Reform roundup

New South Wales Law Reform Commission

Rape shield laws

In sexual assault cases, the law in New South Wales generally prohibits evidence being given about the alleged victim's sexual reputation and sexual experience. There are certain circumstances in which evidence of the alleged victim's sexual experience may be raised, as an exception to this general prohibition. Section 409B of the *Crimes Act 1900* (NSW) sets out these exceptions.

Section 409B has been criticised by the courts, including the High Court, for being too restrictive and preventing the accused from raising matters relevant to the defence, such as the suggestion that the alleged victim has previously made false allegations of sexual assault, or has been sexually abused by someone other than the accused. Critics of s 409B argue that it potentially prevents the accused from having a fair trial, with the result that an innocent person may be wrongly convicted and imprisoned.

The Commission's report recommends that the law continue to impose a general prohibition on evidence about an alleged victim's sexual reputation and sexual experience. However, it also recommends that s 409B be made less restrictive to admit evidence of sexual experience if the court considers that it has significant probative value, which substantially outweighs the danger of prejudice to the proper administration of justice. In deciding whether to admit evidence of sexual experience, the court must take into account a number of factors, including the risk of distress to the alleged victim and the need to respect the alleged victim's personal dignity and privacy. In addition, the Commission recommends the introduction of strict procedural requirements for applying to admit evidence of sexual experience, to ensure that alleged victims are not subjected to unnecessary distress in the courtroom.

Contribution

The Commission's Report No 89, *Contribution Between Persons Liable for the Same Damage*, was tabled in NSW parliament in May this year. The report deals with the situation where a person suffers damage as a result of the action of two or more persons. The person may seek compensation from only one of the defendants, who, if found liable for the loss, may then seek contribution from other defendants who are also responsible for the loss. The Commission's report endorses retention of the principle of joint and several liability, rather than introducing the principle of proportionate liability. The report contains several recommendations to improve the certainty of this area of the law.

- Rights of contribution should apply to all tortfeasors.
- Rights of contribution should be extended to include mixed concurrent wrongdoers.
- Rights of contribution to mixed concurrent wrongdoers, some of whom are liable in contract, should explicitly provide that a defendant, whose liability to the plaintiff in contract is expressly limited or exempted, should have the full benefit of those contractual terms.
- The proposed legislation defining rights of contribution should supersede all other rights of contribution except equitable rights of contribution.
- The sanction in costs rule should apply to all plaintiffs pursuing successive actions in relation to the same damage.
- The sanction in damages rule should apply in actions against concurrent wrongdoers only in cases where the plaintiff has already received judgment for the whole of his or her damages without limitation.
- The judgment bar rule and the settlement bar rule should be abolished for all joint wrongdoers.

In the pipeline

Over the next six months, the Commission will complete the following reports and consultation papers:

Disability and community services. Report No 90, *Review of the Disability Services Act 1993*, and Report No 91, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993*, were

expected to be tabled in NSW parliament at the time of print. The reports endorse the policy objectives of both Acts, but recommend a range of amendments to improve their operation. A detailed outline of these reports will appear in the next edition of *Reform*.

Review of the *Anti-Discrimination Act 1977* (NSW). This report has been completed and should be released at the time of print. A fuller report on the scope of that review will appear in *Reform*, Issue 76.

Surveillance. The report on the review of the *Listening Devices Act 1984* (NSW) and the need to regulate the use of surveillance equipment in public places will be published in early 2000.

Concealment of serious offences. Section 316 of the *Crimes Act 1900* (NSW) creates an offence for a person who knows or believes that a serious crime has been committed, and fails to inform the police without a reasonable excuse. The Commission plans to publish the report before the end of this year.

Uniform succession laws. This is a joint project with representatives from each state and territory. It is being led by the Queensland Law Reform Commission. Reports on wills and family provision have been presented to the Standing Committee of Attorneys-General. The report on wills is being printed in final form, and a report on family provision should be published in the next six months. A consultation paper on administration of estates has just been published by the Queensland Law Reform Commission and will also be published by the New South Wales Law Reform Commission.

Set-off. Set-off is a mechanism whereby one party can apply a debt owed to him or her by another party to discharge all or part of the debt that he or she owes to that party. The Commission plans to complete its report in December.

Sentencing of Aboriginal offenders. This report, one of a series of reports the Commission is publishing on sentencing, also should be completed by December.

Civil procedure: discovery and interrogatories. The Commission has deferred work on this project while awaiting the results of work being undertaken by a number of other committees, including the Supreme Court Rules Committee.

Contempt by publication. The Commission is conducting a general review of the law of contempt by publication. In doing so, it will be considering whether a person who causes a trial to be aborted should have to pay the costs of the aborted trial. In undertaking this project, the Commission will be reviewing the work done by the ALRC in the late 1980s (ALRC 35 *Contempt*). A discussion paper will be published early in 2000.

The Commission has received two new projects:

- a review of the law of third party guarantees; and
- a review of the rule in *Pigot's* case.

The Commission will be producing consultation papers on these projects early in 2000.

Victorian Law Reform Committee

Technology & the law

In May this year, the Committee tabled its report into technology and the law. The inquiry required the Committee to investigate ways in which technology can improve the efficiency of, and increase access to, the justice system. It was a challenging inquiry that required an examination of new technologies, the way that globalism is altering the way we live and work, and organisational resistance to change. In developing solutions, the Committee looked to the long-term future of the justice system and of government. The report represents a bipartisan blueprint for the Victorian justice system in the next millennium.

The Committee's vision for the use of technology is for the citizen to have seamless online access to legal information, advice and dispute resolution. The report recommends widespread reform of the justice system including the amalgamation of the administration of courts and tribunals to facilitate increased efficiency and the centralised implementation of information technology. While Victoria has led the world in its implementation of electronic service delivery, the justice system has lagged behind. Extensive change is required in the Department of Justice, courts, tribunals and in the legal profession to harness new technologies for the benefit of the community as a whole.

Some of the major recommendations in the Committee's report include:

- the amalgamation of the administration and registry functions of all Victorian courts and tribunals;
- the establishment of a separate government entity to coordinate technology policy across government;
- the establishment of a clearinghouse on technology and law;
- the implementation of common systems and greater integration of information systems across justice agencies;
- the availability of electronic information for the public in all court and tribunal foyers;
- the provision of ongoing funding for AustLII, as the national electronic repository of all Australian primary legal materials;
- the provision of more information and support by the Law Institute of Victoria and the Bar Council of Victoria on new technologies and the modernisation of the profession; and
- the prioritising of initiatives targeting marginalised groups to increase access to technology.

People from around the world have contributed and collaborated on this report, so although it makes recommendations for the Victorian legal system, the report deals with the common issues and challenges of our global society. While looking to the future of law and technology, the Committee hopes it has formulated pragmatic recommendations that when implemented will make an immediate difference by improving the delivery of services of the justice system to all that come before it. The report is available at **<http://www.parliament.vic.gov.au/lawreform/>**.

Criminal liability for self-induced intoxication

The Committee's final report on criminal liability for self-induced intoxication also was tabled in the Victorian parliament in May this year. The inquiry arose out of a decision in the ACT Magistrates Court in 1997 to acquit the Canberra Raiders' rugby player, Noa Nadruku, of violent acts of 'thuggery' on the basis that he was so drunk he did not intend to commit the assaults. The decision was controversial and caused a great deal of public outrage. As a result, the federal Attorney-General put pressure on Attorneys-General in South Australia, Victoria and the ACT to change state laws concerning the so-called 'drunk's defence' and in particular urged the enactment of legislation distinguishing between offences of specific and basic intent. This distinction was rejected by the Committee as artificial and confusing.

The Committee unanimously recommended that the *O'Connor* principles, that is evidence of self-induced intoxication, should be considered when determining whether a person has acted voluntarily or intentionally in committing a criminal offence, should continue to state the law in Victoria. However, the Committee recommended that in relation to all indictable offences, any person who pleads not guilty on the basis that he or she has consumed too much alcohol should face a jury trial. To assist future juries in determining the guilt of an intoxicated defendant, the Committee also recommended that evidence of prior conduct be allowed to be put to the jury, but only where a person bases his or her defence on self-induced intoxication and where there is evidence of prior conduct.

The Committee received overwhelming evidence in relation to the relationship between alcohol and violence and, therefore, recommended that in sentencing offenders, greater use be made of rehabilitation and treatment programs and anger management training. To resolve the problem of unnecessary and costly appeals based on evidence of self-induced intoxication, the Committee recommended the adoption of a recent South Australian amendment, which will prevent evidence of intoxication being raised on appeal if it has not been raised as an issue during the trial.

Jury service

The introduction of the Juries Bill 1999 in the Autumn sitting of the Victorian parliament saw the implementation of most of the Committee's recommendations made in its 1996 report, *Jury Service in Victoria*. In line with the Committee's recommendations, the Bill abolishes the right of many classes of persons to be automatically excused from jury service.

As recommended by the Committee, a person will be able to apply for a deferral of jury service for a period up to 12 months and a person may also be permanently excused from jury service for reasons of continuing poor heath, disability or advanced age. The Victorian government accepted the Committee's firm view that there should be no upper age limit for jury service. The Committee's recommendation that up to three year's automatic exemption from jury service should apply to all persons

who attend for jury service or who serve on juries also has been accepted. A court can grant a longer period of exemption.

In its report, the Committee noted the discrepancy between the Victorian and Commonwealth position in relation to the reimbursement of jurors by their employers. While the Commonwealth provisions sought to put an employee in the same financial position as he or she would have been in but for jury service, Victorian provisions only required compensation in respect of pay for ordinary hours of work. The Bill has rectified the position by requiring employers, regardless of the terms of the employment contract, to reimburse employees who serve on juries with an amount that represents the difference between the jury allowance and their normal weekly salary.

Law Reform Commission of Western Australia

Justice system review

The Law Reform Commission of Western Australia (LRCWA) has restructured during the course of its largest project ever, the review of the criminal and civil justice system in Western Australia. The LRCWA changed its approach to facilities, staffing, consultation with the public and stakeholders, research, writing, editing and publication to deal with its vast reference. In effect, the LRCWA has adapted its operations to become a community outreach organisation actively listening to the public and willing to take the significant step of engaging consulting authors through a public tender process.

The LRCWA also relocated from comfortable but isolated offices into a small space situated in a building predominantly occupied by the Ministry of Justice. Being associated with the Ministry facilitates access to information and affords opportunities for cost savings. However, the LRCWA retains its intellectual and financial independence as a separate statutory entity.

No transition as multi-faceted as this could take place in the context of a huge project without some strain. Nevertheless, during the 1998-99 year, as part of the justice system review, the LRCWA has produced a greater quantity of material, more expeditiously, with substantially the same financial resources, than in any previous year in its 31-year history.

The LRCWA's 30 consultation drafts and background papers published in connection with this inquiry propose more than 400, sometimes controversial, reforms to reduce delays and make the state's justice system simpler, fairer and less expensive.

Topics covered by the review include: the role of the legal profession; justice and technology; aspects of the law of evidence; the use of court-based or community alternative dispute resolution schemes; pleadings; expert evidence; discovery; costs; case management; the right to silence; trial by judge alone; and cross-examination and testimony.

A two-volume set of the collected consultation drafts will be published, in addition to the final report (due later this year), a public submissions report and an executive summary. The entire collection will be available on CD-ROM, as well as on the website.

Fifty consulting writers, researchers and editors have participated in the review – 10 on a volunteer basis – and more than 650 people and stakeholder organisations have made submissions to the inquiry.

Publications of the Law Reform Commission of Western Australia are available on the Commission's website at: **<http://www.wa.gov.au/lrc/>**.

Administrative Review Council

Merits reviewable decisions

Much of the work of the Administrative Review Council is directed to making recommendations to the federal government on improvements to the Commonwealth system of administrative review. The Council's contribution to, and broader support for, that system is not, however, limited to its project reports. For example, the Council has recently reformulated its guidelines for identifying merits reviewable decisions. One of the Council's statutory functions is to make recommendations to the federal Attorney-General about

the classes of decisions that should be subject to merits review. An updated and consolidated set of guidelines, which the Council applies in identifying merits reviewable decisions, was published in the Council's *Twenty-second Annual Report 1997-1998*.

The Council recently reformulated its guidelines to make them more accessible to, and usable by, officers undertaking the development of legislative proposals that involve the creation of administrative powers of decision. The booklet *What decisions should be subject to merits review?* clearly sets out the Council's guidelines, and is available either in hard copy from the Council's Secretariat, or electronically on the Council's website **<http://law.gov.au/arc>**.

Legal, Constitutional and Administrative Review Committee, Queensland

The Queensland Constitution

In April 1999, the Committee produced a consolidated Queensland Constitution. The Committee's final report on this inquiry consists of:

- a Constitution of Queensland Bill 1999 (setting out Queensland's fundamental laws relating to parliament, Ministers, the Governor, the Supreme and District Courts and local government); and
- an adjunct Parliament of Queensland Bill 1999 (dealing with the procedures, powers and privileges of the Legislative Assembly and its members and committees).

The report also includes notes explaining the Bills and a table comparing clauses of the consolidated, modernised Constitution with existing provisions.

The Queensland government recently released discussion draft versions of both Bills, largely based on the Committee's work. The government's intention in releasing these versions is to stimulate community discussion about whether there should be reform of Queensland's Constitution (a matter facilitated by the government's recently appointed Queensland Constitutional Review Commission).

State Ombudsman

In July 1999, the Committee reported on its review of the May 1998 *Report of the Strategic Review of the Queensland Ombudsman*. Three broad themes emerged from the Committee's consideration of the 30 recommendations in the strategic review report.

Firstly, the Committee agreed with the reviewer that a number of specific measures should be undertaken to enhance administrative review in Queensland. The Committee endorsed the reviewer's recommendations relating to increasing community and government agency awareness about the Ombudsman's role and powers (and limits on those powers), and enhancing systems of internal review of administrative decisions. The Committee also urged the government to rationalise the administrative appeal mechanisms in Queensland with a view to streamlining, and diminishing the complexity and cost of, administrative appeals machinery.

Secondly, the Committee recommended that the Premier, as the Minister responsible for the Ombudsman's legislation, commission an external management review of the Ombudsman's Office. (The strategic review touched on the Office's performance but did not extend to a full management review *per se*.)

Finally, the Committee agreed with the reviewer's overall sentiment that parliament's ties with the Ombudsman should be strengthened via the Committee. It became apparent to the Committee that the legislation dealing with the relationship between the Committee and the Ombudsman requires clarification, given the importance of ensuring the Ombudsman's independence from the Executive and accountability to parliament.

Organ donors

In July 1999, the Committee reported on a private member's Bill referred to it by the Queensland Legislative Assembly. The objective of the Transplantation and Anatomy Amendment Bill 1998 is to increase the number of organ donors in Queensland by giving full 'legal' effect to the donor consent notation on Queensland drivers' licences.

The Bill attempts to make the donor consent notation on a driver's licence paramount so that hospital staff need not consult with a potential donor's family before donation goes ahead. Public consultation, especially with

those who work in the donation field, revealed that this would not be in accordance with standard (and accepted) medical practice. The Committee recommended that parliament not support the Bill in its current form, despite its laudable objective.

Electoral reform

The inquiry into issues of electoral reform raised in the Mansfield decision is ongoing. It concerns regulation of misleading how-to-vote cards and the possibility of appeals from the Queensland Court of Disputed Returns to the Court of Appeal. The Committee is examining recent judicial decisions on electoral matters and intends to report in the near future.

Freedom of Information

In March this year, the Queensland parliament referred a wide range of matters regarding the state's *Freedom of Information Act 1992* (FOI Act) to the Committee for inquiry and report. The terms of reference of the Committee's inquiry include:

- whether the basic purposes and principles of the FOI Act have been satisfied, and whether they now require modification; and
- whether the FOI Act should be amended, in particular with regard to the Act's objects clauses and exemption provisions; the ambit of the application of the Act; internal and external review of FOI decisions; fees and charges and FOI resource implications for agencies; and other specified matters.

This will be the first major public review of the Act since its passage in 1992. The Committee received an overwhelming response to its call for public submissions and will be conducting further public consultation on issues raised by the terms of reference following its analysis of these submissions.

Copies of all the Committee's reports and other publications can be obtained at: **<http://www.parliament.qld.gov.au/committees/legalrev.htm>**.

The Law Reform Commission of Ireland

Statutory drafting and interpretation

In July, the Commission published a *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law*. The paper makes a number of provisional recommendations, which aim to improve the accessibility of legislation and make it easier to understand. These recommendations are based on the principle that, under the Rule of Law, legislation should be intelligible to the people it governs. In the consultation paper, the Commission highlights the link between the drafting of legislation, and its interpretation in the courts. The paper advocates a clearer and less complex style of legislative drafting, together with a more flexible approach to statutory interpretation. Submissions are being sought on the Commission's provisional recommendations and a seminar to discuss the recommendations will be held later this year. Following this, a final report will be prepared.

Collateral benefits

In August, the Commission published a consultation paper, *Deductibility of Collateral Benefits from Awards of Damages under Section 2 of the Civil Liability (Amendment) Act, 1964*. The consultation paper makes a number of provisional recommendations, which are intended to ensure that plaintiffs are not over-compensated for the same loss. This can arise, for example, where a plaintiff receives an insurance or a social welfare payment, which compensates for a particular loss suffered as a result of an injury, and is subsequently awarded damages in the courts in respect of the same loss. A system that allows for double compensation in this way is objectionable in principle, as well as wasteful and inefficient. The consultation paper provisionally recommends a move away from a general principle of non-deduction, toward a principle of deduction of those collateral benefits, which serve to compensate for the same loss for which damages are awarded, subject to certain well-defined exceptions. Submissions are being sought on the Commission's provisional recommendations and a final report on this topic will be issued next year.

Gazumping

Following a reference from the Attorney-General in December 1998 and consultation with a wide range of interested parties, the Commission published its *Report on Gazumping* in September this year. The report examines the practice of vendors of residential property requiring booking deposits from prospective purchasers and investigates what, if any, protection could be afforded to those purchasers in situations where the vendor later seeks to sell the property at a higher price than that initially agreed. The report considers the existing law on contracts for the sale of land and the necessary requirements for a concluded contract to come into being. After examining a number of possible reform options, the Commission concludes that the only legislation that can be recommended to ameliorate the problem, without creating further inequity and opportunities for abuse from either party depending on market conditions, is in the sphere of consumer protection. Its decision is influenced by the relatively small scale and transitory nature of the problem, and the fact that the current system of booking deposits is essentially to the benefit of the prospective purchaser. Therefore, it recommends legislation regulating the terms of booking deposits, including a standard form receipt, which would inform purchasers of their rights. The Commission is of the opinion that self-regulation can also offer considerable protection to prospective purchasers.

Other projects

• **Miscellaneous provisions.** In August, the Commission submitted to the Attorney-General a Miscellaneous Provisions Bill setting out a series of proposed statutory amendments on a range of topics. The Bill's purpose is to effect minor but valuable legal reforms, which do not necessitate extensive research or a lengthy report.

• **Child abuse.** The Commission is to consider the law regarding the limitation of civil actions arising out of the abuse of children (other than sexual abuse). Work commenced on this subject in July, with a view to the publication of a consultation paper early next year.

• **Damages.** Work continues on a number of other projects, including aggravated, exemplary and restitutionary damages; the law of homicide; land and conveyancing law; and the law of limitation as it applies in contract and tort claims in respect of latent damage (other than personal injury).

• **Draft convention.** The Commission continues its involvement at the Hague conference on Private International Law in the negotiation of the Draft Convention on International Jurisdiction and the Effects of Foreign Judgements in Civil and Commercial Matters.

• **The next five years.** Development continues on the Commission's Second Programme for Law Reform, which is to form the basis of the Commission's work for the next five years and beyond.

Alberta Law Reform Institute

Class actions

The Alberta Law Reform Institute's project on class actions is considering how to provide a more satisfactory procedural framework to meet the litigation demands of modern society. Class actions in Alberta currently are governed by Rule 42 of the Alberta Rules of Court. Rule 42 is similar to 'representative action' rules that exist in other jurisdictions in the common law world. It originated in a procedure permitted by the Court of Chancery, which was embodied in the Judicature Acts of 1873 and 1875. Rule 42 allows a representative plaintiff to assert, on behalf of other plaintiffs, a claim that is already recognised by law. It provides a procedural device for determining, in a single proceeding, an issue for plaintiffs who are similarly situated, whether or not they are party to the action.

Over the years, the courts have limited the scope of application of the historic rule, so much so that the Alberta Court of Appeal described Rule 42 as inadequate and stated that "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits" (*Western Canadian Shopping Centres Inc v Dutton* [1998] AJ No 1364 (the Hong Kong immigrant investors case)).

Several jurisdictions have already replaced the historic rule with a statutory scheme that provides for and controls cases where multiple plaintiffs have claims that are based on the same, or a similar interest. Such enactments are known as 'class actions' or 'class proceedings' legislation.

Although we do not want to pre-judge the issue, the Institute is currently of the view that Rules of Court amendments could help, but cannot do the full job. We plan to consult on the provisions of the Class Proceedings Act adopted by the Uniform Law Conference of Canada in 1996. This Act embodies a leading example of the emerging Canadian model of class actions legislation. Its provisions are similar to those found in the legislation in Quebec, Ontario and British Columbia and in legislation recommended by the Manitoba Law Reform Commission for enactment in that province.

The Institute plans to complete a consultation document by the end of the year, to be distributed early in 2000.

Trustee investments

The Institute has been asked to consider whether Alberta should join most other North American jurisdictions in replacing the current 'legal list' approach to trustee with the 'prudent investor' rule. If the decision is made to do so, there are a number of ancillary issues relating to exactly how the prudent investor rule is implemented.

Alberta's Trustee Act currently takes the traditional English legal list approach to investment of trust funds by trustees. Unless the trust instrument itself provides broader powers, trustees are authorised to invest trust funds only in types of property identified in a statutory list. The types of asset included in the list are based on the premise that a trustee's primary duty is to preserve the monetary value of the trust capital, while earning as much income as is consistent with discharging that duty. Thus, the legal list is heavily weighted to such 'low-risk' investments as fixed income government bonds and first mortgages.

For many years it has been recognised that a legal list that restricts trustees to investing in ostensibly low-risk investment may rule out investment strategies that are likely to produce substantially higher long-term returns for the beneficiaries without increasing the overall risk of the trust's investment portfolio. Indeed, in an environment of high inflation, a strategy of investing only or predominantly in fixed return securities might preserve the nominal value of the trust's capital while its real value is dramatically eroded.

One approach to addressing the inflexibility of legal lists is simply to include a broader range of investments in the list. Such an expansion of the list could be accompanied by a requirement that trustees obtain expert advice before investing in items on the list that the legislature considers to be riskier than those investments that are associated with a traditional legal list approach. Another approach is to do away with the concept of a legal list and to replace it with an approach that focuses on how trustees go about making investment decisions.

The approach that has recently been taken by most American and Canadian jurisdictions (as well being proposed by the US National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada) is what is referred to as the 'prudent investor' rule. This rule is explicitly based on modern portfolio theory (MPT). A central tenet of MPT is that a prudent investment strategy involves the balancing of return and risk objectives. Moreover, given that an investor wants to 'optimise' risk, this is done not by focusing on the riskiness (variability of expected returns) of individual investments in isolation, but through diversification. The focus, then, is on the riskiness of the overall portfolio, rather than the riskiness of its individual components. Reduction of risk to acceptable levels is achieved by investing in a spectrum of assets whose expected returns are negatively correlated or uncorrelated. No type of asset is deemed to be inherently unsuitable for a prudent investor's portfolio, since the actual effect of any given investment on the riskiness of the portfolio depends on its fit with the other components of the portfolio.

The Institute intends to circulate a consultation paper on trustee investments in September this year.

Other projects

Administrative procedures. A Model Code has been developed for Alberta, and the Institute is currently developing an annotated version for publication.

Limited liability partnerships. A final report was distributed June 1999.

Reform of the Intestate Succession Act. A final report was released in August this year.

Other projects include investigation into the cost of credit disclosure, substantial compliance of wills and occupiers liability.

National Conference of Commissioners (US)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) in the United States has approved new uniform acts dealing with electronic signatures and computer information transactions.

At its annual meeting in Colorado in July, the NCCUSL approved the Uniform Electronic Transactions Act, which is designed to support the use of electronic commerce. The primary objective of this Act is to establish the legal equivalence of electronic records and signatures with paper writings and manually signed signatures, removing barriers to electronic commerce.

Also approved was the Uniform Computer Information Transactions Act, which represents the first uniform comprehensive computer information licensing law. This Act will make it possible for states to provide a neutral and predictable legal framework for transactions in computer information, and also will provide greater legal certainty for the millions of transactions which are occurring daily under less than clear legal rules.

Revisions to the Uniform Rules of Evidence, originally promulgated in 1974, were also approved. The primary purpose of this Act is to simplify and codify the rules pertaining to what may be introduced in evidence in any civil or criminal trial in a state court of law. A revision was necessary to keep abreast of current developments in the law of evidence, such as the use of DNA evidence.

The fourth Act approved was a revised Uniform Disclaimer of Property Interests Act. A disclaimer, in the context of this legislation, is a refusal to accept property. The planning for individual estates, including increases in real estate values, insurance benefits, retirement plans, living trusts benefits, and benefits from others, have required the expansion of the existing disclaimers laws. This new Act is a powerful estate planning tool that will help cope with gaps in existing estate plans beyond the traditional settings.

Important revisions to the Uniform Commercial Code were debated, but not completed. UCC Article 2, Sales, and UCC Article 2A, Leases, were both scheduled for final approval, but after much debate, it was decided that these Acts require more consideration.

The NCCUSL also debated drafts dealing with mediation, arbitration, athlete agents, money laundering, and interstate domestic violence orders.

South African Law Commission

Administrative law

A report on administrative justice has recently been finalised by the Commission, and submitted to the Minister of Justice and Constitutional Development. The report and the draft Administrative Justice Bill seek to give effect to section 33 of the Constitution of 1996. Section 33(1) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(2) makes provision that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33(3) requires that national legislation must be enacted to give effect to these rights, and must:

- provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- promote an efficient administration.

Conflict of laws

This investigation was necessitated by the acknowledgement that it is not always clear when customary law should be applied in real life circumstances and the realisation that both Roman-Dutch law and customary law are now major components of the state's legal system.

Courts and litigants need clear and explicit choice of law rules to indicate when common law or customary law will be applicable to the facts of a particular case. A new enactment

devoted exclusively to the application of customary law is now needed in order to disentangle choice of law rules. The final report, which recently has been submitted to the Minister of Justice and Constitutional Development, has attempted to achieve this purpose.

Sexual offences

The Commission is seeking comment on a discussion paper on sexual offences (the substantive law) and a draft Sexual Offences Bill, which seek to address the following chief concerns:

- the unacceptably high incidence of rape and other acts of sexual violence in South Africa;
- the growing problem of child sexual abuse and the commercial sexual exploitation of children; and
- sexual offences against mentally impaired persons.

The aim of the draft Sexual Offences Bill is to present a single comprehensive act in respect of all sexual offences. However, this does not entail a complete codification of the common law offences relating to sexual offences.

The discussion paper is the first of a three-part series. Further papers are planned on the process and procedural law relating to the management of sexual offences, adult commercial sex work and adult pornography.

HIV testing & sexual offences

Recently there has been mounting public concern and pressure on the authorities to take appropriate action with regard to the deliberate transmission of HIV infection. This has come about largely in response to a number of widely publicised incidents of deliberate transmission of HIV, together with the very real concern that, for the most part, women and young girls are exposed to HIV infection in this manner.

In general, the law at present provides for HIV testing only with the informed consent of the person concerned. Every person is entitled to privacy regarding medical information, and no general legislation exists which allows for disclosures. Furthermore, neither currently available public health law nor criminal procedure makes provision for compulsory HIV testing of persons arrested for having committed sexual offences with a view to disclosing their HIV status to victims. The Commission has released a discussion paper, which debates the need for legislative intervention.

Domestic arbitration

Arbitration is increasingly recognised as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system. Arbitration needs to be supported by appropriate legislation. The objects of a modern arbitration statute are the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the tribunal to conduct the reference effectively. It is clear that the existing Arbitration Act 42 of 1965 fails to meet these objectives adequately. A recently released Commission discussion paper contains proposals for a new domestic arbitration statute intended to replace the Arbitration Act 42 of 1965.

Insolvency

The principal Act dealing with insolvency in South Africa is the Insolvency Act 24 of 1936. This Act replaced the Insolvency Act 32 of 1916, but did not amend it drastically. The 1936 Act has been amended more than 20 times, but it has not been reviewed as a whole.

The Commission has undertaken a comprehensive review of the law of insolvency. During 1996 a draft Insolvency Bill and Explanatory Memorandum was published. The draft Bill in a discussion paper published recently indicates the changes to the previous Bill to take account of comments on that Bill, further research and subsequent developments. The changes deal with matters such as a presumption of insolvency to assist in setting aside dispositions, the Master's discretion to appoint liquidators and preferent salary claims.

Review of the Marriage Act

Requests are increasingly made that the provisions of the *Marriage Act 1961* be reconsidered and adapted to reflect the needs of contemporary South African society. The Commission noted these requests and decided to undertake a review of the provisions of the Act. The Commission has released a discussion paper, which reflects these issues and contains provisional recommendations to remedy the shortcomings of the Act.

Community dispute resolution

A recent discussion paper on this topic addresses the important issue of community dispute resolution structures. Community forums are at present diverse, fragmentary and tentative. These forums also suffer from a negative perception that they are 'kangaroo courts' or linked with vigilantism. If local justice and dispute resolution structures are properly recognised and supported, the resultant broadened access to peaceful means of dispute resolution will itself be an important barrier against the temptation for people to take the law into their own hands. The challenge is to devise ways of providing recognition, regulation and support without stifling the informality, flexibility, accessibility and community appeal that give these structures the legitimacy without which they cannot play a meaningful role in the communities in which they operate.

The Commission's latest publications are available online at **<http:// law.wits.ac.za/salc/>**.

Law Commission of Canada

As the Law Commission of Canada approaches the mid-point of its current five year strategic plan, work is in full stride in all four of its research themes: personal relationships, social relationships, economic relationships, and governance relationships. In addition, the Law Commission will release its report in November on a reference into institutional child abuse. This report will assess the processes of redress for adults who suffered physical and sexual abuse as children living in government-funded and government-run institutions.

Personal relationships

Like many other countries, Canada is currently rethinking its laws and policies in response to the diversity of family forms. Governments are confronted with deciding whether programs that target married couples should be redesigned to reach a broader range of citizens. Interest in this issue has been heightened in Canada as a result of a recent judgment of the Supreme Court of Canada.

In *M v H*, (1999), 171 DLR (4th) 577, the Court held that the exclusion of same-sex couples from support obligations incumbent on unmarried heterosexual couples violates the *Canadian Charter of Rights and Freedoms*. This decision has revived debate in Canada on whether to extend the benefits to all relationships of economic and emotional co-dependency. For example, should two sisters who live together be able to share in dental and other contributory plans?

The Law Commission has already published a research paper entitled *Marriage and Marriage-Like Relationships*. This paper examines how Canada is responding to changing family forms and whether Canadian laws are consistent with social values and objectives. The Law Commission is co-sponsoring a conference, *Registered Domestic Partnerships* in October 1999 to explore this concept in greater detail. A discussion paper is scheduled to be published in early 2000.

Social relationships

The Law Commission recently published a discussion paper, *From Restorative Justice to Transformative Justice*, as part of this research theme. This paper attempts to trace a new understanding of how we might imagine the substance of law, the processes by which conflicts are named and framed, the assumptions about who is properly a party to a conflict, and what the optimal remedial outcomes might be. The objective is to capitalise on the transformative potential of conflict, to use conflict as a springboard for moving towards a more just society.

Restorative justice can help the law build a framework for handling all kinds of conflicts whether in criminal, civil, constitutional, or commercial. In this sense, the principles and practices of restorative justice can be transformative.

In its final report, expected in March 2000, the Law Commission of Canada will pursue several issues highlighted in the discussion paper.

- Can restorative justice principles be applied to conflicts in areas such as environmental law, corporate law, labour relations, consumer bankruptcy and family law?
- Is restorative justice a system of justice? Can it operate independently

of current civil and criminal justice processes?

• Is restorative justice something more than a forum for individuals to resolve their disputes?

• What is the relative weight of the interests of the community, the interests of the victim(s) and the interest of the offender(s)?

Economic relationships

Under the economic relationship theme, the Law Commission is conducting a preliminary investigation on whether there is a need in Canada to create a uniform federal security interest regime. In the preliminary stage of the project, a paper was prepared outlining the federal parliament's constitutional authority to create and enforce security interests. The paper concludes that, in theory, the Parliament of Canada has a broad scope to create both consensual and non-consensual security interests, and, to a limited extent, has already done so. The Law Commission is currently deciding whether to examine existing federal security interests and whether to conduct a detailed review of the constitutional authority of the Parliament of Canada to enact its own legislation or to adopt international conventions relating to security interests.

Also under the economics theme, the Law Commission published a paper *Major Issues Relating to Organized Crime: Within the context of Economic Relationships*. This paper considered the preliminary issues of studying organised crime within the economic marketplace as opposed to traditional criminal law.

The Law Commission is also undertaking a joint project relating to workplace relationships. It recognises that there are structural changes in labour markets and workplaces. The perceived decline of job security, the impact of downsizing and contracting out, and the potential of technology are changing employment relations between workers and employers and among workers. The Law Commission will attempt to examine the legal implications of these changes by studying the framework that regulates and supports labour market activity.

Governance

The Law Commission's public consultations and meetings with the Advisory Council revealed that many Canadians feel abandoned by the law. Many think the legal system does not treat them with respect. That is, they are not being treated as capable of making intelligent and thoughtful choices about how to live their lives.

In June 1999, the Law Commission sponsored a Round Table on the concept of citizen agency at which time four commissioned papers were presented and critiqued. The concept of citizen agency is valuable because it reminds us to focus on both the capacity to act and the resources needed to act. It directs attention to the potential of human beings to act purposively. The capacity of citizens to participate meaningfully in processes of democratic governance, and the notions of intention and consent, which imply deliberative action and empowerment, are central to the citizen agency concept.

Also within the governance theme, the Law Commission recently produced a joint publication entitled *Urban Aboriginal Governance in Canada: Re-Fashioning the Dialogue*. This study considered both the normative and practical arguments for implementing multiple governance models for Aboriginal peoples residing in urban areas. In particular, the research project attempts to highlight obstacles and opportunities for engaging youth more effectively in urban Aboriginal governance.

Papers and reports produced by the Law Commission of Canada are available at **<http://www.lcc.gc.ca>**.

Law Reform Commission of Nova Scotia

Probate reform

In March 1999, the Commission published its final report, *Probate Reform in Nova Scotia*. The report examines the Probate Act and makes recommendations for its improvement, modernisation, and reform. In particular, the Commission considers the viability of a simplified summary procedure for small or uncomplicated estates.

The final report recommends a simpler probate system, which involves courts only when necessary. The Commission recommends that separate procedures be developed to deal with estates where there are no disputes (non-contentious estates) and estates in which disputes arise (contentious estates).

Among its other proposals, the Commission recommends that estate appraisals no longer be mandatory. The Commission also considered the issue of formal estate closings. Although required by the Act, only 10 per cent of estates are independently reviewed at a formal court hearing. The Commission recommends that instead of formal closings, a standard form should be developed, to be completed and filed with the court once processing of an estate is concluded. A copy of the completed form would be provided to interested parties.

Enduring powers of attorney

Nova Scotia has a Powers of Attorneys Act, which allows for enduring powers of attorney. However, after reviewing the Act, the Commission believes it fails to address a number of concerns, including a lack of adequate procedural safeguards to prevent financial abuse. Additionally, some people question whether enduring powers of attorney are legally valid if they come into effect only when a donor is mentally incompetent.

The Commission's final report, *Enduring Powers of Attorney in Nova Scotia*, published in September 1999, recommends that legislation specifically allow for contingent powers of attorney, which would come into effect only upon the occurrence of a future contingency, usually a donor's mental incompetence. A donor should be able to specify in a contingent power of attorney a person who would determine when the contingency has occurred. In addition to the person named by the donor, a physician should agree in writing that the donor is mentally incompetent. If the contingent power of attorney does not specify a person to determine the donor's mental incompetence, or if the specified person refuses or is unable to make the determination, then the certificates of two medical practitioners should be required to prove that the contingency has occurred.

Among other proposals, the Commission recommends that:

- neither mandatory legal advice nor registration should be required for a valid enduring power of attorney;
- a donor should be able to appoint multiple attorneys, to act jointly or successively; if an enduring power of attorney has been terminated or is not valid;
- the attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that his or her authority as attorney had been terminated or lost; and
- courts should continue to be authorised to remove an attorney upon application by a nearest relative, by an attorney, or by a named alternate, where the donor had specified an alternate attorney.

Hospitals Act

In January this year, the Commission commenced a comprehensive review of the mental health provisions of the Hospitals Act. The Act governs the admission - whether on a voluntary or involuntary basis - of persons to psychiatric facilities and also sets guidelines concerning the classification, commitment, and discharge of persons with psychiatric disorders. Given the size of the Act and the number of interested stakeholders, this is likely to be a lengthy project.

Tortfeasors Act

The Commission has recently begun to examine whether the Tortfeasors Act and the Civil Procedure Rules should be amended to clearly eliminate a common law rule that the release of one joint tortfeasor in a civil liability action releases all other joint tortfeasors. Currently, a 'covenant not to sue' must be used if the injured party wishes to release a particular joint tortfeasor, but seeks to maintain the right to sue the remaining joint wrongdoers. This distinction is not widely known. The common law rule has been corrected in other provinces, such as Ontario, but not in Nova Scotia.

Interim payment of damages

Another current project concerns whether the Civil Procedure Rules, which allow courts in certain circumstances to order defendants in a civil action to make interim payments to plaintiffs before a final determination on liability, should be expanded in scope. If there is a considerable delay between the times of injury and judgment, a plaintiff may have no income for a lengthy period and may feel compelled to accept a compromise settlement as a result.

The Commission's papers are available at **<http://www.chebucto.ns.ca/Law/LRC>**.