Reform ROUNDUP

Articles in Reform Roundup are contributed by the law reform agencies concerned

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Administrative Review Council

New Council President

Mr Wayne Martin QC was appointed President of the Administrative Review Council (the Council) on 22 August 2002. His appointment is for a term of three years.

Mr Martin is a member of the Western Australian Bar and currently one of the three senior counsel assisting the Royal Commission into the failure of HIH. He has been a Council member since 9 July 1997 and was a senior research officer for the Council in 1978. He was appointed a Queen's Counsel in 1993 and served as Chairman of the Law Reform Commission of Western Australia from 1996 to 2001.

Council of Australasian Tribunals

Work undertaken by the Council to facilitate the establishment of a council of tribunals culminated on 6 June 2002 in Melbourne with the establishment of the Council of Australasian Tribunals (the COAT).

On this date, at a specially convened meeting, Commonwealth, state, territory and New Zealand tribunal heads agreed upon a constitution and objects for the COAT and office holders were elected. The Hon Justice Murray Kellam, President of the Victorian Civil and Administrative Tribunal, was appointed Chair of the COAT.

The objects of the COAT include:

- establishing a national network of tribunals and a national register of tribunal members;
- providing training and support for members of tribunals;
- providing a forum for the exchange of information and opinions on aspects of tribunals and tribunal practices and procedures; and
- potentially developing support systems for tribunals

(eg case management and IT systems), performance standards, model procedural rules, standards of behaviour and conduct for members of tribunals.

Under clause 2(1) of the COAT Constitution, which was adopted at the 6 June 2002 meeting, a tribunal that is eligible for COAT membership is:

> *any Commonwealth, State or Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.*

It may be anticipated that the COAT will promote greater liaison between Commonwealth, state, territory and New Zealand tribunals, and provide a valuable support network for tribunal members, particularly those from smaller tribunals.

Further information concerning the COAT may be found on the COAT website which is located at www.coat.gov.au

The scope of judicial review

Work by the Council on this project continues. It is proposed that the outcome of the project will be a set of guidelines for agencies, legislators and commentators exploring policy issues relevant to the appropriate scope, including the desirable minimum scope having regard to constitutional considerations, of judicial review. The Council hopes in this regard that its final publication on the scope of judicial review will be a useful complement to its 1999 publication *What Decisions Should Be Subject To Merits Review?*

As part of the consultative process preceding development of the proposed guidelines, the Council is presently in the final stages of development of a discussion paper canvassing a range of policy and legal factors relevant to the appropriate application of judicial review. Matters to be canvassed in the discussion paper will include:

- the constitutional significance and shape of judicial review;
- other factors relevant to the scope of judicial review from either the judicial or the government perspective, including:
  - justiciability;
  - deference;
  - the nature of certain grounds of judicial review;
  - resource-related considerations;
  - the nature of the decision maker;
  - the nature of the decision; and
  - the alternative remedies available.

The paper will also address the means of legislatively limiting or excluding judicial review.

The use of expert systems in administrative decision-making

The Council is continuing its inquiry into the use of expert systems in administrative decision-making. An expert system is a computing system which, when provided with certain basic information and general rules instructing it how to reason and draw conclusions, can then mimic the thought processes of a human expert in a specialised field.

Rule-based systems are one type of expert system. While the Council is considering the use of expert systems, its focus is on rule-based systems because they are generally the type of expert system used to model legislation. Such systems are used in administrative decision-making in a number of Commonwealth government departments and some state government departments.

The Council is preparing an Issues Paper on the subject. Among other matters, the Issues Paper will consider the implications of the use of such systems for primary decision-making, particularly the potential deskilling of decision makers, and how administrative review is undertaken of decisions made using expert systems.

The Council has conducted a stocktake of the current and proposed use of expert systems in administrative decision-making within Commonwealth agencies. The results of that stocktake will be published in the Issues

Paper. The Council has also undertaken informal consultations with a number of agency heads and their agencies.

It is anticipated that the Issues Paper will be published by the end of 2002.

Further information is available from the Administrative Review Council's website at www.law.gov.au/aghome/other/arc/

Family Law Council

The Council has a number of on-going references it is continuing to progress.

Child and Family Services (CAFS) Committee

The Child and Family Services Committee is working on its final report following on from its October 2000 discussion paper, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia.* In April 2002, Council sent the Attorney-General a letter of advice regarding the child protection jurisdiction. The Committee expects to present its final report to the Attorney-General later in the year.

Violence and the Family Law Act Committee

The Violence and the Family Law Act Committee is currently preparing a letter of advice to the Attorney-General regarding options to reform Division 11 of the *Family Law Act 1975* (Cth) (the *Family Law Act*). Division 11 regulates the making of contact orders in circumstances where there is an inconsistent violence order already in force.

Paramountcy Committee

The Paramountcy Committee is continuing with its review of the operation of s 65E of the *Family Law Act*. The Committee is examining the nature and application of the legal principle that the child's best interests must be regarded as the paramount consideration in family law litigation.

Pathways Committees

Three newly constituted committees of the Family Law Council are undertaking preliminary work relating to recommendations contained in the Family Law Pathways Advisory Group's report *Out of the Maze.*

1. The Child Representatives Committee, in response to recommendation 21, has commenced work on a paper reviewing (i) the role of child representatives and (ii) the basis for appointing child representatives in light of the Pathways Report and the changes that have affected the family law system since the Family Law Council's 1996 report *Involving and Representing Children in Family Law.*

2. The Guidelines Committee, in response to recommendation 4, will work with the Family Law Section of the Law Council of Australia to draft national guidelines for lawyers practising in family law which reflect best practice for family law practitioners and develop a system for tracking the practitioners who subscribe to the national guidelines.

3. The Aboriginal and Torres Strait Islander Issues Committee will consider recommendation 22 which suggests reforms to specific provisions in the *Family Law Act* concerning the operation of kinship obligations and child-rearing practices of indigenous Australians.

Further details of the Family Law Council's work program are available on its website: www.law.gov.au/flc

New South Wales Law Reform Commission

Cross-examination in sexual assault cases

The NSW Law Reform Commission has been asked to consider whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine the

complainant in person and, if not, what alternatives are available.

Concerns about this situation have been raised as an unrepresented accused can use cross-examination as an opportunity to intimidate or humiliate the complainant. Placing restrictions on cross-examination by an unrepresented accused could reduce the distress suffered by victims in court and could improve the quality of their evidence. These potential benefits will be weighed against the need to ensure the accused has a fair trial.

The Commission will examine the adequacy of existing restrictions on cross-examination and will consider how other jurisdictions deal with the problem. Specifically, it will consider whether courts should have the power to appoint a third party to cross-examine complainants in sexual offence cases, whether or not the accused consents.

The Commission published an Issues Paper (IP 22) in September 2002 and will issue a final report in early 2003.

Relationships and the law

The Commission released a comprehensive Discussion Paper (DP 44) as part of its review of the *Property (Relationships) Act 1984* (NSW).

The *Property (Relationships) Act 1984* (NSW) recognises cohabiting heterosexual and same sex de facto and other close personal relationships, for example, an adult child caring for an elderly parent. The main focus of the Act is to facilitate a fair redistribution of property and other financial resources (for example, superannuation) should those relationships break down. At the moment, different legal consequences attach to relationships depending on whether the people are married or, if not married, whether the relationship is between a man and a woman, or a same sex relationship.

The Commission pioneered work on the reform of relationships law back in 1983 with its Report 36, which was the catalyst for the enactment of the *De Facto Relationships Act 1984* (later renamed the *Property (Relationships) Act 1984*). Now, almost 20 years later, the Commission is charged with the task of assessing that legislation to ensure that it reflects the diversity of family forms in which people live today.

In undertaking its work in this area, the Commission has been guided by four basic principles:

- recognising and respecting the diversity of relationships;
- allowing parties to order their own financial affairs, subject to safeguards to ensure that agreements are voluntary and fair;
- facilitating a just and equitable resolution of financial matters after separation; and
- providing a fair, timely and affordable process for resolving disputes about financial matters.

The Commission is currently seeking submissions on the Discussion Paper, and will produce a final Report in mid-2003.

Uniform succession laws

When a person dies, their executor or administrator must apply for probate in the State or Territory in which they were domiciled when they died but they must also apply for the grant of probate to be recognised in any other State or Territory where the deceased owned property.

The topic is highly specialised and made more complex by the fact that the States' laws are not uniform across Australia.

In May 2002, the Commission released Issues Paper 21, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*. This Paper was a summary of a comprehensive Discussion Paper prepared by the Queensland Law Reform Commission on behalf of the National Committee for Uniform Succession Laws, of which the NSW Law Reform Commission is a member.

The discussion paper proposes a system of automatic recognition in all other States of a grant of probate made in the State where the deceased died domiciled.

The paper also makes proposals for changes to the law in relation to the recognition of foreign grants of probate.

The NSW Law Reform Commission is currently consulting on the proposals set out in IP 21.

Other developments

The Commission's Interim Report on Surveillance (Report 98) was tabled in Parliament in December 2001. The Report contains recommendations relating to the regulation of both covert and overt surveillance. The Commission is receiving further submissions and undertaking consultations on the recommendations contained in the Interim Report.

The Commission is continuing work on three projects related to sentencing. The Commission is planning to produce reports on *Sentencing: Corporate Offenders* and *Sentencing: Young Offenders* by the end of the year. The Commission will also be publishing a Discussion Paper on *Sentencing: Mandatory Penalties* before the end of the year.

The Commission's Report on *Contempt by Publication* is expected to be released in November 2002.

The Commission has received three new projects in addition to the project noted above relating to cross-examination in sexual assault cases:

- a review of Part 15A of the *Crimes Act 1900* (NSW), which deals with Apprehended Violence Orders;
- a review of aspects of the *Jury Act 1977* (NSW), in particular, whether people who are blind or deaf should be able to serve on juries;
- a review of the law relating to the consent by minors to medical treatment.

Details of projects and publications of the NSW Law Reform Commission can be found at: www.lawlink.nsw.gov.au/lrc

Queensland Law Reform Commission

Privilege against self-incrimination

The Commission has received a new reference from the Attorney-General, the Hon R Welford MP. The terms of reference are:

> *The privilege against self-incrimination (which applies to both documents and oral testimony) is sometimes abrogated by statute. Sometimes the statutory provisions contain both use and derivative use immunities and on other occasions only a use immunity. Sometimes the use immunity applies only to criminal proceedings and on other occasions to any proceedings. The Queensland Law Reform Commission is requested to:*
>
> - *Examine the various statutory provisions abrogating the privilege in Queensland.*
> - *Examine the bases for abrogating the privilege.*
> - *Recommend whether there is ever justification for the abrogation of the privilege and, if so, in what circumstances and before what type of forum.*
> - *If there are circumstances and forums where the abrogation may be justified, recommend whether the abrogation be accompanied by both a use and derivative use immunity, especially having regard to the limitations that a derivative use immunity may have on subsequent prosecutions.*
> - *Recommend whether these immunities should apply to subsequent criminal proceedings only or to all subsequent proceedings (including civil or disciplinary proceedings).*
> - *If there are circumstances and forums where the abrogation may be justified, recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions.*

It is anticipated that work will commence on the reference in the near future.

Vicarious liability

On 11 April 2002, the Attorney-General tabled the Commission's Report No 56: *Vicarious Liability*.

The Report, which included draft legislation to give effect to its recommendations, examined the circumstances in which vicarious liability should be imposed, and a number of related issues.

In the Report, the Commission recommended a number of changes to the law, including changes in relation to:

- the liability of an employer for a tort committed by an employee who has been lent – for example, on secondment or by way of a hiring agreement – to another employer;
- the liability of the State for a tort committed by an employee or a person in the service of the State who is performing a duty conferred not by the State, but by law, and who exercises an independent discretion in the performance of that duty;
- the rights of indemnity and contribution between an employer and an employee in circumstances where the employer is vicariously liable for the tort of the employee.

Damages for wrongful death

The Commission's terms of reference require it to review the existing practice, in a wrongful death claim, of discounting a surviving spouse's damages for the possibility that the spouse's relationship with the deceased may have ended in separation or divorce, or for the prospect that the spouse may enter a new financially supportive relationship. The terms of reference also call for consideration of these issues in relation to a claim by a dependent child of the deceased.

In June 2002, the Commission published an Issues Paper (WP 56) for consultation purposes. The Issues Paper outlined the present law, its underlying principles and the arguments for and against change. The Issues Paper also set out the situation in a number of comparable jurisdictions and suggested a number of possible options for reform.

A copy of the Issues Paper may be obtained free of charge by contacting the Commission *[see details in 'Contacts' at the back of this journal].*

Uniform succession laws

The Commission continues to lead the Uniform Succession Laws Project, which was initiated by the Standing Committee of Attorneys-General with a view to developing uniform succession laws for the Australian States and Territories.

Work on the project is currently focussed on the administration of estates. This stage of the project has been divided into two parts.

The first part deals with general issues of administration, such as the appointment and removal of personal representatives, the powers, duties and liability of personal representatives, the vesting of property on the death of a person, the order of payment of debts, and the payment of legacies. A Discussion Paper on this topic was released in 1999: *Administration of Estates of Deceased Persons* (MP 37).

The second part deals with the more specific issue of how a grant made in one jurisdiction may be recognised in another jurisdiction. At present, when a person dies leaving assets in two or more jurisdictions, it is necessary for the personal representative to obtain fresh authority to administer the estate in each of those jurisdictions. This authority may take the form of an original grant made by the Supreme Court of each jurisdiction. Alternatively, it may be possible to have a grant that has been made in one jurisdiction resealed by the Supreme Court of another jurisdiction, in which case the resealed grant has effect as if it were an original grant. In December 2001, the Commission released a Discussion Paper examining the issues in relation to the resealing and recognition of grants: *Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (WP 55).

The Discussion Paper proposed a uniform procedure for the resealing of a grant made in another Australian jurisdiction or overseas. At present, there is considerable divergence in the resealing legislation of the Australian States and Territories in relation to matters such as the persons entitled to apply for the resealing of a grant, the countries whose grants may be resealed, and the instruments that may be resealed.

The Discussion Paper also proposed a scheme, developed from earlier recommendations made by the Law Reform Commission of Western Australia, that would avoid altogether the need to reseal certain grants made in an Australian State or Territory. Under the proposed scheme, a grant made by the court of the jurisdiction in which the deceased was domiciled at the time of death would have effect in all Australian States and Territories as if it had been resealed in that jurisdiction.

Work has commenced on the final report on the administration of estates. However, some of the issues that will be addressed in that report overlap with issues arising in the context of a scheme involving the automatic recognition of certain grants. Accordingly, it is intended to deal separately with the more discrete question of a uniform procedure for the resealing of grants, and to give priority to the preparation of the final report on that issue. That report should be completed in 2003. At the same time, the National Committee will also work on the final report dealing with the broader issues relating to the administration of deceased estates, including whether certain grants should be recognised throughout Australia without having to be resealed.

Current publications may be accessed through the Queensland Law Reform Commission's website at www.qlrc.qld.gov.au

Queensland Legal, Constitutional and Administrative Review Committee

The Electoral (Fraudulent Actions) Amendment Bill 2001

On 27 March 2002 the Committee tabled its report on the Electoral (Fraudulent Actions) Amendment Bill 2001. The private member's bill sought to amend Queensland's *Electoral Act 1992* by inserting a new 'catch-all' provision making it an offence to fraudulently do any act with intent to influence the outcome of an election.

In its report the Committee stressed that it wholeheartedly agreed with the sentiment of the bill that electoral fraud is totally unacceptable and that measures must be in place to ensure that, to the greatest extent possible, people are discouraged from engaging in such practices. However, the Committee also reported that it had some fundamental concerns with the bill, including issues as to the practical application of the bill and, more critically, its constitutional validity.

In a majority report the Committee recommended that the Legislative Assembly not proceed further with the bill in any form. The bill subsequently failed.

Meeting with the Queensland Ombudsman

On 12 April 2002, the Committee met with the Queensland Ombudsman and senior officers of the Ombudsman's office to discuss issues arising from the Ombudsman's *2000/2001 27th Annual Report to Parliament*, and the strategic plan for the Office of the Queensland Ombudsman for 2001/02-2004/05.

On 14 May 2002, the Committee reported to Parliament on its meeting with the Ombudsman. The Committee included in its report questions on notice that the Committee had asked of the Ombudsman prior to the meeting and the Ombudsman's responses to those questions, together with a transcript of the meeting of 12 April 2002.

Constitutional reform

On 18 April 2002, the Committee released an issues paper titled *The Queensland Constitution: specific content issues* which canvassed a range of issues including incorporation of constitutional principles, conventions and practices, a Lieutenant-Governor for the State, the members' oath or affirmation of allegiance to the Crown, indicative plebiscites, initiation of legislative amendment, summoning Parliament, the number of parliamentary secretaries and certain issues relating to the judiciary. This issues paper commenced the first stage of a review of certain issues of constitutional reform including recommendations made by the Queensland Constitutional Review Commission in its February 2000 *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.*

The second stage of the Committee's review will relate to whether, and to what extent, the Queensland Constitution should be entrenched. The Committee anticipates releasing a consultation paper in relation to stage two at the same time as its report on stage one.

Annual report 2001/2002

On 23 August 2002, the Committee tabled its Annual Report for 2001/2002.

Information on Committee inquiries and reports is available at www.parliament.qld.gov.au/committees/legalrev.htm or by contacting the Committee's secretariat on (07) 3406 7307.

Victorian Law Reform Commission

Defences to homicide

Victorian law currently separates homicide into two main categories: murder and manslaughter. Neither of these offences is defined in legislation but have developed historically through the common law. Many critics argue that the law concerning homicide retains anachronistic notions which are not consistent with contemporary social values. In particular, they argue that the available defences to homicide excuse or condone male patterns of aggression or perpetuate stereotypes about a person's race, religion or sexual preference.

In June 2002, the Commission completed the first stage of its reference on defences to homicide, publishing two papers. An Issues Paper, *Defences to Homicide*, outlines the current law in Victoria, identifies the areas which will be the focus of the reference and raises some of the issues which the Commission will be investigating through the course of the project.

Three main areas of law are addressed in the Issues Paper: the law of self-defence, the issue of provocation and the overlapping between the defences of mental impairment, automatism, diminished responsibility and infanticide. The defence of provocation has been the subject of much criticism and the Commission will be examining whether it should continue to exist. The Issues Paper also contains an analysis of available data in the area and outlines research the Commission intends to undertake during the project.

The Commission has also published an Occasional Paper, *Who Kills Whom and Why?: Looking Beyond Legal Categories*, written by Associate Professor Jenny Morgan. This Paper summarises the Australian data on homicide and argues that social problems rather than legal categories should best inform law reform in this area.

The next stage of the reference will be the publication of a Discussion Paper which will include specific proposals for reform. The Commission will then engage in a consultative process, seeking feedback and submissions from the community, prior to the publication of a Report.

Compulsory care & treatment of people with intellectual disabilities at risk

Over recent years there has been considerable concern about the lack of protection for the rights of people with intellectual disabilities who are at risk of harming themselves or others. The Commission's reference is concerned with the development of an appropriate legislative framework for compulsory treatment and care of people with intellectual disabilities who are at risk.

In researching the current law in the area, it became apparent to the Commission that the lack of regulation of care and treatment for people with intellectual disabilities who are seen to be a risk to themselves or others can potentially lead to serious infringements of rights and freedoms.

In June 2002, the Commission published a Discussion Paper, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, which outlines these concerns and explores options for addressing them. The Paper examines the complex human rights issues which need to be balanced when considering practical ways of reforming the law in this area.

In preparing the Discussion Paper and in planning a community consultation process around the issues raised, the Commission has worked closely with a range of stakeholders and experts in the area, including representatives from the Department of Human

Services, the Office of the Public Advocate, academics and members of the disability advocacy and community legal centre sectors.

A Reference Group of people with intellectual disabilities has also been involved in assisting the Commission to develop an Easy English version of the Discussion Paper, an audio version of the paper and a consultation process which is inclusive of people with intellectual disabilities.

During August and September 2002, the Commission has been engaged in a consultation process in metropolitan and regional Victoria, meeting with service providers, families and people with intellectual disabilities to gain responses to the issues and options raised in the Discussion Paper. A Report with recommendations will be published by the end of 2002.

Sexual offences

The aim of the Commission's reference on sexual offences is to determine what legislative, administrative or procedural changes might be necessary to ensure that the criminal justice system is more responsive to the needs of complainants in sexual offences cases. The Commission will also consider the kinds of educational programs which might be useful to facilitate knowledge and understanding of existing and proposed reforms.

During the last 18 months, the Commission has consulted extensively with the public and with service providers and other professionals both in metropolitan Melbourne and in regional Victoria. We have met with and received written submissions from members of the public with an interest in sexual offences law, with victims/survivors (women and some men) who have not reported offences, and many who have reported and have been through the criminal justice system as complainants.

The Commission has initiated a number of research projects as part of this reference. Further to research conducted into prosecution outcomes for rape in Victoria for the years 1997/8 to 1998/9, the Commission has now conducted research on 'non-rape' offences against young people and children. Research with Victoria Police focuses on the problem of low reporting rates for sexual offences. The Commission will also examine how judges are delivering their directions to juries, particularly in relation to the definition and meaning of 'consent' and the admissibility of evidence relating to the complainant's prior sexual history. Further research is being conducted into some of the issues which arise in relation to child victims of sexual offences, specifically regarding tests for competence, comprehensibility of legal language, capacity to compel children to testify against parents, exceptions to the hearsay rule and the extension of alternative arrangements.

The Commission is also engaging a wide range of stakeholders on both substantive and procedural issues facing victims/survivors of sexual assault from specific target groups which have been identified as experiencing particular disadvantage when dealing with the legal system: people with 'impaired mental functioning', people from non-English speaking backgrounds and indigenous Australians. Separate roundtable discussions with key stakeholders from these groups are being held in August and September 2002.

An Interim Report describing the outcomes of the consultations and findings of some of these projects is scheduled to be released before the end of 2002.

Privacy

The Commission's reference on privacy is being conducted in two stages: workers' privacy and surveillance in public places.

Research has been conducted in preparation for an Issues Paper which will provide an examination of the concept of privacy itself, the practices which currently occur in Victorian workplaces that may be considered to affect workers' privacy, the law as it relates to privacy and the law regulating industrial relations in Victoria.

In order to further the aims of the Issues Paper, the Commission will then engage in a consultation process with areas of the community which have a particular interest in workplace privacy issues, including trade unions and employer groups, and interested individuals. The feedback gained during consultation will contribute to the formulation of specific options which will be contained in a Discussion Paper to be published by mid-2003.

Please visit the Victorian Law Reform Commission's website for publications and further information on references: www.lawreform.vic.gov.au

Law Reform Commission of Western Australia

The 30th Anniversary Report

The commencement of the year 2002 marked the 30th year of operation for the Law Reform Commission of Western Australia (LRCWA). To celebrate this significant milestone, and to assist the Attorney-General to achieve his commitment to implement the vast bulk of its outstanding reports, the LRCWA carried out an audit of all its previous reports. In December 2001, the LRCWA presented its 30th Anniversary Reform Implementation Report to the Attorney General for his consideration. The Attorney-General formally launched the published version on 28 May 2002 as part of the LRCWA's 30th Anniversary celebrations.

The Report commemorates the history of the Commission (and its predecessor the Law Reform Committee), whilst providing a convenient record of work completed to date and the action taken since the completion of each of the Commission's reports. Every reference the Committee and Commission have ever received is recorded, as an account of the genesis of the reference, the process involved in addressing it, and its upshot. The report indicates not only the high implementation rate of recommendations made by the Committee and the Commission, but also prioritises the unimplemented recommendations which would still enhance the quality of the legal system in Western Australia. The Commission views the 30th Anniversary Reform Implementation Report not only as a celebration of its establishment, but also as a record and a continued history of commitment to the ideal of law reform for the benefit of all Western Australians.

The other subsidiary project relating to the Commission's 30th Anniversary was the conversion of all the Commission's previous reports and discussion papers into an electronic format, to be republished on a CD-ROM. This project has now been completed and is available with an electronic copy of the 30th Anniversary Reform Implementation Report.

Aboriginal customary laws

The Commission's current reference on Aboriginal customary laws aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian justice system. The reference resulted from the LRCWA's Review of the Criminal and Civil Justice System where concerns were expressed in relation to the treatment received by indigenous Australians in the current justice system. The Commission believed that these concerns would be best dealt with as a separate reference in its own right.

After receiving the reference, the Commission's immediate response was to issue a request for tender seeking the assistance of researchers, editors, writers and project managers with an expertise in Aboriginal customary laws. The Commission received an overwhelming number of applications and, with the assistance of an Aboriginal Reference Group, undertook a detailed evaluation of the various tender responses lodged.

The Commission appointed an Aboriginal Project Manager in March 2002, with two Research Directors appointed shortly thereafter. The Project Manager has since assembled highly respected community people and representatives from key Aboriginal organisations to form the project's Aboriginal Reference Council. The Attorney-General also approved the appointment of a prominent Aboriginal male and female representative of the Western Australian Aboriginal community as the project's Aboriginal Special Commissioners.

The Commission estimates the project will extend over two and a half to three years, involving extensive public consultations and travel to remote Aboriginal communities. The Commission is very enthusiastic about commencing work on such a significant reference, particularly as it follows so closely on from the success of the review of the criminal and civil justice system. The Commission envisages the reference will be run in the same manner as the previous review, with numerous public meetings, extensive culturally appropriate

consultations with Aboriginal peoples and visits to all parts of the State.

Although the Commission has not been given a deadline to complete the reference, it is hoped that by the end of 2002 a Project Overview and an initial Discussion Paper will be available.

Contempt

The LRCWA is currently undertaking a reference on the law of contempt. Three writers and an editor have been engaged to produce Discussion Papers on the three topics that form the terms of reference. To date, the Commission has published and distributed two Discussion Papers: *Contempt in the Face of the Court* and *Contempt by Publication*. The third Discussion Paper on *Contempt by Disobedience to the Orders of the Court* was published at the end of August 2002. After seeking submissions from various stakeholders and interested parties, the Commission expects to deliver its Final Report by the end of 2002.

Judicial review of administrative decisions

On 6 September 2001, the Commission received new terms of reference from the Attorney-General to inquire into and report on the inadequacies and deficiencies of the current law and procedures pertaining to the judicial review of administrative decisions, and to make recommendations for reform. The Commission engaged a research assistant and produced a Discussion Paper in June 2002, which has now been distributed to various interested stakeholders, for consideration and comment. Once all submissions have been received, the Commission envisages a Final Report will be published by December 2002.

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

Law Commission of Canada

Seeking justice between the generations: age distinctions in laws & policies

Age is often used as a distinguishing characteristic in Canadian laws and policies. Many benefits are awarded and obligations or restrictions imposed on the basis of age. Some of these distinctions are overt, such as driving age, access to certain income support programs, eligibility to vote, mandatory retirement, discounts based on age, and age categories for automobile insurance. Other distinctions are either very subtle, systemic, or unwritten. These include laws and policies that may have a differential impact on a particular age group or where distinctions are carried out in the application of laws or policies. Examples of these would be limited access to job re-training, cutbacks to home care funding, a greater focus on preventing fraud that is targeted towards vulnerable people, and assumptions regarding peoples' capacity to make decisions for themselves.

Differences between the generations are being highlighted in recent discussions around the aging population. We hear how the older generation is going to bankrupt the health care system and the pension regime while younger generations will face higher tuition, fewer publicly-funded services, and an increasing workload, particularly as informal caregivers.

Some age distinctions are based on stereotypes and incorrect assumptions, but others are based on a desire to distribute society's wealth and resources. Current debates on intergenerational issues and the aging population often centre on benefits being provided to older adults and how this affects others. In most of these discussions, there is no regard for the diversity that exists among older adults. At the same time, there is an increasing concern about the well-being of children and youth and their prospects, particularly in an era of government cutbacks. Issues of discrimination, unfairness, burdens and benefits can also be examined from their perspective.

The Law Commission of Canada seeks a methodological approach that would examine distinctions based on age, whether benefits or burdens, and determine whether age is relevant to the objectives, whether other criteria would be more relevant, and how best to achieve the equality and dignity of all generations while promoting intergenerational justice and respecting differences. The aim is to determine an approach that will not simply respond to current discrimination or fears about an aging population, but will provide a proactive, just way to address age distinctions in laws and policies.

As a result, the Law Commission is currently preparing a discussion paper on age distinctions and justice between the generations. The first part of this project will look at intergenerational justice and issues relevant to older adults. The paper will examine some laws and policies that provide benefits or impose burdens on older adults and propose a variety of approaches to address these distinctions taking into account human rights, intergenerational issues, and differences within the age group. A second paper will apply these approaches to issues related to children and youth. The two papers will result in a Law Commission discussion paper that engages Canadians on the topic of age distinctions and justice between the generations.

In keeping with its mandate to involve Canadians and use innovative practices, the Law Commission is seeking the perspectives of high school students through its annual Roderick A. Macdonald Contest. Roderick Macdonald, the Law Commission's first president, firmly believes that young Canadians should be involved in improving Canada's laws.

The theme for 2002 is *Does Age Matter?* The Contest asks students to collect the views of young people and older adults on intergenerational issues such as perceptions of each other, contributions of each age group to society, laws and policies that make distinctions based on age, the impact of an aging population, and the role of government in providing assistance to young people and older adults. In order to obtain input from a wide variety of students, they are invited to create written submissions (diary, collection of personal stories, short story) or visual ones (poster, collection of photos with captions, video). The deadline is May 2003 and winners will be announced in June.

In search of security

In April 2002 the Law Commission of Canada released a discussion paper titled *In Search of Security: The Roles of Public Police and Private Agencies*. Policing in Canada, and throughout the world, is in the process of changing from a system in which public police forces provided most of our policing services, to one in which policing services are provided by a range of public and private agencies. Many functions that were once the exclusive domain of public police forces are now being performed by private agencies. It is more and more difficult to differentiate between public and private as the line between public police and private security has blurred.

In February 2003, the Law Commission will host "In Search of Security: An International Conference Policing and Security". The world's leading experts on policing will come together in Montreal to discuss the future of policing. The conference will feature plenary sessions, smaller workshops and ample time to network with old and new acquaintances.

For copies of documents or further information, check out the Law Commission's website at www.lcc.gc.ca or send us an e-mail at info@lcc.gc.ca

Alberta Law Reform Institute

Enduring powers of attorney

The Alberta enduring powers of attorney legislation has been in effect for over 10 years. Our provisions dealing with health care directives came into effect later, providing for personal directives to be given as to courses of treatment or who should make a decision on those courses of treatment. At the time the personal directives legislation was introduced, there were parallel relaxations in the formalities that had previously been required for enduring powers of attorney (EPA). These formalities had included a certificate from a lawyer stating that the grantor knew the nature and purposes of the document, the incorporation of some plain language

notes and instructions. The certificate and ancillary information were discontinued to make the personal directive and the EPA fairly similar.

After 10 years of experience, anecdotal evidence began to develop relating to the possible abuse of EPAs by certain attorneys. While it is difficult to pin down the incidence of abuse, the anecdotal evidence and the existence of similar evidence in other jurisdictions suggests that it might be time to readdress the question of the efficacy of the safeguards which are currently required. Specifically, the question is to achieve the best possible balance between:

1. the interests of an individual in being able to arrange, in the event of their mental incapacity, for the administration of their property by one or more trusted persons in a cost efficient way and without the embarrassment of publicity; and

2. the interests of an individual in being protected against misappropriation of their property by the person whom they appoint to administer their property.

The Institute produced an Issues Paper, No. 5, in February of this year, asking the community to comment both on the instances of abuse, and the possible effect of safeguards. We divided the possible safeguards into four areas – execution safeguards such as writing, witnesses, and mandatory notes; triggering safeguards such as requirements of notice or a second opinion as to the coming into effect of the power of attorney; substantive law safeguards such as the redefinition of the duties of the attorney; and accountability safeguards such as the requirement to prepare and provide accounts to family members or other specific office holders.

There is some debate on two particular issues. The first is whether increasing the formalities will necessarily discourage potential users from taking advantage of enduring powers of attorney. The second is whether there is a public functionary who can take on the supervisory role that is necessary in order to ensure that all attorneys account appropriately and fully.

Is a certain amount of abuse inevitable? Would the additional safeguards necessary to prevent abuse in the small minority of cases be an unnecessary burden on the majority of cases which proceed fairly smoothly without abuse? Would the additional safeguards be effective in any event in precluding or preventing abuse?

A number of responses were received to the Issues Paper, and the Institute is now attempting to work out whether the balance between protection and freedom of choice should, or can, be effectively adjusted.

Future income plans

The Institute is also close to completion of a study on the question of whether registered retirement savings plans (RRSPs), deferred profit sharing plans (DPSPs), and registered retirement income funds (RRIFs) should be exempt from the remedies of creditors. The issue is significant because of the policy questions involved and the large sums of money invested annually in retirement savings plans.

There are two relevant major legal policies. The first is the legal encouragement to save for retirement, evidenced by the tax deferral status of RRSPs and similar mechanisms. The second is the necessity for an effective and efficient system for the enforcement of money judgments. These policies come into direct conflict in the question of exemption of registered retirement savings plans.

Under Alberta law a judgment creditor may enforce a money judgment against the RRSP of the debtor. However, most pension plans are exempt from enforcement as are most RRSPs and annuities purchased from insurance companies. It is only the non-insured RRSPs which are fully available to creditors.

When pensions, annuities, RRSPs, and RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the payments. Exemptions are again an issue. Most pension statutes expressly prohibit garnishment of pension benefits or payments. Insurance legislation will in some cases also exempt payments. However, payments out of a non-insurance RRSP or RRIF, after tax is deducted, will be fully garnishable.

When the depositor debtor dies, the situation becomes even more complex. There is doubt as to whether the plan becomes part of the depositor's estate, or whether

it passes directly to beneficiaries, and if so, whether the beneficiaries are subject to the claims of the deceased's creditors. The result is a free-for-all scramble for the plan proceed, a situation which has caused the courts much trouble.

Our Consultation Memorandum No. 11 posed the following two major groups of issues:

1. the threshold issue of whether any exemption should be recognised for RRSPs, DPSPs, and RRIFs; and

2. whether the exemption, if approved, should be total or surrounded by limits to prevent the possibility of abuse.

As might be expected, depositors, beneficiaries, plan administrators, financial institutions, and creditors have very definite views on these issues.

For further information see the Institute's website at www.law.ualberta.ca/alri

Manitoba Law Reform Commission

Current projects

In early June, the Commission issued a Discussion Paper on *Withholding or Withdrawing Life Sustaining Treatment.* It was circulated to various individuals, professions and organisations with an interest in the subject matter. The deadline for responses was set at September 30, 2002. Although the paper was not circulated outside of Canada, anyone wishing to receive a copy can e-mail the Manitoba Law Reform Commission at lawreform@gov.mb.ca

Implementation of reports

Several of the Commission's Reports were implemented through legislation at the recent Session of the Legislature.

Our Report on *Assessment of Damages under The Fatal Accidents Act for the Loss of Guidance, Care and Companionship* (Report #105, 2000) has been implemented by amendments to *The Fatal Accidents Act.* The legislation now provides that damage awards be increased from $10,000 to $30,000 for parents, spouses and children and from $2,500 to $10,000 for each sibling of the deceased. It also provides that the court take inflation into account when setting the award.

Other reports implemented are *Class Proceedings* and *The Legislative Assembly and Conflict of Interest* (Reports #100 and #106) providing for the bringing of class actions in Manitoba and the appointment of an independent conflict of interest commissioner. In addition, the legislation of two health care professions (occupational therapists and registered dieticians) was based on recommendations contained in the Commission's Report on *Professions and Occupations* (#84).

All of the above received Royal Assent but only the amendments to *The Fatal Accidents Act* have been proclaimed. The others will come into effect on a date set by proclamation.

Recent reports of the Manitoba Law Reform Commission, in English and French, are available at www.gov.mb.ca/justice/mlrc/

South African Law Commission

Adult prostitution (Issue Paper 19)

This Issue Paper is the first paper of the third leg in the series of the investigation into sexual offences.

After presenting a historic overview of legal measures used to address adult prostitution and considering current debates surrounding adult prostitution, the existing legal framework and the international developments, also in respect of trafficking and HIV/AIDS, the Commission has decided to present three legal options for addressing the problem of adult prostitution:

- criminalise all aspects of adult prostitution as criminal offences;

- legalise adult prostitution within certain narrowly circumscribed conditions; and
- decriminalise adult prostitution which will involve the removal of laws that criminalise prostitution.

Within these options further subdivisions and variations are possible. Comments are invited on the legal options presented. The closing date for comment on Issue Paper 19 is 31 October 2002.

Security legislation: terrorism (Report)

The Commission has had the benefit of considering numerous precedents set by other countries which have passed legislation since September 11, 2001.

The offence of terrorism as it exists in South African law is inadequate as its operation is too narrow. The South African legislation for combating terrorism should be brought in line with the international conventions dealing with terrorism, it should provide for extra-territorial jurisdiction, and financing of terrorism must be addressed.

Recommendations are made in respect of, among other things, the following:

- Investigative hearings in order to obtain information from a person suspected of being in possession of information on terrorist acts.
- A brief period of detention is possible but provision is made for legal representation and bail may be granted. As many other safeguards as possible have been incorporated to ensure that the proposed legislation can withstand constitutional scrutiny.
- Preventative measures that entail that a person suspected of being about to commit a terrorist act can be brought before a court to enter into an undertaking to refrain from certain activities.
- Forfeiture of terrorist property and property used for terrorist purposes.
- Offences set out in international conventions which identify certain acts as constituting terrorist acts.
- Specific offences relating to false alarms involving packages or letters containing apparently hazardous material

Simplification of criminal procedure: a more inquisitorial approach to criminal procedure (Report)

The Commission's report *Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure: Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial Management of Trials* includes the following recommendations:

- *Police questioning of the suspect/accused, its legitimacy, effectiveness and the right to silence and its consequences.*

Legislation should be introduced in terms of which a suspect is placed under a duty to disclose particular matters to the police at the risk that a court might in due course draw an adverse inference from his or her failure to do so, in certain circumstances.

- *Admissibility of admissions and confessions.*

The Commission recommends that provision be made for common requirements for the admissibility of all statements or conduct of the accused which might be self-incriminatory, without distinguishing between statements made to police officers and others.

- *Defence disclosure before and during the trial.*

(a) Disclosure by the defence of specific defences.
Essentially disclosure of specific defences provides for compulsory pre-trial disclosure by the accused (in most cases only if the accused is legally represented) of the defence of an alibi; the intention to allege that the accused was not criminally liable by reason of mental illness or defect; the intention to raise any statutory or other ground of justification, or a defence excluding *mens rea*; and the intention to call an expert witness. The sanction that is sought to be imposed for failure to make such disclosure is that the accused will not be permitted to raise the particular defence, or call the expert witness, as the case may be, without the leave of the court.

(b) Codifying prosecution disclosure.
The Commission recommends that legislation be introduced in terms of which the prosecution is obliged to provide the defence with documents which tend to

exculpate the accused; statements of witnesses, whether or not the state intends to call them; and any material which is reasonably required to enable the accused to prepare his or her defence. In addition the circumstances under which the prosecution may withhold information are outlined.

(c) Providing for reciprocal disclosure by the defence and the prosecution.
The Commission does not support the proposal for reciprocal disclosure by the defence and the prosecution and is of the view that the proposal for reciprocal disclosure would be workable only if a distinction were to be made between those accused who are represented and those who are not.

- *A greater role in the criminal justice process by judicial officers.*

The Commission recommends that it be provided that, at the commencement of the trial, the judicial officer be placed in possession of the material that by that stage is in the hands of both parties, which will enable him or her to evaluate how to conduct the trial.

- *Possible ways of enhancing judicial management of trials and case management.*

The Commission recommends that statutory provision be made for pre-trial conferences.

Simplification of criminal procedure: out-of-court settlements in criminal cases (Report)

The report considers whether there is a need in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way in which this can be achieved within the South African context.

An out of court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion of the matter from the trial process.

The Commission concludes that the formal recognition of a procedure to settle criminal cases out of court will have particular advantages for the criminal justice process in South Africa. Such a process will, among other things –

- contribute to saving precious court time and costs, since cases can be finalised without going to court, and without the time-consuming task of settling factual disputes;
- improve the public's perception of the administration of justice;
- give the accused person certainty regarding the outcome of the case, provided the conditions of the agreement are complied with;
- give the accused person the opportunity not to end up with a record of previous convictions, a factor which often prompts people to dispute a criminal charge;
- provide ample opportunities for the application of restorative justice initiatives as an outcome of an out-of-court settlement; and
- protect victims from publicity, and from having to be subjected to cross-examination, while giving them the benefit from compensation or restitution by the accused.

The publication of divorce proceedings: section 12 of the *Divorce Act 70 of 1979* (Report)

The South African media are, in terms of s 12 of the *Divorce Act 70 of 1979* (Divorce Act), currently prohibited from publishing any particulars of a divorce action or any information which comes to light in the course of such an action other than the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law and the judgment or order of the court.

However, since the provision does not have extra-territorial operation, the foreign media who are allowed to attend proceedings in courts are unrestricted in their reportage of South African divorce proceedings. Since South African citizens have access to the foreign media and the press, the whole purpose of the prohibition is defeated.

There are furthermore clear indications that at present s 12 of the *Divorce Act* is simply being defied by the South African media because it is seen as being unconstitutional.

The Commission recommends that s 12 of the *Divorce Act* be amended to allow a court the discretion to:

- make an order to lift the general ban on publication and to grant leave to any party to publish such particulars of a divorce or such information or evidence which has come to light in the course of such an action, as the court may deem fit;
- protect the anonymity of parties in specific circumstances; and
- close the court at any stage of the proceedings where there is a likelihood that harm may result to a child as a result of the hearing of any evidence.

The amended section will also make it an offence to furnish particulars of a divorce action or any information or evidence which emerges during the course of such an action unlawfully to third parties.

For access to papers and reports of the South African Law Commission, visit the website at www.law.wits.ac.za/salc/salc.htm

Scottish Law Commission

Appointment of new Chairman

The Honourable Lord Eassie has been appointed Chairman of the Scottish Law Commission for a three year term, with effect from 15 July 2002. The appointment is on a part-time basis. Lord Eassie is a Senator of the College of Justice in Scotland and succeeds Lord Gill who resigned as Chairman on his appointment as Lord Justice Clerk.

Obligations

The Commission is currently examining the statutory protection provided against the penal enforcement of leases. A discussion paper (No 117) on *Irritancy in Leases of Land* was published in October 2001. Work is progressing on finalising policy in light of the consultation response, with a view to submission of a report early in 2003.

At the request of the Department of Trade and Industry, a new project is underway on registration and priority of rights in security granted by companies. The Commission aims to publish a discussion paper in the [northern] autumn of 2002.

Work is continuing, jointly with the Law Commission for England and Wales, on a review of the law of partnership. A consultation paper (No 111) was published in October 2000 seeking views on proposals for reform of the law on ordinary partnerships. It examines, in particular, the issues of separate legal personality and continuity of partnership and suggests a new mechanism for solvent dissolution. A second consultation paper (No 118) was issued in November 2001 dealing with the law on limited partnerships. The aim is to report on both aspects of the law by the end of 2002.

Another joint project with the Law Commission for England and Wales considers the desirability and feasibility of replacing the *Unfair Contract Terms Act 1977* and the Unfair Terms in Consumer Contracts Regulations 1999 with a unified regime which would be consistent with European legislation and also extend the scope of the 1999 Regulations to protect businesses, as well as consumers. A joint consultation paper (No 199) was published in August 2002.

Persons

In response to a request from the Scottish Ministers, the Commission published a discussion paper (No 120) in August 2002 dealing with liability for psychiatric injury.

Property

A discussion paper (No 112) on *Conversion of Long Leases* was published in April 2001. It proposes that ultra-long leases, that is, leases for more than 175 years, should be converted into ownership. It also seeks views on whether conversion should be available for

leases of much shorter duration (50 years or more). A possible alternative for these leases would be to introduce some form of security of tenure. The Commission has prepared its final recommendations for reform in light of the consultation response and will submit its report as soon as drafting resources are available to complete the accompanying Bill.

The Commission has recently started work on a review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. The Commission is also engaged on a project concerning completion of title to land following the seller's receivership. A discussion paper (No 114) on *Sharp v Thomson* (1997 SC (HL) 66), which is the leading case in this area, was published in July 2001. In it the Commission proposes special statutory protection for the buyer in this situation. The project is likely to be completed after the discussion paper on the *Land Registration (Scotland) Act 1979* has been published.

Another property project concerns review of the law of the foreshore and seabed. It concentrates on the technical issues involved in this area with a view to advising the Scottish Executive on options for reform to improve clarity and consistency in the law. The topics covered include Crown interest and public rights of access, including an analysis of the Scottish Executive's proposal to create a statutory right of access over land. (This proposal is currently before the Scottish Parliament). A discussion paper (No 113) was published in April 2001 and, subject to parliamentary progress on the Executive's proposal, the Commission aims to submit its final report by the end of 2002.

Criminal law

At the request of the Scottish Ministers, the Commission is undertaking a review of the defences of insanity and diminished responsibility. A seminar, involving speakers from New Zealand, the United States, Ireland and England, was held in April with a view to identifying the specific issues involved in reform of this area. The Commission aims to publish a discussion paper by the end of 2002.

Trusts

Work is underway on a wide-ranging review of the law of express trusts. The first part of the project will concentrate on the powers, duties and liabilities of trustees and the aim is to produce a discussion paper on this topic in the first half of 2003.

Recent reports

The Commission's report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 180) was published in August 2002. The report includes a number of recommendations concerning the list of those entitled to claim non-patrimonial damages on the death of an individual, including conferring title to sue on brothers and sisters and on the same-sex cohabitant of the deceased.

Further information about the Scottish Law Commission's work and its publications may be found on its website at www.scotlawcom.gov.uk

Contributions to *Reform Roundup* and *Clearinghouse* are welcome and should be sent to reform@alrc.gov.au