*. It is hoped to circulate this Discussion Paper in the near future and to present a Report to the Taoiseach on the topic before the end of 1991.

Work was also begun during the year on the preparation of a draft Discussion paper on *Choice of Law in Tort* which will also be circulated in the near future. Again, the Commission intend to submit their final Report on this subject to the Taoiseach before the end of 1991.

At its Sixteenth Session, held in the Hague in October 1988, the Hague Conference on Private International Law decided to concentrate on a Convention on the *Adoption of Children Coming from Abroad* which it is hoped will be adopted at the Seventeenth Session in 1993. Professor Duncan and Mr Binchy attended the first meeting of the group of experts on this subject at the Hague in May 1990. Professor Duncan was appointed a member of the special steering Committee whose function is to formulate in specific terms the scope of the draft Convention. Professor Duncan attended a meeting of the Committee in December 1990.

27. Action taken on Reports of the Commission during 1990

(i) Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries

The *Statute of Limitations (Amendment) Bill 1990* gives effect to the Commission's recommendations contained in its *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987).

In this context it is worth noting the Supreme Court's strong assertion, in *Toal v Duignan (No. 2)* [1991] ILRM 140, of the constitutional entitlement of the courts to dismiss an action in circumstances where, by virtue of the passage of time since the events complained of, it would be unjust to let the case proceed.

(ii) Rape

The *Criminal Law (Rape) (Amendment) Act 1990* implements most of the recommendations on the subject contained in its *Report on Rape and Allied Offences* (LRC 24-1988).

(iii) Receiving Stolen Property

The *Larceny Act 1990* incorporates a number of the Commission's recommendations in respect of handling unlawfully obtained property, contained in its *Report on Receiving Stolen Property* (LRC 23-1987). In many respects, however, the Act differs from the Commission's recommendations. We have already expressed our views on some specific aspects of the legislation, in our Eleventh Report (PI 7448, 1989), para 24.

(iv) Malicious Damage

The *Criminal Damage Bill 1990* gives substantial effect to the recommendations contained in the Commission's Report on *Malicious Damage* (LRC 26-1988).

(v) Private International Law

The *Child Abduction and Enforcement of Custody Orders Bill 1990* gives effect to the Commission's Report on the *Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985).

The *Recognition of Foreign Adoptions Bill 1990*, introduced by Mr Alan Shatter, T.D., and endorsed by the Government, gives effect (*inter alia*) to the substance of the recommendations contained in the Commission's Report on the *Recognition of Foreign Adoption Decrees* (LRC 29-1989).

28. Contacts with other Law Reform Agencies

The Commission continues to receive from law reform agencies in many parts of the world copies of their Working Papers and Reports. We find these of the greatest assistance in formulating our own proposals for reform and appreciate the continued co-operation of these bodies, which we are happy to reciprocate.

In December the President, at the invitation of the Secretary of State for Northern Ireland, Mr Peter Brooke, attended a reception at Hillsborough Castle to mark the presentation of the first report of the Law Reform Advisory Committee for Northern Ireland. The Commission wish to record their appreciation of the hospitality offered on that occasion by the Secretary of State and Mr Justice Carswell, Chairman of the Committee. We look forward to further co-operation with this recently established body which is addressing law reform problems very similar to those which arise in this jurisdiction.