Reform Roundup

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

Entries to Reform roundup are welcome.

Please contact the Editor on reform@alrc.gov.au

Contents

Administrative Review Council

Scope of judicial review

Following publication of a discussion paper last year, work is now in progress on the final report of this project. In the report, the Council hopes to identify principles that will be of assistance to agencies, legislators and others in considering issues relevant to the appropriate scope of judicial review.

Automated assistance in administrative decision making

Work has now commenced on a report on this topic, following receipt of responses to the issues paper published last year and a public forum held in Melbourne in November 2003. The report is expected to include commentary on the benefits and limitations of using 'expert systems' in administrative decision making and principles of good practice for their usage.

Core competencies in law for primary decision makers

Work by the Council on the development of a course curriculum guide is nearing completion. It is intended that the guide will assist trainers and those responsible for the development of training courses to determine the appropriate content for courses teaching administrative law concepts to primary decision makers. Government agencies may also be able to use the guide to assess externally provided courses.

Coercive investigative powers of government agencies

Work is continuing on this project, which will focus on the powers of agencies to require provision of information through documents and answers to questions. Selected agencies

have been contacted to seek their involvement in the project, in order to establish the use to which coercive powers provided for in legislation are put in practice.

The project's principal objective is to determine whether greater consistency in these powers across government is either desirable or achievable. It will also consider the accountability mechanisms associated with the exercise of coercive investigative powers and the protections available to individuals.

Procedural discretions of tribunals

Research is continuing into the procedural discretions given to tribunals to extend time limits imposed upon the review process (such as the time in which an application for review can be made), vary the normal rules of standing and order a stay of a decision under review. Consideration is also being given to the capacity of tribunals to grant or refuse legal representation.

Admin Review

The Council anticipates that a new issue of its regular publication on developments in administrative law will be available in the middle of this year.

Copyright Law Review Committee

On 4 December 2003, the Attorney-General, the Hon Philip Ruddock MP, appointed a new Copyright Law Review Committee (CLRC) to review the law relating to government ownership of copyright.

Under the *Copyright Act 1968* (Cth), Commonwealth, state and territory governments own copyright in a range of materials, including materials made by government departments and agencies. Furthermore, the government possesses prerogative rights in the nature of copyright over certain primary legal materials, such as Acts of Parliament. This differs from many other countries, which provide little or no protection for material produced by governments.

The CLRC is inquiring into the appropriateness of the law relating to government ownership of copyright. The inquiry will examine the policy basis for government ownership of copyright material and the public interest in access to information. It will also look at other matters such as competition regulation and the effect of new technologies. The terms of reference for the CLRC inquiry are available at <www.ag.gov.au/clrc>.

The CLRC is chaired by Professor James Lahore, Professorial Fellow, Faculty of Law, University of Melbourne. Professor Lahore has been at the forefront of the development of intellectual property law in Australia for more than 30 years as a legal practitioner, academic and author.

The other members of the CLRC are:

- Professor Michael Pendleton, Faculty of Law, Murdoch University;
- Associate Professor Allan Brown, Faculty of Economics, Griffith University;
- Ms Susan Bridge, Chief Executive, Australian Publishers Association;
- Mr Nigel Hardiman, Convenor, States and Territories Copyright Use Group and Senior Project Officer, ACT Urban Services Department;
- Mr John Gilchrist, Senior Lecturer in Law, University of Canberra; and
- Ms Helen Daniels, Assistant Secretary, Copyright Law Branch, Attorney-General's Department.

The CLRC published an issues paper and called for submissions in February 2004. The CLRC will report to the government in December 2004.

New South Wales Law Reform Commission

Guaranteeing other people's debts

In 1999, the Commission received a reference to review aspects of the law relating to guarantees. Issues Paper 17 was published in April 2000. The Commission recognised in the early stages of its research that there was little empirical data available relating to the use of guarantees and their impact on a guarantor (who is usually in a close personal relationship with the debtor) when a debt is not paid. The Commission therefore decided to participate in a large empirical study conducted by academics at the University of Sydney Law School. The results of this study, which extended over three years, are contained in Research Report 11, entitled *Darling, please sign this form: a report on the practice of third party guarantees in New South Wales*.

The research report focuses on relationship debts (also sometimes referred to as 'sexually transmitted debts'), which arise when a person guarantees someone else's debt and the debtor fails to repay the loan. In these cases, the lender can require the person who guaranteed the debt to repay the original loan.

The study confirmed the general understanding that a high proportion of women support the borrowing of male partners who are engaged in small business. The evidence shows that women, elderly people and those from non-English speaking backgrounds are disproportionately affected by such guarantees. Those from non-English speaking backgrounds were particularly unlikely to seek legal advice before they signed.

Some of the more surprising findings included:

- the high proportion of older people who support the borrowing of their adult children;
- the relatively small proportion of people who received legal advice before entering a guarantee and the high level of poor practice on the part of solicitors in these cases; and
- a high level of reported poor practice on the part of lenders.

Poor practice on the part of lawyers included giving advice in a matter of minutes, in front of the main borrower, and sometimes also acting for the borrower. A high proportion of guarantees were entered into in informal circumstances.

The resolution of disputes relating to guarantees was also examined, highlighting the complex array of common law and legislative defences and the lack of avenues for informal dispute resolution.

The study was carried out between 2000 and 2003 with funding made available by an Australian Research Council Strategic Partnerships in Industry, Research and Training grant.

The Commission will use the findings in this study to prepare its final report and recommendations later this year.

Community Justice Centres

The future form of community mediation to resolve neighbourhood and other disputes is the subject of Issues Paper 23 released by the Commission in October 2003.

Community mediation is conducted in New South Wales by Community Justice Centres (CJCs), a government agency first established in 1980. CJCs were established to provide a means of dealing with the sort of disputes for which conventional court-based procedures are unsuited—domestic or neighbourhood disputes where the disputing parties had, or once had, an ongoing relationship, including disputes between family members, partners, friends, workmates, members of social groups and other community organisations, neighbours, landlords and tenants, flatmates and so on.

The CJC mediators, who are members of the community they serve, work to help the parties reach a mutually satisfactory settlement. As well as benefiting the parties to a dispute, CJC mediations also help to free up police and court resources.

The Centres now provide services to all regions of New South Wales.

The review looks at all aspects of the operation of the *Community Justice Centres Act 1983* (NSW). Some specific issues being considered are:

- the mediation 'model' adopted by CJCs;
- the provision of mediation services to Aboriginal communities;
- the consequences of requiring parties to attempt mediation at a CJC before going to court;
- the role of CJCs in Apprehended Violence Order proceedings; and
- mediator accreditation, training and remuneration.

The Commission has received written submissions and is currently conducting consultations with a view to finalising a report in the second half of 2004. [For more detail on this inquiry, see Joseph Waugh's article, 'The heartburnings of imperfect justice: Is mediation the answer?' on p62.]

Blind or deaf jurors

People who are blind or deaf are currently excluded from jury service in New South Wales. In Discussion Paper 46, published in April 2004, the Commission considers whether this exclusion should remain.

The discussion paper suggests that it is a fundamental principle that no group of Australian citizens should be excluded from the

duties or rights attaching to citizenship without compelling and acceptable reasons. Thus, exclusion of any citizen from jury service should occur only in circumstances where that person is incapable of fulfilling the task. At the same time, jurors need to have the capacity of communication for the purpose of evaluating evidence presented in court, which is often a difficult task. Whether or not blind or deaf persons would have greater difficulty in doing this than other jurors, and whether the quality of justice might be adversely affected if a blind or deaf person served on a jury, are key issues the Commission is considering. Other issues raised in the Discussion Paper include:

- whether technologies are now available to enable blind or deaf people to discharge the duties of a juror;
- the cost implications of making these technologies available in court;
- the implications of the use of peremptory challenges; and
- the availability of Auslan interpreters for deaf jurors (both in court and in the jury room).

The Commission is currently receiving submissions and will be reporting in the latter half of 2004.

Other developments

In the next six months, the Commission will publish the following consultation papers or reports:

- Informed Consent to Medical Treatment by Minors (Issues Paper);
- Sentencing: Young Offenders (Report);
- Relationships and the Law (Report);
- Surveillance (Report);
- Review of the Community Justice Centres Act (Report).

Queensland Legal, Constitutional and Administrative Review Committee

Meeting with the Queensland Ombudsman

The Committee's responsibilities include monitoring, reviewing and reporting on the performance of the Queensland Ombudsman's functions. In fulfilment of this responsibility, the Committee met with the Queensland Ombudsman in November 2003 to discuss issues relating to the office. These issues included complaints by prisoners, evaluation of office restructuring, and budgetary issues.

The following month, the Committee tabled a report to Parliament on its meeting and, in the same document, made its final report to Parliament on the implementation of recommendations made in the June 2000 *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner*. The Committee commended the Ombudsman/ Information Commissioner and his officers for their substantial effort in implementing these recommendations.

Entrenchment of the Queensland Constitution

In its February 2000 report, the Queensland Constitutional Review Commission recommended referendum entrenchment of the most fundamental aspects of the Queensland Constitution, and that certain procedural requirements should apply to all sections of the Constitution. The Committee subsequently considered this proposal in a specific inquiry regarding entrenchment of the Queensland Constitution.

The Committee's report, tabled in the Parliament in August 2003, identifies certain essential elements of the Constitution which should be referendum entrenched, such as provisions about the Legislative Assembly, the appointment and removal of Supreme Court judges and the system of local government. However, the Committee did not consider that any provisions relating to the constitutional monarchy should be referendum entrenched.

Hands on Parliament

One of the recommendations of the Queensland Constitutional Review Commission was that the Committee "conduct an inquiry into the possibility of special representation for Aborigines and Torres Strait Islanders". The Committee broadened the scope of this inquiry to examine Aboriginal and Torres Strait Islander people's participation in democratic processes and released an issues paper in December 2002 to stimulate public submissions to its inquiry.

The Committee conducted extensive face-to-face consultation throughout Queensland and received a number of written submissions. The Committee's report, *Hands on Parliament — Inquiry into Aboriginal and Torres Strait Islander Peoples' Participation in Queensland's Democratic Process*, was tabled in the Queensland Parliament on 11 September 2003. At the time of tabling, the Committee was

pleased to present to the Parliament the first artwork to hang on the Wall of Reconciliation, which was established by the Speaker, the Hon Ray Hollis MP.

Fees and charges under the FOI Act

The Committee finalised a comprehensive review of Queensland's *Freedom of Information Act 1992* in December 2001. As part of its review, the Committee considered the resource implications of the Act for agencies and the Act's regime of fees and charges. However, just prior to the Committee tabling its report, a new fees and charges regime commenced.

Due to the short period of time the amended regime had been in operation when the Committee reported, the Committee recommended that it review the new fees and charges regime after a year to assess whether it was operating fairly and efficiently.

Throughout 2002 and 2003 the Committee sought to gather information to inform its review of the new regime. The Committee reported on the steps taken in its *Annual Report 2002-03*, which was tabled in Parliament on 21 August 2003.

Dissolution

As the Queensland Parliament was dissolved on 13 January 2004, the Legal, Constitutional and Administrative Review Committee of the 50th Parliament also was dissolved. The new Committee appointed after the February election is not obligated to continue any particular inquiries being undertaken by its predecessor.

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 or lcarc@parliament.qld.gov.au

Tasmania Law Reform Institute

Vendor disclosure

This project considers the need for the enactment of legislation requiring vendor disclosure of certain matters prior to the sale of property in Tasmania. The project will examine current practices in Tasmania and possible problems caused by a lack of compulsory vendor disclosure, as well as the experiences and approaches of other jurisdictions to this issue. The project will consider:

- arguments for and against vendor disclosure;
- matters which should be included in the disclosure statement;
- when the disclosure statement should be provided;
- the effect of providing false information;
- circumstances in which vendor disclosure should not be required; and
- whether encouraging voluntary vendor disclosure is more appropriate than compulsory disclosure.

The project was proposed by the Institute's Property Law Reform Group, which is comprised of key figures in this area such as the Recorder of Titles, the Surveyor General, the head of the Law Society's Property Committee, and property law lecturers from the University of Tasmania. An issues paper will be released in 2004.

Driving causing death

Following media attention about the acquittal of drivers who have fallen asleep thereby causing accidents resulting in the death of other road users, the Attorney-General indicated an interest in this issue being addressed by the Institute. The law in such cases is largely governed by the High Court decision of *Jiminez v The Queen*, in which it was held that although the actions of a driver while asleep are not "conscious or voluntary", the driver may be able to be found criminally responsible for driving the car in a manner dangerous to the public if, at the time of the driving which immediately preceded the falling asleep, the driver was "affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous". The court also held that the liability for offences such as dangerous driving causing death and negligent driving causing death is strict rather than absolute. Accordingly, the defence of honest and reasonable mistaken belief is available. The court held that "[if] in a case based on tiredness, there is material suggesting that the driver honestly believed on reasonable grounds that it was safe for him to drive, the jury must be instructed with respect to that issue".

An issues paper is to be released considering the need for legislative and procedural change to address the criminal liability of drivers who fall asleep causing motor vehicle accidents resulting in death or other serious injuries.

Corporate manslaughter

This project considers the desirability of introducing a specific corporate manslaughter provision. Such a provision would provide specific definitions of manslaughter in the case where the alleged perpetrator is a corporation, as well as providing specific penalties. It has been argued that such legislation is needed to make companies accountable for the workplace environment that they create and to encourage them to take the issues of workplace safety more seriously. As the law currently stands, to prove manslaughter, a 'controlling mind' must be found, which is a difficult task. Only once in the past 16 years has such a controlling mind been found in a manslaughter case in Australia. The project will consider recent legislative proposals and developments in Victoria, the Australian Capital Territory and Queensland as well as developments in overseas jurisdictions such as Canada. It is also planned that the project will include case studies of some workplace deaths and the legal consequences of those incidents.

The Board of the Institute agreed to undertake this project in October 2003, following its proposal by an undergraduate student of the University of Tasmania, Ben Bartl. This is particularly pleasing as one of the aims of establishing the Institute and basing it within the Faculty of Law at the University was to stimulate and provide further opportunities for staff and students to be actively involved in the process of law reform. Mr Bartl is assisting in the preparation of an issues paper on this topic, which will be released in 2004.

Update on adoption by same sex couples

The recommendations in the Institute's final report on this topic (May 2003) were partly implemented by the *Relationships (Consequential Amendments) Act 2003*. Same sex and de facto couples are now eligible to apply for known child adoptions.

Victorian Law Reform Commission

Compulsory care of people with an intellectual disability

In December 2001, the Victorian Law Reform Commission received a reference from the Attorney-General, the Hon Rob Hulls MP, requiring it to inquire into the use of compulsory care and treatment practices in relation to people with intellectual disabilities who are a risk to themselves or other members of the community. The Commission's final report, which proposes a comprehensive legal framework to regulate compulsory care and treatment, was tabled in Parliament by the Attorney-General on 20 November 2003.

The subject matter of this inquiry required the Commission to engage in a difficult balancing act involving the rights of a profoundly marginalised sector of the community. The recommendations contained in the report are intended to safeguard the rights and liberties of people with a disability, while at the same time providing for a transparent and accountable means of responding to situations where a person's conduct poses a risk to themselves or others.

The report addresses two types of practices that affect people who have an intellectual disability. First, it deals with decisions to detain people without their consent in a prescribed facility, so that they can be provided with services and programs to reduce a significant risk that they may seriously harm others. Second, it deals with decisions about restrictive care practices used in a variety of settings, and particularly in residential services, that affect the freedom of people who have an intellectual disability.

In relation to the very small number of individuals with an intellectual disability whose conduct poses a serious risk of harm to others, the report recommends that, in certain circumstances, a person should be able to be detained in a prescribed facility in order to participate in a program designed to help them modify their behaviour. The report recommends criteria that would need to be satisfied before a person could be detained and compelled to participate in such a program. These criteria are deliberately narrow and also require that the program must be beneficial for the individual concerned. The report also proposes the creation of a specialist list in the Victorian Civil & Administrative Tribunal (VCAT) to hear applications for the placement of a person on such a program, the hearing of appeals, and the conduct of regular reviews. Given the seriousness of these matters it is recommended that a judicial member of VCAT be required to be part of the decision-making process for these matters.

The report also proposes additional constraints on the use of 'restrictive practices' in caring for

people with an intellectual disability. The restrictive care practices that are considered in the report include 'mechanical restraint' (for example using a belt to restrain a person to prevent self injury or injury to others); 'chemical restraint', which involves prescribing a person drugs to change that person's behaviour; and 'seclusion', which involves locking a person in a room apart from other people. The Commission's report contains a number of recommendations that are intended to result in a systematic and multi-faceted approach to regulation utilising reporting, monitoring and independent audits as well as statutory restrictions on the use of such practices.

Eligibility for assisted reproductive technology & adoption

The Victorian Law Reform Commission has recently published a consultation paper for its reference relating to eligibility for both assisted reproduction and adoption. The consultation paper provides people with the necessary background to make informed submissions to the inquiry. It outlines the current legal framework for eligibility for adoption and for assisted reproductive technology, including where a surrogacy arrangement is involved. The current eligibility criteria have the most direct effect on people who are single or in same-sex relationships and who wish to have children. Some people who are not eligible for treatment in Victoria may seek the assistance of services interstate where different eligibility criteria—or no eligibility criteria at all—apply. Others may remain in Victoria and have children through donor procedures without going through the clinic system. The legal status of donors of gametes and of parents of children conceived in these ways are among the issues that are being considered in this inquiry.

Family violence

The Commission is currently reviewing the *Crimes (Family Violence) Act 1987* (Vic) to identify any procedural, administrative and legislative changes which may be needed to ensure that the Act provides the best possible response to the problem of family violence in Victoria. The Attorney-General appointed a dedicated full-time Commissioner, Judith Peirce, to conduct the reference over two years.

In the 16 years since the introduction of the *Crimes (Family Violence) Act* there have been significant changes in attitudes towards family violence. There is now widespread understanding of the damage, often longstanding, inflicted on victims including those children who witness violence.

In 2002, Victoria Police conducted a review into all matters related to violence against women. The review found that while family violence remains significantly underreported, the number of police reports increased by 10.3% between 2000 and 2001. While there has been an increase in the number of reports to police, the numbers of complaints finalised under the *Crimes (Family Violence) Act 1987* has remained fairly constant between 1995-96 and 2000-01. In that time there have been approximately 15,000 intervention orders finalised each year. However, there has been a rapid increase in the number of complaints for intervention orders under the stalking provisions of the *Crimes Act 1958* which increased by almost 283% in the seven year period to 2000-01. Overall in excess of 20,000 orders were made in 2001-02 under the *Crimes (Family Violence) Act 1987* and *Crimes Act 1958*.[1]

The first phase of the reference has focused on consultations in metropolitan and regional Victoria to scope the issues and to consider some solutions to those issues. The outcomes of the consultations will be reflected in a publication that will be used to inform the community about the current state of the law and to provide the basis for further community and stakeholder consultation. The Commission expects to complete its final report to the Attorney-General in July 2005.

Copies of all publications are available on the VLRC website at <www.lawreform.vic.gov.au>.

Endnotes

1. Statistics of the Magistrates' and Children's Courts of Victoria 1994—*Intervention Order Statistics 1994/5–2000/01*.

Victorian Parliament Law Reform Committee

Committee membership

With the commencement of the 55th Parliament in March 2002 a new Law Reform Committee was established with six new members and one member from the previous Committee. The Committee membership is as follows:

- Mr Rob Hudson MP, Chair;
- Mr Noel Maughan MP, Deputy Chair;
- the Hon Mr Andrew Brideson MLC;
- the Hon Mr Richard Dalla-Riva MLC;
- Ms Dianne Hadden MLC;
- Ms Dympna Beard MP; and
- Mr Tony Lupton MP

Forensic sampling and DNA databases

This inquiry reviewed the current legislative and procedural regimes regulating the use of DNA sampling for criminal investigative purposes. This included all stages of the process from sample collection, through to storage and destruction. The inquiry focused particularly on the use made of samples and the resultant profiles produced, and the effectiveness of the existing DNA sampling regime. Recommendations made aimed at improving the investigation and detection of crime, while maintaining adequate protection of the rights of those providing samples, and safeguards against misuse.

This reference was originally given to the Committee during the 54th Parliament. The Committee's final report was almost complete when Parliament was prorogued at the end of 2002 and the reference lapsed. In March 2003, the new Parliament reinstated the inquiry. A new Committee was appointed which included only one member from the previous Committee. A number of significant reports were released during the period in which the inquiry had lapsed and before its reinstatement, or shortly thereafter, most notably the report of the Australian Law Reform Commission and the Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96). The new Committee brought some different perspectives to the inquiry and significant redrafting was required to accommodate these and to incorporate material from the newly released reports.

The report, *Forensic Sampling and DNA Databases in Criminal Investigations*, was released in March 2004.

Administration of justice offences

The terms of reference for this report specifically referred to the offences of perjury, perverting the course of justice, falsifying evidence and threatening witnesses, but the list was not meant to be exhaustive. The Committee was asked to consider the Model Criminal Code Officers Committee (MCCOC) *Report on Administration of Justice Offences* (July 1998).

The MCCOC report identifies Victoria as the jurisdiction in which statute law has the least significance in relation to these offences. An important issue for the inquiry was whether statutory offences should be introduced to replace some or all of the existing common law offences.

The Committee released a discussion paper in August 2003 and expects to table its final report by June 2004.

Administration and Probate Act 1958

As reported in the last issue of *Reform,* this inquiry has yet to begin. The reference was made to the Committee by the 54th Parliament and lapsed in November 2002 when Parliament was prorogued. No work had been done on the inquiry at that time. The Committee was aware of the work of the National Committee for Uniform Succession Laws and was delaying the start of its reference to await the final report of the National Committee. The reference was reinstated in March 2003 by the 55th Parliament and should now commence around the middle of 2004. It is expected that the commencement of the inquiry will coincide with the release of the National Committee's final report.

The reference requires the Committee to consider the desirability of legislative change in relation to the resolution of disputes that involve small estates. It will also consider whether the Magistrates' Court and the County Court should be given jurisdiction to deal with grants of probate and administration, and disputes relating to wills. The charges and commissions of solicitors who act as executors will also be investigated.

Further information on the Committee and our current and past references can be found on the website at <www.parliament.vic.gov.au/lawreform>.

Victorian Scrutiny of Acts and Regulations Committee

Discrimination in the law

The Scrutiny of Acts and Regulations Committee of the Victorian Parliament is currently inquiring into provisions within all

Victorian Acts and enactments (other than Council by-laws or local laws) that have the effect of discriminating or leading to discrimination against any person. The Committee has invited comments or submissions from persons or organisations identifying possible discriminatory provisions. The comments or submissions may also address whether these laws should be retained, amended or repealed.

By way of background, the objectives of the *Equal Opportunity Act 1995* (Vic) are to promote recognition and acceptance of everyone's right to equality; and eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes. The relevant attributes are listed in s 6 of the Act. Section 207 of the Act provides that the Attorney-General "must cause a review of all Acts and enactments to be undertaken for the purpose of identifying provisions which discriminate, or may lead to discrimination, against any person".

The Committee has prepared a discussion paper to assist persons or organisations wishing to make comments or submissions. A person with an impairment or disability may make a comment or submission by audiotape or another agreed method, or through a friend or advocate.

Review of redundant legislation

During 2004 the Committee is also reviewing three further Acts and invites any comment or submission concerning the retention, amendment or repeal of these laws. The Acts are the

- *Maintenance Act 1965;*
- *Marriage Act 1958;* and
- *Perpetuities and Accumulations Act 1968.*

Further information about current Committee inquires is available on the web at <www.parliament.vic.gov.au/sarc/>.

Law Reform Commission of Western Australia

Aboriginal Customary Law

The Law Reform Commission will continue working on its complex and historic reference on Aboriginal customary laws throughout 2004. The project aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian legal system. It provides the Commission with the opportunity to revisit the work of the Australian Law Reform Commission (in *The Recognition of Aboriginal Customary Laws* (ALRC 31)) in light of subsequent developments in law, research and policy as they relate to Western Australia.

The Commission completed its pre-consultation phase in 2002. with members of the project team visiting all parts of the State to enhance awareness of the project and to seek permission to conduct further research consultations on Aboriginal land. In November and December 2002 the Commission conducted successful community research consultations in the Perth metropolitan area.

During 2003, the Commission continued its trips to various remote and regional areas within Western Australia, to consult and receive submissions on the matters as set out in the terms of reference. The information received at these consultation visits has been drafted into a series of thematic summaries. These will be returned to the various communities for feedback and approval before being made available on the Commission's website.

The Commission has published and distributed its first background paper as part of this inquiry, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*. This background paper is the first in a series to be published throughout 2004. The background papers will be followed by discussion papers and the final report, setting out the Commission's recommendations, to be published some time in 2005.

Contempt

The Commission's reference on the Law of Contempt has now reached a conclusion, with three discussion papers and the final report having been published and distributed. The Commission has republished the discussion papers and the report on CD-ROM for electronic access and ease of distribution.

Commission publications can be viewed on our website at <www.lrc.justice.wa.gov.au>.

Law Commission of Canada

Electoral reform

In March 2004, the Law Commission of Canada issued a Report to Parliament,

Enhancing our Democracy: Electoral Reform in Canada. The report is a response to Canadians' disenchantment with Canada's electoral system. Healthy political systems should allow voters to engage in an ongoing dialogue with government decision makers, informing them of the policies and programs that they deem essential and rendering judgment on the effectiveness or desirability of the government's decisions.

For many, Canada's 'first-past-the-post' electoral system is inherently unfair—more likely to frustrate or distort the wishes of the voters than to translate them fairly into representation and influence in the legislature. The first-past-the-post system is overly generous to the party that wins a plurality of the vote in a general election, rewarding it with a legislative majority that is disproportionate to its share of the vote. It allows the governing party, with its artificially swollen legislative majority, to dominate the political agenda almost completely for a period. It promotes parties formed along regional lines and can leave large areas of the country without adequate representatives in the governing party caucus. Finally, it contributes to the under-representation of women, minority groups and Aboriginal peoples.

After extensive consultation and research, the Law Commission of Canada recommended to Parliament that Canada adopt a mixed-member proportional electoral system. The mixed-member proportional system should be based on giving voters two votes: one for a constituency representative and the other for a party list. The party vote should determine who is to be elected from provincial and territorial lists as drawn up by the parties before the election. Two-thirds of the members of the House of Commons should be elected in constituency races using the first-past-the-post method, and the remaining one-third should be elected from provincial or territorial party lists. Because of the many potential benefits to reforming the current electoral system, it should be a priority item on the political agenda. While electoral reform is not a panacea for all of the country's political problems, nor will it single-handedly invigorate Canada's democracy, it is a necessary and vital step in improving electoral democracy in Canada. Without it, Canada is faced with trying to make a 19th century institution work within a 21st century society. For a growing number of Canadians, this is no longer acceptable. This report is designed to inform and invigorate a movement toward electoral reform that can stimulate and energise Canadian democracy.

Leveraging knowledge assets

A knowledge economy requires a modernisation of commercial law. The Law Commission of Canada is about to table a report that suggests reform in the area of security interests in intellectual property. Initial studies demonstrated that legal uncertainty played a role in the difficulties in accessing credit for debtors who hold intellectual property assets. The Commission explored how personal property security registries could be adapted to the realities of intellectual property assets. Typically, intellectual property assets were not used in the context of financing because the valuation of the assets was deemed too uncertain. Debtors with intellectual property assets were relegated to more expensive forms of credit financing.

The report recommends that intellectual property statutes be clarified with respect to security interests in intellectual property and that a notice filing registry be put in place. The report also notes the need to adapt the legal environment to new realities. It recommends research and training of lawyers to develop innovative tools of leveraging knowledge assets. It concludes that diminishing legal uncertainty in the area of security interests in intellectual property would facilitate access to credit in an economy where wealth resides more and more in knowledge assets. Such reform would stimulate and support the move to a knowledge economy.

Aboriginal legal traditions

The Law Commission of Canada has embarked on a project that will examine the role of Aboriginal legal traditions in Canadian law. Although many communities in Canada demonstrate ongoing commitment to concepts and values from Indigenous laws and traditions, frequently such concepts and values have been ignored or overruled by non-Indigenous law.

Canada has been able to benefit from the enrichment of two legal traditions, civil law and common law. It should also benefit more from the Aboriginal heritage and legal traditions. The legal framework that governs the relationship between Indigenous and non-Indigenous communities in Canada has, at times, undermined the development of Indigenous laws. Although many communities in Canada demonstrate ongoing commitment to concepts

and values from Indigenous laws and traditions, frequently such concepts and values have been ignored or overruled by non-Indigenous law.

The project will create the appropriate framework for more respectful relationships between Indigenous and non-Indigenous people in Canada, and in the process, contribute to the social and economic development of Aboriginal communities and Canada.

In the upcoming year, the Law Commission of Canada will publish a discussion paper that will develop a broader framework for understanding Indigenous legal traditions, including the issue of institutional change, the capacity of Canadian governments and society to address it, and the choice of the tools to effect this change. The Commission has also entered into a partnership with the Indigenous Bar Association of Canada and the Université de Montréal to sponsor comparative research in three areas: Indigenous corporate governance, Indigenous family property and Indigenous penal justice organisations.

Does age matter?

"How old are you?" is a question that children learn to ask early in their lives. After their name, age is often what children want to know about their friends. It is because age defines and structures much of our lives, particularly when we are young. It is not only our personal lives that are structured using the concept of age. Our social relationships are very much influenced by our age grouping. We live and are categorised according to 'generations'. Certainly, this generation categorisation does not aptly describe the diversity within generations: not all Baby Boomers are wealthier than their parents and not all members of Generation X have had trouble finding employment.

Law is no exception to concepts of age and generations. Our laws often use age to impose responsibilities and to prescribe eligibility to benefits and programs. While using age as a marker constitutes an easy way to determine eligibility and appears efficient and simple, it can become obsolete, and over or under inclusive. It can create unfairness. Law frames relationships between generations in more or less subtle ways. It imposes obligations on one generation to support the other at certain stages in their lives. These obligations often stem from a rigid vision of the proper life course: it often assumes that education is completed in the early years, that work continues uninterrupted for a number of years and is then crowned by a well-deserved retirement period. Our law and policies regarding education, care giving, work and retirement frequently institutionalise this 'standard' life course. Obviously, that course may, increasingly, be out of touch with the way individuals live their lives.

A discussion paper, *Does Age Matter? Law and Relationships between the Generations*, was released for public comment in February 2004. The discussion paper asks whether it is appropriate to use age in our legislation, public policies and programs. Are age-based distinctions in Canadian law just? Are there situations in which such distinctions result in injustice? What are the advantages and disadvantages of using age as a criterion? Are the current age categorisations appropriate? Are they outdated? Could other concepts better reflect the diversity of life choices among Canadians? What about the relationships between generations? Are they rooted in fairness and understanding between generations, or disengagement and distrust? What is the role of law in supporting relationships between generations?

Information on the projects of the Law Commission of Canada is available online at <www.lcc.gc.ca/>.

Alberta Law Reform Institute

Rules of Court Project

The Rules Project is a three-year project undertaking a major review of the Alberta Rules of Court with a view to producing recommendations for a new set of Rules by 2004.

The project has adopted a two-stage consultation process. During the first year of the project, the Alberta Law Reform Institute (ALRI) engaged in an extensive consultation process with the bench, Bar and the public, seeking information and views to guide the project. A general questionnaire and focus group discussions were also adopted to facilitate public consultation. Input received through this first stage of consultation was categorised and entered into a central ALRI database.

The project is now in the second stage of consultations. This stage uses Consultation Memoranda to present proposed policies for review and to invite specific comments. Nine Consultation Memoranda dealing with specific areas of court practice have been published to date.

All Rules Project reports and publications are available on the ALRI website at <www.law.ualberta.ca/alri/>.

Manitoba Law Reform Commission

Life sustaining medical treatment

Since the last issue of *Reform*, the Manitoba Law Reform Commission has published one report—Report 109, *Withholding or Withdrawing Life Sustaining Medical Treatment* (December 2003).

In this report, the Commission sets out fundamental principles and policies that should be reflected in the rules or framework controlling the withholding or withdrawing of life sustaining medical treatment. It favours a uniform approach applicable throughout the Province and in all health care institutions. The Commission recommends a transparent step-by-step approach designed to secure consensus decision making between the physician and the patient or substitute decision maker without imposing an obligation on physicians to provide inappropriate medical treatment. The Commission contemplates the use of a variety of procedures to promote the patient's interests and to secure agreement between the parties.

The Commission's preference is that the principles and procedures pertaining to withholding or withdrawing life sustaining medical treatment be embodied in a statement or by-law of the College of Physicians and Surgeons of Manitoba. It further recommends that other health care institutions, agencies, associations and bodies involved in delivering health care in Manitoba adopt the statement or by-law of the College as a template for their own protocols and procedures.

The Commission believes that its recommendations, coupled with an extensive program of public education and awareness of the end of life decision-making process, will serve the citizens of Manitoba well.

Current projects

Work continues on the following projects:

- Title insurance (a joint project with the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission).
- Substitute consent to medical treatment.
- Powers of Attorney (a joint project with the British Columbia Law Institute, the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission).

Further information can be found at the Commission's website at <www.gov.mb.ca/justice/mlrc>.

Saskatchewan Law Reform Commission

Membership

The Saskatchewan Law Reform Commission has recently expanded its membership to include two lay Commissioners and Mr Justice RD Laing of the Court of Queens Bench.

Commission projects

The Commission is currently considering new projects in areas including employment law and wills and estates.

Work on the Commission's Administrative Law Project is continuing. A consultation paper, *A Model Code of Procedure for Administrative Tribunals*, was published in 2003 and discusses the feasibility of a model code of procedure for administrative tribunals. The paper is currently in consultation. The Commission considered a similar paper on procedure before professional discipline committees, but has concluded that a better approach would be a guide to procedure that is not given official status. The guide is likely to be issued within the first half of this year.

The Commission is working jointly with the Law Reform Commission of Canada to investigate issues relating to Aboriginal self-government in a broad social and political context.

As a first step in defining this project, the Commission presented a paper on self-government issues at a national conference on *Governance, Self-government and Legal Pluralism* sponsored by the Assembly of First Nations in Hull, Quebec in April 2003.

During the course of consultations with members of the Saskatchewan Bar as part of the Commission's inventory of law reform

issues, concern about several matters involving the law of wills and administration of estates was identified. A consultation paper on revocation of wills on divorce and remarriage is presently in the final stage of preparation, and will be released for public comment.

Recent Commission publications can be accessed online at the Commission's website <www.lawreformcommission.sk.ca>.

The Law Commission of England and Wales

Partnership law

The Law Commission published a joint report with the Scottish Law Commission, *Partnership Law* (Law Com No 283, Scot Law Com No 192, November 2003), proposing a new Partnerships Act (replacing the *Partnership Act 1890* and the *Limited Partnerships Act 1907*). This would result in partnerships in England and Wales becoming legal entities, as they already are in Scotland, so that their legal nature would reflect their role in the commercial life of Britain today and result in a largely uniform partnership law in England, Wales and Scotland. Although the UK tax authorities are content that the proposals should not affect the UK tax treatment of partnerships (subject to legislation to achieve that), serious concerns have been expressed that giving legal personality to limited partnerships may affect their tax treatment overseas. This might affect their usefulness as a vehicle for investment and therefore be damaging to the UK economy. The Law Commission proposes that limited partnerships should have the option of becoming special limited partnerships, which would not have separate legal personality.

Registration of security interests

This inquiry is looking at the way that lenders take security for loans. Security may take a variety of legal forms (charges, hire-purchase and finance leasing, to factoring agreements and 'repos'). Some must be registered as company charges, but not all. In July 2002 the Law Commission consultation paper (No 164) provisionally proposed a new system of 'notice filing' that would be simpler and broader than the current system. The Commission intends to publish draft regulations in Summer 2004, setting out a notice filing scheme for companies. The Commission will then consult on the regulations, aiming to publish a final report in Spring 2005 on security interests granted by companies.

Unfair terms in contracts

With the Scottish Law Commission, the Law Commission is preparing new legislation on unfair terms in contracts to make the law clearer and more accessible by replacing the *Unfair Contract Terms Act 1977* and the *Unfair Terms in Consumer Contracts Regulations 1999* with a single Act written in plain language. At present, protection focuses on the needs of consumers, but respondents to the Commission's 2002 consultation paper (No 166) highlighted the needs of very small businesses, especially those employing fewer than 10 staff. The Commission is exploring ways of strengthening protection for these businesses. The Commission will publish a final report in 2004.

Pre-judgment Interest on Debts and Damages

This report (Law Com No 287, February 2004) considers whether the courts should have the power to award compound interest, and whether court interest rates should more closely track commercial ones.

The forfeiture rule and the law of succession

A consultation paper (Consultation Paper No 172, October 2003) on this inquiry considers the issues highlighted by the case of *Re DWS* [2001] 1 All ER 97. A son murdered both his parents, who died intestate. The son was clearly barred from inheriting. The Court of Appeal found that on a literal interpretation of the *Administration of Estates Act 1925* the money should pass not to the grandson but to the estate of the deceased's sister. The Law Commission provisionally proposes to amend the law to allow the grandson to inherit.

Renting homes

In November 2003 the Law Commission published a narrative report *Renting Homes* (Law Com No 284). The Commission originally planned to publish a final report and draft Bill in the summer of 2003. However the project was substantially enlarged by the inclusion of issues relating to succession, joint occupation and transfer of agreements (covered in the Commission's second consultation paper), and the Commission received a far greater response than anticipated to the consultation papers. This delayed preparation of the draft Bill. This narrative report sets out the Commission's conclusions and recommendations on the project and should allow those considering the implementation of the scheme to proceed with their thinking and

planning without having to wait for the outcome of the bill drafting process.

Compulsory purchase code

Towards a Compulsory Purchase Code: (1) Compensation, (Law Com No 286, 16 December 2003) includes a framework for a Code. The Commission will publish its second report on procedure (building on consultation paper No 169) in 2004.

Non-accidental death or injury of children

The report *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Law Com No 282, September 2003) addresses the problem of establishing criminal liability in cases where a child is non-accidentally killed or seriously injured, it is apparent that one or more of a limited number of defendants must have committed the crime, but there is no evidence to identify which defendant. The Law Commission's report recommends reform of procedural, evidential and substantive law to: remove tactical advantages which operate adventitiously and illogically for the benefit of defendants; and ensure that determined silence is not enough to render the criminal justice system powerless. Clauses 4 and 5 of the Domestic Violence, Crime and Victims Bill, published on 1 December 2003, incorporate a scheme for addressing the problem which incorporates key features and concepts of the Commission's scheme but is different in structure, extent and effect.

Partial defences to murder

The Law Commission issued a consultation paper *Partial Defences to Murder* (Law Com No 173) on the Commission's website on 31 October together with appendices comprising comparative law papers on the law of Australia, Canada, India, Ireland, New Zealand, Scotland and South Africa. In June 2003, the Home Office asked the Commission to review the operation of two of the partial defences, namely diminished responsibility and provocation in the overall context of murder but with particular reference to murders committed in the context of domestic violence. In addition, the Commission was asked to consider whether there should be a new partial defence to murder where a person kills in circumstances in which the current complete defence of self-defence is not available because the force used was excessive. The hardcopy of the consultation paper, without appendices, was published on 13th November. As mentioned, the government is legislating on the issue of domestic violence and the Commission's project is intended to assist the government and to inform public debate. The Commission intends to publish a report shortly.

Information about the Law Commission (including copies of recent reports and consultation papers) can be found on the web at <www.lawcom.gov.uk>.

Scottish Law Commission

Commercial law

At the request of the Department of Trade and Industry, a project is being undertaken on registration and priority of rights in security by companies. The Commission published a discussion paper (No 121) in October 2002, which proposes that floating charges should continue to be registrable but should be constituted by registration rather than by the earlier granting of the deed. It also proposes that other rights in security that are already publicised in specialist registers, and assignations in security, should no longer be registrable at Companies House. The Commission is currently finalising its recommendations for reform with a view to submitting its report in the first half of 2004.

Criminal law

The Commission published a discussion paper (No 122) on *Insanity and Diminished Responsibility* in January 2003. One of the main proposals put forward is the creation of a new statutory insanity defence of 'not guilty by reason of mental disorder'. This defence would apply where an accused was suffering from a mental disorder which had the effect that he or she lacked a full or correct appreciation of his or her conduct at the time of the offence. The Commission intends to submit its report in the first half of 2004.

Interest

A new project has just started examining the law on interest on debt and damages. While the current law is reasonably certain in many respects, it lacks any coherent principle underlying the availability of interest in different situations. The Commission aims to publish a discussion paper by the end of 2004.

Obligations

A 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 single piece of legislation, written in a plain, accessible way, which would be consistent with European legislation and which would also extend protection to small businesses, as well as to consumers. A consultation paper (No 119) was published in August 2002. Work is progressing on finalising policy with a view to submitting a report in 2004.

Damages for psychiatric injury

The Commission published a discussion paper (No 120) in August 2002 dealing with liability for psychiatric injury. Among the issues examined are: the requirement that the pursuer's injury must arise from a sudden shock; the need for foreseeability of psychiatric injury; whether there should be a threshold of severity of compensatable injury; and the position of 'secondary' victims, that is, persons who suffer psychiatric injury from witnessing or learning about an injury to another person.

The Commission's objective is to replace the present rigid rules, which are difficult to justify and produce harsh anomalies, with a more flexible approach. However, controls other than foreseeability seem necessary in order to keep claims for damages within acceptable limits. Balancing these policy considerations has proved to be a difficult task. The Commission aims to submit its report by the end of 2004.

Property

A discussion paper (No 112) on *Conversion of Long Leases* was published in April 2001. It proposes that leases that are longer 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 and will submit its report as soon as drafting resources are available to complete the accompanying Bill.

The Commission is working 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. A discussion paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second discussion paper considering matters of detail and taking account of responses to the first paper will follow.

The Commission is also engaged in 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. At the end of 2003 the House of Lords heard an appeal in the case of *Burnett's Trustees v Grainger* 2002 SC 580 which raised wider but related issues concerning a conflict between the holder of an unrecorded conveyance and a trustee in bankruptcy. The Commission will not start work on its report until the outcome of the appeal is known.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of express trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two discussion papers were published in September 2003 as part of this phase—one on breach of trust (No 123) and one on apportionment of trust receipts and outgoings (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts, will be published in the first half of 2004.

The second phase of the project will cover trusts, their constitution and termination and the restraints on accumulation of income and long-term private trusts. It will also look at trustees' liability to third parties and enforcement of beneficiaries' rights. However, before beginning this second phase the Commission intends to issue a discussion paper by the end of 2004 on whether a trust should have legal personality.

The Commission has recently started preliminary work on a project concerning the law relating to judicial factors. It believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. The initial stages of the project involve empirical research into the current use of judicial factory and consultation with practitioners experienced in this field. The Commission aims to publish a discussion paper in 2005.

Recent reports

A joint report with the Law Commission for England and Wales on *Partnership Law* (Scot Law Com No 192) was published in November 2003. It recommends major changes to the

present law, seeking to retain the flexibility and informality of a business partnership while addressing the problem of instability which arises in cases where there are changes in the membership of the partnership. A central recommendation is to clarify the concept of separate legal personality for partnerships in Scotland and to introduce that concept in England and Wales. The report also recommends a new mechanism for solvent dissolution and clarification of the law on limited partnerships.

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

South African Law Reform Commission

Trafficking in persons

Issues Paper 25 highlights various international instruments which recognise trafficking in persons as a world-wide problem. It further focuses on the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime*, which is the first international instrument that deals comprehensively with the issue of trafficking in persons.

The issues paper gives an overview of the extent of the problem of trafficking in persons, particularly within the South African context. It further identifies weaknesses within the South African legal system which hinder the country from dealing effectively with the problem of trafficking in persons. Questions posed in the Issues Paper relate specifically to how the current system can be improved for the purposes of reforming the law regarding trafficking in persons.

Assisted decision-making: Adults with impaired decision-making capacity

Making decisions is an important part of human life. Although we take it for granted that adults can make decisions about their personal welfare, financial affairs and medical treatment, some adults cannot make such decisions for themselves because of diminished capacity as a result of mental illness, intellectual disability, physical disability or an incapacity related to ageing in general. A legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected. Such a structure should provide appropriate substitute decision-making devices and the necessary protection from abuse, neglect and exploitation.

At present, South African law deals with decision-making incapacity by way of curatorships. The curatorship system has been criticised on the ground that it suffers from a number of serious and frustrating difficulties. In Discussion Paper 105, the Commission proposes that a change to the law is necessary to provide for an alternative to the curatorship system (without abolishing it), consisting of a multi-level system including a default arrangement, short term measures and longer term measures. The proposed alternative provides for assisted decision-making with regard to financial affairs as well as personal welfare.

Publications of the South African Law Commission are available online at <www.law.wits.ac.za/salc/salc.html>.

California Law Revision Commission

Financial privacy

In 2002, the Californian Legislature directed the Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to, or arising out of, financial transactions. The report is due in January 2005. In light of the Legislature's enactment of comprehensive legislation in California in 2003, the main tasks remaining involve the interrelation of the new legislation with federal law and with other state law. The Commission will continue to give this matter a high priority during 2004.

Mechanics' lien law

The Commission has initiated work on mechanics' lien law pursuant to a legislative request for a comprehensive review on a priority basis.

Common interest development law

The Commission will continue its review of statutes affecting common interest housing developments with the goal of setting a clear, consistent, and unified policy regarding their formation and management and the transaction of real property interests located

within them. The objective of the review is to clarify the law and eliminate unnecessary or obsolete provisions, to consolidate existing statutes in one place in the codes, and to determine to what extent common interest developments should be subject to regulation.

Discovery

In 2004, the Commission will continue its review of discovery developments in other jurisdictions to determine whether they may be appropriate models for improvement of discovery practice in California.

Small claims and limited civil cases

The Commission is conducting a review of basic trial court procedures under unification and will continue its study of what, if any, changes should be made to the jurisdictional limits for use of small claims and limited civil case procedures in the unified courts. This is a joint project with the Judicial Council.

Unincorporated associations

An analysis of whether the *Uniform Unincorporated Nonprofit Association Act* should be adopted in California in whole or in part has been completed by the Commission, and the Commission has made its recommendations to the Legislature for appropriate revision of the law.

This year, the Commission will turn to issues involving unincorporated association governance. The Commission is working closely with the State Bar Nonprofit Organizations Committee.

Evidence Code

The Commission has commenced work to determine whether the *California Evidence Code* should be conformed to the Federal Rules of Evidence on points where they differ. This is a multi-year project that will cover the entire *Evidence Code* in discrete segments. During 2004 the Commission will continue to focus on the hearsay rule and its exceptions.