Reform roundup

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

Entries to Reform roundup are welcome.

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

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Administrative Review Council

Report on the scope of judicial review

The Council has made significant progress on this report. In the report, the Council will examine the powers of Parliament to expand and contract judicial review and some of the mechanisms that have been used to do this. The report will also look at some of the factors that have been advanced to justify restrictions on judicial review.

Coercive investigative powers of government agencies

Last year the Council interviewed a number of key agencies in connection with this project in order to establish the use that the agencies make of the coercive powers provided for in their legislation.

The Council is now using this data to develop an exposure draft of its final report.

The report will examine agency information-gathering powers with a view to providing guidance on the legislative drafting of these powers. The report will also consider whether a model set of information-gathering provisions is possible and desirable.

Guide to procedural fairness

The Council has commenced work on this project, which will involve the production of a guideline publication. The publication will be designed to provide practical assistance to government decision makers on the rules of procedural fairness that must be complied with when making administrative decisions.

Admin Review

The Council is in the process of developing the 57th edition of this periodic journal. The Council anticipates that this issue will be available by early next year.

Family Law Council

Exposure Draft Family Law Amendment (Shared Parental Responsibility) Bill 2005

On 23 June 2005 the Government released the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Exposure Draft). The Exposure Draft substantially incorporated the recommendations made by the Council in its report to the Attorney-General entitled *Recognition of Traditional Aboriginal and Torres Strait Islander Kinship Obligations and Child-Rearing Practices*.

The Council provided a submission to the House of Representative Standing Committee on Legal and Constitutional Affairs (the Committee) on the Exposure Draft. On 18 August 2005, the Committee released a report on the Exposure Draft. The report incorporated most of the recommendations made in the Council's submission.

New Terms of Reference

The Council received new Terms of Reference from the Attorney-General on 13 September 2005. The Terms of Reference are to be completed jointly with the National Alternative Dispute Resolution Advisory Council (NADRAC). The aim of this reference, entitled *Immunity for Family Counsellors and Family Dispute Resolution Practitioners under the Family Law Act 1975*, is to determine the requirement for immunity for family counsellors and family dispute resolution practitioners under the Act.

Ongoing Committee Work

Post-parenting order conflict: The Terms of Reference on improving family law processes for dealing with post parenting order conflict are currently being examined by the Council's sub committee.

The paramountcy principle: The Council is continuing to work on the Terms of Reference of an inquiry on the paramountcy principle (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the *Family Law Act 1975*). The Council is presently considering the submissions of interested groups on its discussion paper on the operation of the child paramountcy principle in family law and will shortly commence work on a letter of advice to the Attorney–General. A second discussion paper is planned on the operation of the child paramountcy principle in relocation cases. It is anticipated that this second discussion paper will be released in early 2006.

Submission to the Australian Law Reform Commission

The Council made a submission to the ALRC on issues related to family law raised in the ALRC *Review of the Uniform Evidence Acts Discussion Paper 69* (ALRC DP 69).

Statistical Snapshot 2002–03

The Council released its statistical report on various aspects of the Australian family law system. The report draws on data sourced from the Family Court of Australia, the Family Court of Western Australia, the Federal Magistrates Court and the Australian Bureau of Statistics.

Family Law Council Annual Report

The Family Law Council *Annual Report 2004-05* was officially tabled in the Senate and in the House of Representatives on 11 October 2005.

Further details of the Family Law Council's work program are available on its web site at <www.law.gov.au/flc>.

New South Wales Law Reform Commission

Uniform Succession Laws: Family Provision

On 26 July 2005, the Commission released a report supporting uniform laws for family provision across Australia. The report was released as part of a major project to develop model national uniform laws for succession. The Queensland Law Reform Commission is the coordinating agency on this project.

A report on family provision was submitted to the Standing Committee of Attorneys-General in December 1997. A further supplementary report was submitted in July 2004. A draft model Bill was also prepared. The NSW Law Reform Commission decided to publish the Bill with a commentary as a means of finalising this stage of the project in NSW. The draft model Bill was based on the *Family Provision Act 1982* (NSW), as this was the most comprehensive and recent legislation in this area.

Family provision legislation aims to ensure that the family and other dependants of a deceased person are adequately provided for. The effect of a successful application for family provision is to override the terms of a deceased person's will or the distribution of the deceased person's estate upon intestacy.

The draft model Bill was based on the following policy considerations:

- all people with a strong moral claim to a share of the deceased person's estate should be entitled to apply for provision,
- the ability of the courts to exercise their discretion to make appropriate decisions regarding an applicant's entitlement to provision, and
- the scheme should facilitate, and the court determine, what is just in all the circumstances.

Two further reports will be published during 2006 to complete the uniform succession laws project. The first will be on intestacy and the second on administration of estates.

Expert witnesses

There has been considerable debate in recent years in many common law jurisdictions about the role of expert witnesses. The Commission was asked to review the operation and effectiveness of the rules and procedures governing expert witnesses following a series of articles in *The Sydney Morning Herald* in the latter half of 2004. The articles suggested it was commonplace for experts to appear on a no-win/no-fee basis, and questioned the extent to which expert witnesses were 'hired guns'. The Commission's report recommended a number of important changes to the procedural rules relating to experts. Fundamentally, the Commission recommended that, in civil proceedings, parties may not adduce expert evidence without the court's permission. The report also recommended that there be provision for joint expert witnesses in addition to the concept of court-appointed experts. A joint expert witness would be one engaged by the parties to the litigation. The parties would be encouraged to agree on an expert, but, failing this, the court could direct the appointment of such an expert. Various other procedural requirements relating to joint expert witnesses and court-appointed witnesses are set out in the report. The report also recommended that the fee arrangements for an expert witness should be disclosed, and that expert witnesses should be informed of sanctions relating to inappropriate or unethical conduct.

Majority verdicts

In November 2005, the Commission's report on majority verdicts was tabled in the NSW Parliament. This project required the Commission to consider whether the requirement for the unanimity of a jury in a criminal trial in NSW should be preserved.

One of the catalysts for the Commission's review was a perception that there had been a significant increase over several years of juries not being able to reach a unanimous decision (commonly referred to as a hung jury). The Commission recommended that the system of unanimity should be retained. It also recommended that empirical studies should be conducted into ways to improve the process of jury comprehension and deliberation. The Commission's report pointed out that 97% of all criminal cases in Australia in 2003–2004 were prosecuted in the magistrates courts, where defendants are tried summarily without a jury. Of the remaining cases adjudicated in a higher court, more than 80% of defendants pleaded guilty, thus removing the need for a jury trial. This means in 2003–2004, as few as 0.4% of all criminal cases were determined by jury trials.

The report analysed the arguments for and against introducing majority verdicts. The arguments in favour in summary form were that majority verdicts:

- led to quicker and easier verdicts;
- put less pressure on jurors to achieve conformity;
- negate the effect of the 'rogue' juror; and
- provide consistency with most other Australian jurisdictions.

The primary arguments against were that majority verdicts:

- may be reached after insufficient negotiation;
- are contrary to the required standard of proof;
- negate the views of a small minority;
- imply a distrust of the jury system; and
- have a negligible effect on reducing hung juries.

On balance, the Commission concluded that the arguments in favour of the introduction of

majority verdicts were outweighed by those in favour of unanimity. Furthermore, there was no convincing evidence of its proven advantages from those jurisdictions which had introduced majority verdicts. While it seemed (from mainly anecdotal evidence) that those jurisdictions with majority verdicts had an apparently lower number of hung juries, there was no evidence relating to the soundness of, or juror or judicial satisfaction with, the verdicts being delivered. The Commission considered that the symbolic nature of a unanimous verdict should not be overlooked.

The Commission's report also considered a number of strategies for reducing the number of hung juries, including:

- juror comprehension;
- juror note-taking and question-asking;
- judicial instructions to juries;
- the timing of instructions;
- written instructions;
- access to transcripts;
- pre-deliberation discussion; and
- the structuring of jury deliberations.

The Commission recommended that further research should be undertaken to get a better understanding of the needs of jurors in order to develop the strategies to better assist them in comprehension and deliberation.

The state government has announced that it will introduce majority verdicts in New South Wales contrary to the recommendations of the Commission.

Other developments

The Commission completed a report on surveillance in mid-2005, but the report had not been released by the Attorney–General at the time of print. The Commission has also completed a report on the sentencing of young offenders, which it expects to be released in the early part of 2006. The report on uniform evidence laws, prepared jointly with the Australian and Victorian law reform commissions, will also be released early in 2006.

The New South Wales Law Reform Commission will also publish reports in the first half of 2006 on:

- Relationships and the law
- Blind or deaf jurors
- People who guarantee other people's debts
- Uniform succession laws: intestacy.

A consultation paper will be prepared on the Commission's project on whether juries should have a role in the sentencing process.

Queensland Legal, Constitutional and Administrative Review Committee

Voices and Votes

In July 2005, the Committee commenced *Voices and Votes*, an inquiry into young people engaging in democracy in Queensland. The Committee aims to recommend practical ways to increase young people's interest and meaningful engagement in democracy in Queensland. Issues to be considered include the practical assistance and resources young people need to become more active in democracy; young people's education about democracy; young people's enrolment and voting patterns; how voting can be made easier; and whether the voting age should be lowered. Recommendations may relate to electoral and constitutional reform.

To facilitate discussion, public debate and submissions to the Committee regarding the issues, the Committee has released a discussion paper, response form and multi-media CD-ROM. Between September and November 2005, the Committee held workshops with young people throughout Queensland. In February 2006, the Committee will convene a youth jury at Parliament House.

Constitutional and Other Legislation Amendment Bill

On 28 September 2005, the Committee's Report 50, *Constitutional and Other Legislation Amendment Bill 2005* (Qld) (Report 50), was tabled in the Parliament. Provisions of the Bill related to recommendations made by the Committees of the 48th, 49th, 50th and 51st Parliaments and, in order to 'inform the Legislative Assembly's debate on the Bill', the report set out some relevant information. One matter to which the report referred was the possible uncertain effect of clause 8 of the Bill regarding the appointment and dismissal of individual Ministers by the Governor under s 34 of the *Constitution of Queensland 2001*. The report stated that it was desirable for the effect of cl 8 to be certain.

The Government's response to Report 50 was tabled on 19 October 2005. That response

stated that, in relation to issues raised by the Bill, including cl 8, the Government would revise and reissue the Explanatory Notes 'to provide further practical and informative explanation'. In addition, the response stated that the Government believes that four-year terms are essential for strong, stable government and that the Premier intended to write to the Prime Minister 'for permission to approach the Governor-General to hold a referendum on this issue in Queensland at the same time as a federal referendum'.

Meetings with the Ombudsman and Information Commissioner

On 9 June 2005, Report 49 of the Committee, *Meeting with the Queensland Ombudsman (24 May 2005); meeting with the Queensland Information Commissioner (24 May 2005); and report on matters raised in a Ministerial Statement by the Premier and Minister for Trade on 23 March 2005*, was tabled in the Parliament.

On 24 May 2005, in fulfilment of the Committee's responsibilities to monitor, review and report on the performance of the Queensland Ombudsman's functions, the Committee held its seventh biannual meeting with the Ombudsman. This was the first biannual meeting following a separation of the Offices of the Ombudsman and the Information Commissioner. In its report, the Committee noted the many significant activities of the Office of the Ombudsman to improve the quality of decision-making and administrative practices in Queensland public sector agencies; efforts to increase public awareness of the functions of the Office and improve the accessibility of services to all Queenslanders; and the timely and effective manner in which the Office continued to resolve complaints.

Following amendments to the *Freedom of Information Act 2001* (Qld) assented to on 31 May 2005, the Committee has responsibilities to monitor, review and report on the performance of the Information Commissioner's functions. Although the Committee met with the Information Commissioner on 24 May 2005, the amendments to the *Freedom of Information Act* (Qld) had not commenced at that time. In future, to fulfil its statutory responsibilities, the Committee will adopt a process of biannual meetings with the Information Commissioner.

During the respective meetings with the Ombudsman and the Information Commissioner on 24 May 2005, the Committee discussed matters raised by the Premier and then Minister for Trade in a Ministerial Statement of 23 March 2005 regarding the possible unauthorised disclosure of information and/or political activity by staff of the Office of the Ombudsman and/or Office of the Information Commissioner. Report 49 stated that the Committee was satisfied the Ombudsman and Information Commissioner had considered the matters seriously, with deliberation, and in accordance with the requirements of the *Crime and Misconduct Act 2001* (Qld).

Strategic reviews of the Offices of the Ombudsman and Information Commissioner

The *Ombudsman Act 2001* (Qld) and the *Freedom of Information Act* (Qld) respectively require, at least every five years, a strategic review of the functions of the Ombudsman and Information Commissioner and the performance of those functions. For strategic reviews to be undertaken in 2005-2006, the Governor has appointed a reviewer and determined Terms of Reference following consultation with the Committee and the Ombudsman/Information Commissioner (as relevant). Once the strategic review is complete and the reviewer has furnished his reports to Parliament, the Committee will consider the review reports and itself report to the Assembly.

Preamble for the Queensland Constitution

In November 2004, the Committee tabled Report 46, *A preamble for the Queensland Constitution?*, in which the Committee recommended that the *Constitution of Queensland 2001* not contain a preamble at that time. The ministerial response to the report, tabled on 19 May 2005, supported the Committee's recommendation. It stated that, given the apparent lack of public support for a preamble, concerns as to how a preamble should or might be used to interpret the Constitution, and other concerns raised by the Committee, there was insufficient justification for the Government to seek to include a preamble in Queensland's Constitution. The Government's response also referred to continuing debate in the community regarding a republican system of government in Australia and stated that it would be appropriate to delay the question of a preamble until that issue has again been put to the people.

Hands on Parliament recommendations

The *Hands on Parliament* inquiry of the Committee of the 50th Parliament examined Aboriginal and Torres Strait Islander people's participation in Queensland's democratic

processes. The Committee continues to monitor implementation of the recommendations made by the former Committee as the Government will request of the Committee an interim evaluation of the strategies recommended in the *Hands on Parliament* report after the first full electoral cycle and a full evaluation after three electoral cycles (or nine years).

Administrative justice

In 2005–2006, the Committee will conduct a review of the accessibility of administrative justice mechanisms in the *Freedom of Information Act 1992* (Qld) and the *Judicial Review Act 1991* (Qld). The Terms of Reference for the review include a review of the fees and charges imposed under the *Freedom of Information Act*. A discussion paper was due in late 2005.

Electoral matters

In 2006 the Committee will inquire into electronic voting and certain other electoral matters. The inquiry originates, in part, from an e-petition to the Queensland Parliament requesting that the Committee be asked to consider ways in which the people of Queensland might be able to vote electronically so as to improve access to democracy for rural and regional Queenslanders and people with disabilities.

Information on Committee inquiries and reports is available at <www.parliament.qld.gov.au/LCARC> or by contacting the Committee's secretariat on (07) 3406 7307 or lcarc@parliament.qld.gov.au.

Queensland Law Reform Commission

Guardianship laws

The Queensland Law Reform Commission has received a reference to review Queensland's guardianship legislation, which consists of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).

The Commission has been asked to report in two stages. The first stage of the reference involves a review of the 'General Principles' and confidentiality provisions contained in the legislation. The Commission is required to complete an interim report on these issues by 30 June 2006. Once that stage is complete, the Commission will commence its review of the balance of the legislation. The Commission is required to provide its final report by 31 December 2008.

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.

The National Committee for Uniform Succession Laws is now working on its final report on *The Administration of Estates of Deceased Persons*, which is expected to be completed in the first half of 2006. The report will address general issues of administration, including the recognition of foreign and interstate grants of probate and administration.

Peace and Good Behaviour Act 1982 (Qld)

In July 2004, the Commission received a reference to review the *Peace and Good Behaviour Act 1982* (Qld). Under the Terms of Reference the Commission is to consider whether the Act provides appropriate, easily accessible and effective protection to the community from breaches of the peace.

The factors to be taken into account by the Commission in its review include:

- the kind of conduct covered by the Act;
- the complexity of the process for obtaining an order;
- whether the existence of a filing fee deters people from making an application; and
- the enforcement of orders made under the Act.

The Commission released a discussion paper (WP 59) in March 2005 and expects to complete its final report in the first half of 2006.

Review of the uniform Evidence Acts

In March 2005, the Commission received a reference to review the uniform Evidence Acts. The purpose of the reference was to enable the Commission to participate in the review of the uniform Evidence Acts that was then being undertaken by the Australian Law Reform Commission in conjunction with the New South Wales and Victorian law reform commissions.

The Queensland Law Reform Commission's report (R 60), which was completed in September, focused on the issues that are likely to be of particular concern to Queensland, and identified the key differences between the uniform Evidence Acts and the law in Queensland. The Commission has examined the advantages and disadvantages of these

differing approaches with a view to identifying particular provisions that would require further review if Queensland were to consider adopting the uniform Evidence Act, or that may not be appropriate for adoption in Queensland.

Victorian Law Reform Commission

Privacy

The VLRC's *Workplace Privacy* final report was tabled in Parliament on 5 October 2005. The report recommended the introduction of a *Workplace Privacy Act* (Vic) and the establishment of an independent regulator to oversee the Act.

Any practice that surveils, monitors, tracks, or tests workers is covered by the proposed Act. This covers employer practices such as use of video cameras in shops, monitoring workers' emails and Internet use and requiring workers to take medical and psychological tests.

The Act would impose a duty on employers not to unreasonably interfere with workers' privacy and a set of principles that clarify this duty. A 'light touch' regulatory approach was recommended, with advisory and mandatory codes covering the bulk of practices. Authorisations were recommended for intrusive practices such as genetic testing and surveillance when people were not working.

A total prohibition on surveillance in toilets, change rooms and washrooms was also recommended.

The next stage of the privacy project will be a consultation paper on privacy in public places.

The Terms of Reference for the second stage ask the VLRC to consider measures to ensure appropriate control of surveillance in public places and the publication of photographs without the subject's consent. It is also asked to consider the application of recommendations made in its workplace privacy to the regulation of surveillance in public places.

Family violence

In September 2005 the VLRC finished an interim report on police holding powers in family violence cases, and the Government responded by adopting the recommendations in its Crimes (Family Violence) (Holding Powers) Bill, which was introduced to parliament on 18 October 2005.

This recommended that police be given the power to hold perpetrators of family violence for up to six hours until police could apply for and serve an intervention order or complaint and summons, and ensure the victims' safety. A four-hour extension on the time limit can be applied for in extraordinary circumstances.

A final report into the *Crimes (Family Violence) Act 1987* was finished in December but had not been tabled at the time of writing.

The VLRC was asked to review the Act and its intervention order system to determine whether it is the best legislative response to family violence. The report covers legal representation in family violence cases, clashes between intervention orders and custody arrangements, exclusion orders, police processes, court processes and prosecution of order breaches.

Assisted reproduction and adoption

The Government has asked the VLRC to consider laws that govern access to assisted reproduction, regulate eligibility to adopt children, and determine parentage of children born through assisted reproduction.

Intense public interest in this project prompted the VLRC to release three short position papers rather than one interim report.

The first paper, released in May 2005, sets out the VLRC's position on changes to legislation governing access, including removal of discrimination on the grounds of sexual orientation from the legislation, the requirement for consent to posthumous use of gametes and the introduction of presumptions against treatment for people convicted of serious sexual and violent offences.

The second position paper was released in July 2005 and recommends allowing female partners to be recognised, through adoption, as parents of children born to a same-sex couple who conceive at a clinic and to be recorded as a parent on children's birth certificates. It also recommends that the law should be clarified to state that sperm donors are not the father of a child conceived through assisted reproduction and proposes changes which will make it easier for children born from assisted reproductive technology to access information about their genetic donors.

A third paper on some aspects of surrogacy was due to be released in November 2005. The VLRC plans to finish a final report in the first half of 2006.

Bail

The Government has asked the VLRC to consider whether the *Bail Act 1977* (Vic) is consistent with the objectives of the criminal justice system and the Attorney-General's 2004 Justice Statement.

In particular, the VLRC is to look at the over-representation of Indigenous people held on remand, possible alternatives to jail for people denied bail, the needs of marginalised groups in society, a 1992 review of the Act and the intersection of the Act with the *Young Person's Act 1989* (Vic).

A consultation paper was released in November 2005 and covered problems with current processes, young people and bail, bail justices and past reviews of the Act. The deadline for submissions to the paper is 30 January 2005.

Once the submissions have been processed and consultations with victims' groups and follow-up consultations with lawyers, police and courts have finished, work will begin on a final report.

Evidence

The VLRC has contributed to a joint review of the uniform Evidence Acts final report with the NSW and Australian Law Reform Commissions. This is the first time that the VLRC has worked with other commissions to ensure uniformity of laws and recommendations.

The joint report was completed in December and is now awaiting tabling or release in all three Parliaments.

As part of the introduction of the uniform Evidence Act the VLRC will produce a second report on changes to the current Evidence Act and other evidentiary provisions in other Victorian legislation. It is intended to complete this work in February 2006.

The final report will specify the provisions in the current state Evidence Act that will be repealed and replaced by provisions in the uniform Act and set out a process for dealing with provisions not included in the uniform Act.

Completed reports

The Victorian Government introduced three Bills in the spring parliamentary session that were based on VLRC reports.

The Crimes (Homicide) Bill and Property (Co-ownership) Bill are based on the VLRC's *Defences to Homicide* report and *Disputes Between Co-owners* report respectively.

Both Bills implement the majority of recommendations in the reports, with the Homicide Bill appearing less than one year after the final report was tabled.

As mentioned, a Bill adopting all of the recommendations in the *Police Holding Powers* interim report was introduced on 18 October 2005.

The Government has established a specialist unit within the Department of Justice to review the recommendations from the VLRC's *Sexual Offences* final report. Both the Magistrates and County Courts have now established specialist lists to deal with sexual offences involving children, as the final report recommended. Legislative reforms based on the report are expected to be introduced in the autumn 2006 parliamentary session.

Law Reform Commission of Western Australia

Aboriginal customary law

The Law Reform Commission's reference on Aboriginal customary laws is reaching the final phase, with the discussion paper setting out the Commission's preliminary recommendations anticipated in December 2005. The project, which aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian legal system, has provided the Commission with the opportunity to revisit the work of the Australian Law Reform Commission (*The Recognition of Aboriginal Customary Laws* ALRC 31, 1986) in light of subsequent developments in law, research and policy as they relate to Western Australia.

In 2004 and 2005, the Commission published the following 14 background papers, which are now available from the Commission's web site:

- *The Approach of Australian Courts to Aboriginal Customary law in the Areas of Criminal, Civil and Family Law* by Victoria Williams;
- *Caught in the Middle: Indigenous Interpreters and Customary Law* by Michael Cooke;
- *The Value of Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area* by Greg Marks;
- *Family Law and Customary Law* by Tony Buti and Lisa Young;
- *Aboriginal Customary Laws Reference—An Overview* by John Toohey;

- *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne* —A Case Study by Kathryn Trees;
- *Aboriginal People and Justice Services: Plans, Programs and Delivery* by Neil Morgan and Joanne Motteram;
- *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia* by Harry Blagg;
- *Aboriginal Customary Law: Can It Be Recognised?* by Greg McIntyre;
- *International Human Rights Law and the Recognition of Aboriginal Customary Law* by Megan Davis & Hannah McGlade;
- *Customary Law, Human Rights and International Law: Some Conceptual Issues* by Chris Cunneen & Melanie Schwartz;
- *Indigenous Cultural and Intellectual Property and Customary Law* by Terri Janke and Robynne Quiggin;
- *Aboriginal Women's Interests in Customary Law Recognition* by Catherine Wohlan; and
- *Aboriginal Customary Law in Context of Western Australian Constitutional Law* by Steven Churches.

The topics covered by the background papers have provided additional information on issues relevant to the project and are assisting in the preparation of the discussion paper. The completion and distribution of the discussion paper will be followed by a three month submissions period in which interested parties can read and consider the contents and comment on the Commission's proposed recommendations. To facilitate the feedback process and to encourage submissions from Indigenous people, the Commission will conduct return visits to a few of the regional and remote communities previously consulted. All comments and submissions received will be given due consideration by the Commission and addressed in the final report, to be published shortly thereafter.

Problem-oriented courts and judicial case management

On 28 August 2004, the Commission received a new reference on problem-oriented courts and judicial case management. The reference requires the Commission to inquire into and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to problem-oriented courts and judicial case management require reform.

In carrying out this reference the Commission is giving consideration to the development of problem-oriented courts and judicial case management, their philosophy and structures, as well as the jurisprudential, ethical and practical issues arising from their operation.

The Commission's appointed project writer and research assistant have completed a detailed research and consultation phase and are in the process of drafting the discussion paper. The Commission anticipates the discussion paper will be submitted to the state Attorney–General in December 2005.

A review of the law of homicide

On 26 April 2005 the Commission received a reference to review the law of homicide, with particular consideration to be given to the distinction between wilful murder and murder; the defences to homicide, including self-defence and provocation; and current penalty provisions.

At present, Western Australia is the only Australian jurisdiction that maintains a distinction between the offences of wilful murder and murder, requiring juries to weigh the issue of intent to kill, in the case of wilful murder, against the issue of intent to do grievous bodily harm, in the case of murder. Other jurisdictions have only one offence of murder, which in effect incorporates both intentions and thus reduces the complexity and confusion often faced by juries when deliberating on such cases.

The Commission will conduct an in-depth examination of the issues surrounding the law of homicide, including the consideration of the removal of the distinction between wilful murder and murder and the effect that such a change may have.

The Commission has completed a thorough research phase and anticipates further consultation with members of the judiciary, prominent criminal practitioners, academics and other interested stakeholders throughout the review process.

Commission publications can be viewed on our web site: <www.lrc.justice.wa.gov.au>.

Law Commission of Canada

Governance beyond borders

Canada is among the most trade-dependent nations in the world. it is an active—and enthusiastic—participant in international

organisations of all sorts and is party to hundreds of international treaties. Many federal (and increasingly provincial) government departments are implicated in international relations, maintaining a constant exchange of information, ideas and policies across international borders. Canada is also psychologically and culturally a global society. Canadians care about this country's place in the world.

The changing world—and the accelerated global engagement it necessitates—also has implications for the way our system of democratic law-making functions and for law and justice in Canada. Globalisation affects democratic accountability, potentially exacerbating concerns about the legitimacy of government decision making. First, the very manner in which intergovernmental organisations function raises concerns about democratic accountability. These institutions often conduct their activities insulated from real scrutiny by a broader public. Second, in international policy making, the executive branches of state governments are enhanced relative to the other branches. Legislative bodies usually exercise little control over international policy making. At the same time, globalisation prompts shared trans-boundary standards, it induces the intervention of domestic legal systems to plug holes in those areas neglected by the official globalisation project. The net result is a confusing patchwork quilt of both trans-nationalised and domestic law and justice; put another way, a legal system that is *quasi*-globalised.

The Law Commission of Canada is embarked on a review of globalisation as it affects the effectiveness and legitimacy of the Canadian legal system.

Hawala banking

In partnership with the Nathanson Centre (Osgoode Hall Law School), the Law Commission funded two research studies on international informal banking, which involves avoiding regulated financial institutions and/or transferring funds or value without a paper trail. This informal system, which has long been in existence, has attracted the attention of authorities in the wake of 9/11.

The informal networks have flourished among trans-national communities for various reasons. Often, these communities originated in impoverished villages or conflict zones in societies characterised by cash intensive economies. Their points of origins were usually remote areas without adequate banking facilities. The official banking system is slow and not responsive to emergencies, while the informal system can deliver money within hours to the recipient's household. The historical role of these systems as reliable, trusted, efficient and cheap has to be given due importance before associating them with criminal activities. Most importantly, before implementing regulations against them to prevent criminal abuse, their values and requirements should be recognised and taken into consideration. Blunt regulations will force these systems underground and fail to prevent their misuse. The differences in culture have to be understood and accommodated, for effective enforcement of any regulation.

Sharia law

The Law Commission funded the National Association of Women and the Law (NAWL) to research the legal implications of arbitration tribunals based on Sharia law set up under Ontario's *Arbitration Act*.

This research examines the legal implications of arbitration tribunals that will utilise Sharia law in Ontario. The paper investigated the role of arbitrators, the mechanisms for appealing arbitral awards to the courts, judicial interpretation of arbitral agreements and awards, the importance of legal representation and the gender-based impact on women with an accompanying analysis of equality rights implicated under the Canadian *Charter of Rights and Freedoms*. Key sections of the *Arbitration Act* were examined and contrasted with the reality of how such clauses are likely to be interpreted to the disadvantage of women. Though the scope of arbitration tribunals can include a wide range of legal areas, the principal area of inquiry of this paper has been family law with a particular emphasis on the impact that Sharia law could have on Muslim women in Ontario. The paper also considers the broad issue of the increasing privatisation of family law.

Commission changes

Nathalie Des Rosiers completed her mandate as President of the Law Commission of Canada at the end of August 2004. She accepted the position as Dean, Faculty of Law, Civil Law Section at the University of Ottawa. From October 2004 through June, 2005, the Vice President, Bernard Colas, fulfilled the role. In June, 2005, Yves Le Bouthillier was named President for a three year term.

Alberta Law Reform Institute

Rules of Court project

As part of its Rules of Court project, the Alberta Law Reform Institute (ALRI) will have issued two consultation memoranda on Criminal Rules topics.

The first consultation memorandum (CM 12.15) was issued in November 2004, reviewed by the working group in the (northern) spring of 2005 and finalised in September 2005. This consultation memorandum deals with the topic *Non-Disclosure Orders in Criminal Cases*. The working group recommends that one set of rules govern all common law or discretionary non-disclosure orders and that a standard application form be established which requires (*inter alia*) the identification of the evidence to be relied upon in the application. The proposals confirm the court's discretion to grant such orders, but do not go so far as to give the media automatic standing to intervene. However, an electronic notification scheme will ensure that the media is aware of the non-disclosure application, and may appear to seek standing if it wishes to do so.

The second consultation memorandum (CM 12.19) about to be published deals with applications under the Canadian *Charter of Rights* in criminal cases, including applications to exclude evidence and applications for relief, for example, a stay. There is no uniform process for the regulation of these applications in Alberta. The working group recommends procedures be established in the rules, and that the rules specify the form and content of notices, as well as service and notice requirements. The working group also discusses the timely pre-trial disposition of *Charter* applications and the disposition of defective applications.

The ALRI expects to publish at least one more consultation memorandum in the Rules project (dealing with the topic of appeals).

Malawi Law Commission

Review of the Constitution

The Malawi Law Commission is currently undertaking a Constitution review process. Since August 2004, it has been receiving written submissions from the general public on which areas of the Constitution should be reviewed. Most of the submissions have centred on the provisions relating to the legislature and the executive. Some of the issues raised are whether to:

- change the system of electing Members of Parliament to require a simple majority of the people that have actually voted;
- bring back the Senate as an upper chamber of Parliament;
- alter the level of majority for electing the President, which at the moment is a simple majority of the electorate; and
- stipulate the upper limit age of presidential candidates in the Constitution.

Spent convictions

The spent convictions program seeks to introduce a novel concept into the criminal procedure laws through a new piece of legislation that will facilitate a process where minor convictions shall fall away from an offender's criminal record after the expiry of a period of time.

Main issues include whether the scheme shall adopt a rights-based approach or go for rehabilitation of offenders, or blend the two. Other issues question whether such a scheme is consonant with the criminal justice legislative framework and the Constitution. The program will also explore what the scheme will achieve, especially in promotion of human rights and the rehabilitation of offenders and their re-integration into society. The program is expected to commence early in 2006 and finish within six months.

Law on abortion

The abortions program seeks to review the existing legislation, which criminalises abortion. The program seeks to examine whether abortions can be regulated by law by allowing them in exceptional circumstances and when performed by specialised personnel.

The main issues in the abortions program relate to striking a balance between pro-choice and pro-life arguments, which stand at two extremes. Other issues relate to the interface between law and faith also enshrined in the Constitution of Malawi. This interface might affect acceptability of a law that legalises abortion in a society that has known the same to be prohibited. A discussion on abortion inevitably sparks debate on issues of human rights (privacy, choice and life) especially relating to the pregnant mother and the unborn child. The program is expected to commence

early in 2006 and finish towards the end of the year.

Legislation to combat human trafficking

The Malawi Law Commission initiated a program to promulgate anti-human trafficking legislation in direct response to increasing cases of human trafficking both to destinations outside Malawi as well as into Malawi and internally from district to district. It was also a direct response to Malawi's ratification of the *United Nations Convention Against Transnational Organised Crime* and its supplement, the *Protocol to Prevent, Suppress, and Punish Trafficking In Persons, Especially Women and Children*.

A research paper was produced in April 2005, which outlined the prevalent trafficking patterns in Malawi, its root causes and the available laws that may be used to prosecute offenders. In October 2005, the Law Commission in collaboration with the International Organisation For Migration provided training to 154 law enforcement officers mainly from Immigration and Police at major air and land ports of entry in Malawi.

The Commission is currently preparing a project paper that will highlight its strategic plan in the development of anti-human trafficking legislation. In addition, the Commission intends to identify non-government organisations and other public service providers to partner with in order to step up public awareness campaigns and provision of counselling and rehabilitation facilities. The Commission also intends to work closely with other law enforcement agencies to identify and prosecute traffickers.

It is aimed that the anti-human trafficking legislation shall be ready at least by early 2007.

Declaration of assets

The objective of this project is to develop legislation that actualises provisions in the Malawi Constitution regarding declaration of assets by public officers. The Constitution makes provision that the President, Cabinet Ministers, Members of Parliament and senior public officers shall declare their assets soon after election, nomination or appointment (s 88A as read with s 213).

Law reforms in this area shall aim to address issues such as the extent of coverage of the law, and in particular who should be required to declare assets, what should be the frequency for filling status of assets, what method should be adopted for effecting this, what kinds of assets should be declared, and how the law should be enforced. The reforms shall also explore the issue of public access to declarations.

Legal aid

The program on the review of the legal aid was finalised at the beginning of this year and the report was submitted to the Minister of Justice and Parliament in July 2005. The draft Bill contained in the report proposes to expand the legal aid service so as to make justice accessible to all, especially the poor. This shall be done by expanding the definition of legal aid to include the provision of legal information, legal education and pre-trial assistance for those seeking legal aid in criminal matters. To this effect, the Bill recognises the role that other players such as senior law students, paralegals and civil society can play in expanding the ambit of services provided under legal aid.

The Bill also proposes the setting up of an independent legal aid state institution away from the mainstream government to ensure effectiveness, independence and ability to overcome resource constraints by allowing the institution to generate income, besides allocations by Treasury. This is proposed to be done through other sources such as contingency fees, costs awarded by the courts to legally aided persons or deductions from awards made by courts.

The Bill has also tackled the issue of geographical extension of the legal aid service by providing for regional and district offices. Areas such as criteria for granting legal aid and the rates payable to private legal practitioners contracted to do legal aid work have also been addressed.

Traditional courts

The review of the *Traditional Courts Act* is nearing its end and there is a draft report, which contains a Bill that has proposed the re-introduction of these courts but with the new name of 'Local Court'. The new courts are to provide familiar and affordable justice in line with the spirit of the Constitution. Further, the jurisdiction of the Local Courts is limited to civil matters at customary law and minor statutory criminal offences as is envisaged by the Constitution.

The Bill also proposes the exclusion of certain matters from the jurisdiction of these courts and such matters include inheritance issues and

matters involving custody of children—because they are pre-determined at custom—cases of witchcraft and land disputes. Sentencing powers in criminal matters have also been reduced drastically to emphasise that the courts are to deal with petty criminal offences.

The final report shall be submitted to the Minister of Justice during the first quarter of 2006.

Land reforms

In response to a request from the Minister of Lands, Valuation and Physical Planning, the Commission has been carrying out a program on land reforms for the past two years. Among the issues examined are: how land is categorised in Malawi; the issue of vesting of land; access to land by non-citizens of Malawi; inheritance of customary land; decentralisation of land administration; and matters of physical planning, rating and valuation of land generally.

The Commission, in its draft report, recommends amendments and the repeal of several statutes regulating land. The following new statutes are proposed for adoption: *Customary Land Management Act; Land Survey Act and Physical Planning Act*.

The Commission aims to submit its final report during the first quarter of 2006.

Scottish Law Commission

Criminal law

During consultation on the Scottish Law Commission's 7th program of law reform it was suggested the law on sexual offences was in need of review. Following public, academic and professional concern about two widely-reported rape cases in Scotland in 2004, the Commission was asked by Scottish Ministers to review the law relating to rape and other sexual offences. Among the issues being considered is whether the definition of rape should be extended to include sexual assaults against male victims, as well as how best to construct offences to ensure adequate protection for persons vulnerable to sexual exploitation. Also being considered is whether the presence or absence of consent should be an intrinsic element of sexual offences and whether models of consent used in other jurisdictions could be usefully employed in Scots law. A discussion paper is to be published followed by a period of consultation early next year. The aim is to publish a final report, including draft legislation, in 2007.

Insurance law

The Commission is assisting the Law Commission for England and Wales with this project.

Insurance law has been criticised as outdated and unduly harsh to policyholders.

It has been decided to look at non disclosure of material facts and breach of warranty, two areas of insurance law that are thought to give rise to particular difficulties in both consumer and business insurances. The Commissions are currently seeking views from all interested parties as to whether there are other issues in this area of the law that should be considered. For example, it has been suggested that the rules on insurable interest are currently too restrictive and that allowing policies to be effected in a broader range of circumstances would benefit both the industry and the insuring public.

The Commissions intend to publish an initial scoping study in the early part of 2006. It will seek to set out those areas of insurance law which are problematic and should be included within the review.

Towards the end of 2006, the Commissions will issue a consultation paper looking at the areas identified by the scoping study. The paper will set out the perceived problems and discuss possible solutions.

Interest

The Commission was asked to examine the law on the application of interest to claims for payment arising from contractual and other obligations, and to make recommendations for reform of the law. While the current law is reasonably certain in many respects, it lacks any coherent principle. In a discussion paper (No 127) published in January 2005 the Commission proposed the introduction of a statutory right to claim interest during the period when a claimant is deprived of the use of his money, whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The proposals received a generally favourable response. Some specific areas of concern with the present law were identified:

- A claim for damages may attract interest from the date when the right of action arose (for example, the date of an accident) but interest will run on a contractual debt only from the date when a court action is raised. This appears inconsistent and it is proposed

that interest on both debts and damages should be due from the date a person lost the use of his or her money.

- Interest is not payable on a debt unless payment has been 'wrongfully withheld' or, in the case of contractual debt, until court proceedings are commenced. A statutory entitlement to interest from the date when payment is due is proposed, which would not apply where parties have made express contractual provision for interest nor where interest is due under another statute.
- At present the courts in Scotland apply a fixed rate of 8% which does not necessarily bear any relation to a rate which would be available commercially. A fluctuating rate of 1% or 1.5% above the Bank of England base rate is proposed.

A final report including draft legislation is currently being prepared with a view to publication next year.

Limitation in personal injury actions and extinct claims

At the request of Scottish Ministers, the Commission is undertaking a review of the provisions of the *Prescription and Limitation (Scotland) Act 1973* concerning limitation in personal injury actions. In particular, the Commission is looking at the so-called knowledge test and the judicial discretion to override the limitation period. Concern has been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised whether the 1973 Act should be amended to specify factors to which the court should have regard in exercising its discretion.

Scottish Ministers have also asked the Commission to review the position of claims for damages in respect of personal injury which had expired as a result of the law of prescription prior to September 1984, when a number of amendments to the 1973 Act came into force. One of those amendments was the removal of personal injury actions from the scope of prescription. This change in the law did not affect claims which had already been extinguished. The Commission was asked to review the position of such claims following concerns about the position of people, particularly those who claim to have suffered childhood abuse many years ago in various institutions in Scotland, whose claims were extinguished under the previous rules of prescription.

The two reviews are being dealt with as one project and the Commission aims to publish a discussion paper in the early part of 2006.

Property

A discussion paper (No 112) on *Conversion of Long Leases* was published in April 2001. It proposed that leases for more than 175 years should be converted into ownership. It also sought 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 hopes to submit its report in the first half of 2006.

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, (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third paper will follow, considering various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register.

The Commission is also engaged on a project concerning protection of purchasers buying property from insolvent sellers. 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. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 (SC (HL) 19) where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. The Commission is considering how best to draw this project to a conclusion. There may be scope for dealing with some of the remaining proposals in the land registration project.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. In its view the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are

common today. The project will concentrate on issues relating to intestacy and protection from disinheritance. As a first step a public attitude survey has been commissioned and a report of the results has been published. A discussion paper is to be published in 2006.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of 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 (No 126) was published in December 2004.

The second phase of the project will cover the constitution, variation and termination of trusts, 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. The Commission aims to publish a discussion paper on variation and termination by the end of 2005. A separate discussion paper (to be published in 2006) will consider the possibility of conferring legal personality on trusts and deal also with trustees' liability to third parties, execution of trust deeds, latent trusts of heritable property and other topics.

The Commission's recommendations regarding the investment powers of trustees contained in the *Report on Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the *Charities and Trustee Investment (Scotland) Act 2005*. Trustees can now invest in any kind of property and also buy land for any purpose.

The Commission is also working on a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission 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 by the end of 2006.

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

South African Law Reform Commission

Privacy and data protection

Privacy is a valuable aspect of personality. Data or information protection forms an element of safeguarding a person's right to privacy. The recognition and protection of the right to privacy as a fundamental human right in the South African Constitution provides an indication of its importance. It is, however, not an absolute right and in protecting a person's personal information, consideration should also be given to competing interests.

The preliminary recommendations of the South African Law Reform Commission (SALRC), as set out in the Bill accompanying Discussion Paper 109, *Privacy and Data Protection*, can be summarised as follows:

- The protection of personal information in the public and the private sector should be regulated in an Act of general application.
- The proposed Bill gives effect to eight core information protection principles.
- Exceptions to the information protection principles are provided for and exemptions are furthermore possible for specific sectors in applicable circumstances.
- Provision has been made for an independent Information Protection Commission with a full-time Information Commissioner to direct the work of the Commission.
- Enforcement of the Bill will be through the Information Protection Commission using as a first step a system of notices where conciliation or mediation has not been successful. Obstruction of the Commission's work is regarded in a very serious light and constitutes a criminal offence.
- A flexible approach will be followed in which industries will develop their own codes of conduct (in accordance with the principles set out in the legislation), which will be overseen by the regulatory agency.

- It is the SALRC's objective to ensure that the legislation provides an adequate level of information protection in terms of the EU Data Protection Directive of 1995.

The closing date for comment on Discussion Paper 109 is 28 February 2006.

Administration of Estates (Discussion Paper 110)

The main thrust of the review of administration of estates is to consider a unitary system for all South Africans. Although a role for traditional leaders and customary law is not excluded, a unitary system for the administration of all estates must be applied following a decision of the Constitutional Court of South Africa. Comment is invited on a proposal that all estates should be administered subject to the supervision of the Master of the High Court. It is proposed that special protective measures should apply in small estates, but that in other estates beneficiaries should protect their own interests and the Master should not be obliged to examine all accounts or call for requirements after a liquidation and distribution account has been advertised for inspection free of objections. Regulations which prohibit classes of persons from being appointed as executor or assisting with the administration of estates should be replaced by a requirement that security must be lodged in all cases where the executor is not a duly qualified person or the executor is not assisted by a duly qualified person. Comment is invited on a long list of practical and technical proposals, for instance, should the Master decide factual questions, should there be an Ombudsman for the administration of estates and should electronic payments be recognised by legislation?

Publications of the South African Law Reform Commission are available online at: <www.doj.gov.za/salrc/index.htm>.

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Endnotes

1. Anglo American, 'Presentation to Financial Community on Anglo American's Sustainable Development Performance 2004/5', 17 May 2005 at <www.angloamerican.co.uk/static/uploads/SRI%20Presentation%20050517.pdf> (9 Nov 2005).
2. For further details see <www.angloamerican.co.uk/corporaterresponsibility>.
3. I Davis, 'The Biggest Contract', *The Economist*, 28 May 2005, 69.
4. N Drummond, *The Spirit of Success: How to Connect the Heart to the Head in Work and in Life* (2004).
5. T Devinney, P Auger, J Louviere and P Burke, (2003) 'What Will Consumers Pay for Social Product Features?' 42 (3) *Journal of Business Ethics*.
6. T Devinney, G Eckhardt and R Belk (2005) *'Consumption Ethics Across Countries'* 8(3) Consumption, Markets, and Culture.
7. P Drucker, *The Frontiers of Management* (1986).
8. C Prahalad, *Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits* (2004).
9. The MIT Media Lab has launched a new research initiative to develop a $100 laptop, which will not be available for sale, but will only be distributed to schools directly through large government initiatives.
10. Drucker ascribes this credo to Control Data founder William Norris.