Reform roundup

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

Contents

Entries to Reform roundup are welcome.

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Administrative Review Council

Report on Government Agency Coercive Information Gathering Powers

This latest Administrative Review Council report, (ARC 48), focuses on the coercive information-gathering powers of six agencies: the Australian Competition and Consumer Commission; the Australian Prudential Regulation Authority; the Australian Securities and Investments Commission; the Australian Taxation Office; Medicare Australia; and Centrelink.

The report identifies 20 best practice principles covering a range of important practical issues including who should exercise the powers, the conduct of hearings and the content of notices.

These principles seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of individuals in relation to whom the powers are exercisable. The principles will provide valuable guidance to all government agencies in their use of these important powers.

Report on Administrative Decisions in areas of Complex and Specific Business Regulation

This project considers adaptations to merits review processes and other accountability mechanisms that are appropriate to complex business regulation. It examines the adoption of public sector mechanisms such as the ombudsman model, and the efficacy of private sector adaptations such as peer review and stakeholder consultation practices. The report concludes with a framework of guideline principles, consistent with administrative law values, which the Council believes will promote efficient, effective and accountable business regulation. The Council is proposing to seek ck on a draft of the report later this year. It is

anticipated that the final report of the project will be presented to the Attorney-General in September 2008

Updating reports on the ARC website

The ARC Secretariat has recently reformatted a number of older ARC reports to make them available for download from the Council's website. These reports cover a wide range of topics including: government business enterprises; rule making by Commonwealth agencies; environmental decisions and the AAT; and merits review tribunals. The reports will be placed on the Council's website shortly.

Best Practice Guides

In late 2007 the Council launched a series of best practice publications for administrative decision makers. The subject matter of each publication in the series reflects a key stage in the decision making process. The guides are generic and have been designed as a general training resource and reference for Commonwealth agencies, which can be supplemented with agency-specific material regarding policies, practices and legislative frameworks. Since the release of the guides, a number of government agencies have worked with the Council to finalise annotated versions of the guides specific to their requirements.

Copies of Council publications can be obtained by contacting the Council Secretariat on (02) 6250 5800 or e-mail .The Council's latest reports are also available on the Council's website atwww.ag.gov.au/arc.

Alberta Law Reform Commission

History

In 1967, representatives of the Province of Alberta, the University of Alberta and the Law Society of Alberta signed the first agreement to establish the Alberta Law Reform Institute [ALRI], formerly known as the Institute of Law Research and Reform. The Institute commenced operations and held its first board meeting in January 1968. Forty years on, ALRI is Canada's senior law reform agency.

Since its inception, ALRI has maintained the institute model for law reform rather than a commission structure. Under the institute model, the core work of research, policy analysis, and project management is carried out by full-time legal counsel who report to a governing board of lawyers and judges. The board brings diverse perspectives and expertise to the law reform process. Over the past 40 years. 127 individuals (58 legal counsel and 69 board members) have contributed to the success of 127 projects – a curious but scholarly balance.

Legal Change (a.k.a. the "I" word)

The goal of law reform work is to bring about legal change, most often through implementation by legislation. For the most part, ALRI selects its own projects. Government concerns and priorities are taken into account in the project selection process and ALRI takes on some government-initiated projects. The ALRI approach to projects has lead to a comparatively high implementation rate that consistently exceeds 60%.

The past four decades have also seen an increasing use of law reform materials by Alberta courts. Currently, ALRI's work is cited in over 20 cases per year. The fact that a statute is before the court for interpretation suggests the possibility of a defect in either the recommendations or their implementation. In other words, judicial citation does not necessarily represent the endorsement of law reform work. However, the use of ALRI reports for interpretation purposes is overwhelmingly positive. In addition, a number of cases champion ALRI recommendations that have yet to be implemented.

Celebrations

ALRI marked its anniversary with a public lecture presented in the ceremonial courtroom of the Court of Queen's Bench in Edmonton. Chief Justice Alan Wachowich welcomed members of the bar, bench and the public. ALRI's Director, Peter Lown QC, introduced the distinguished guest speaker, the Hon Justice Michael Kirby. Justice Kirby delivered a thought-provoking paper title "Law Reform– Past, Present, Future". The paper paid tribute to Dean Wilbur Bowker, ALRI's founding Director, whose reputation for scholarship grounded ALRI's first decade. Justice Kirby also recognised, Bill Hurlburt QC, Director Emeritus, both for his work within Alberta and for his enduring contribution to the international community of law reform.

Justice Kirby noted the research challenges faced by modern law reform agencies.

Evidence-based research is now essential and has surpassed former reliance on case law and legislative histories. Consultation that is limited to the legal profession will usually be inadequate. Law reformers must now be able to master topics in the spheres of science and technology which once lay well beyond the scope of legal research. In light of these and many other challenges, Justice Kirby questioned whether institutional law reform continues to be worth the cost and if it can deliver the goods.

ALRI also hosted a forum for policy lawyers from both government and Canadian law reform agencies. The forum was an opportunity to reflect on the career path from law school graduate to policy advisor and the skills that need to be picked up along the way.

Recognising that all work and no play would make a for a dull celebration, anniversary events were capped off by a black tie dinner. The dinner was held both to recognise ALRI's achievements over the past 40 years and to recognise the contributions of the individuals who made those achievements possible.

British Columbia Law Institute

The British Columbia Law Institute (BCLI) has been very active in its project work. The following is a selection of some of its current projects.

Society Act Reform Project

The *Society Act* provides for the incorporation, organisation, governance, financial affairs, amalgamation, and dissolution of societies in British Columbia. A society within the Act is an incorporated body that is created to pursue public, not-for-profit purposes.

The current *Society Act* was largely based on the 1973 *Company Act*, the organizational statute for for-profit companies. In 2004, the *Company Act* was repealed and replaced with the more streamlined *Business Corporations Act*. However, the *Society Act* has seen little change since its enactment in 1977. The three primary reasons a new *Society Act* is needed are:

- the not-for-profit sector has grown increasingly prominent and sophisticated, rendering inadequate the 30-year-old legal framework;
- some onerous provisions continue to apply to societies that no longer apply to for-profit companies for which they were originally designed; and,
- reform initiatives are underway or completed in other jurisdictions, giving British Columbia an opportunity to enact both modern and harmonised legislation.

The project is being carried out by a volunteer committee comprised of lawyers, consultants, and society executives prominent in the not-for-profit sector. The consultation phase for the project opened in September 2007, with the publication of the *Consultation Paper on Proposals for a New Society Act*. The consultation phase closed in February 2008. The BCLI was pleased with the level of response to the consultation paper. The comments received from the legal community, the not-for-profit sector, and the general public will assist in the final, drafting phase of the project. The BCLI aims to complete this phase by publishing a final report containing a draft of a new *Society Act* and commentary in July 2008.

Probate Rules Reform Project

The Probate Rules reform project is a sequel to the Succession Law reform project, and aims to reform the rules of court governing contentious and non-contentious probate procedures.

The three specific objectives are to:

- harmonise the probate rules with proposed reforms to estate administration legislation emerging from the Succession Law reform project;
- revise the probate rules to better reflect the reality of computerisation of the British Columbia Supreme Court's civil registry and eliminate obsolete procedures; and,
- ensure that the reformed rules are compatible with the general reform of the British Columbia *Supreme Court Rules* currently underway.

The project committee is continuing to examine procedure in uncontested applications for probate and administration of estates. A consultation period of three to four months is planned. The BCLI's final report will include draft probate rules and commentaries to be submitted to the Attorney–General and

published in our usual manner.

Predatory Lending Research Project

Predatory lending is a practice whereby a lender deceptively persuades a borrower to agree to abusive loan terms. A lender may be expected to require less favourable loan terms in exchange for dealing with a comparatively more risky borrower *(i.e.*, an individual with a poor or non-existent credit history or low income). If the surrounding circumstances include a vulnerable borrower easily taken advantage of due to their financial circumstances, the situation may be characterised as predatory. Although anyone could be a victim of predatory lending, older adults are often sought out as they frequently fit the profile of having scant credit history, low income and financial need.

While predatory lending is a well-known phenomenon in the United States, it has received much less attention in Canada. The development of the Canadian subprime mortgage market has been relatively cautious. Seniors may nevertheless find themselves victims of predatory lending without legal recourse or remedy.

The extent to which predatory lending occurs in Canada is still largely unknown. Research in this area is necessary before the need for law reform can be properly assessed. The Canadian Centre for Elder Law (a division of BCLI) has published a study paper that explores the underlying assumptions that the structure established by both the Canadian mortgage market and Canadian legislation are such that there is little cause for concern. The aim of the paper is to provide a point of departure for further discussion, analysis, and investigation.

The study paper is available online, at: <http://www.ccels.ca>.

Family caregiving

The BCLI is reviewing the current legal framework governing family caregiving employment leave and other entitlements available to employees and other working people who are engaged in providing care for family members. The project examines employment standards, employment insurance, tax, human rights and other relevant legislation and case law, as well as the practices of a cross-section of employers and a comprehensive literature survey.

Consultations with major stakeholders will take place; as this is a legal research project rather than a law reform project, consultation is largely for the purpose of fact-finding. The project will culminate in a study paper examining the issues with recommendations for future study and reform.

This two-year initiative will be completed in September 2009.

The Vanguard Project

A coalition of not-for-profit organisations is reviewing capability in the broad inter-jurisdictional and cross-disciplinary context of law and policy. The group is identifying and critiquing legislation governing capability and extracting best practices from existing policy and protocols currently guiding capacity assessment.

The collaborative project will also develop an interdisciplinary provincial protocol, draft comparative legal summaries and make recommendations for law reform and increased access to justice. The goal is to clarify the law and harmonise practice in this area.

The BCLI will write the project's final report and the two-year project will be completed in December 2008.

Elder Law Clinic

The BCLI is assisting in the creation of an Elder Law Clinic to serve seniors in British Columbia. The objective of the clinic is to provide access to justice for older adults in British Columbia who cannot otherwise obtain legal services. The clinic will be the second legal clinic in Canada with a mandate to specifically serve older adults, and is scheduled to open in the summer 2008.

Real Property Review

British Columbia is moving closer towards a fully electronic system of land registration and conveyancing. It is therefore appropriate to review and modernize the substantive legal principles on which that system depends. To this end, the BCLI has embarked on a project pertaining to reform of the law of real property and completed an assessment of the feasibility and scope of the project. Phase 1 of the project identified the following areas, not currently under review by another body, where reform may be needed:

- the effect of section 29 of the *Land Title Act* and notice of an unregistered interest;
- section 35 of the *Property Law Act* and judicial extinguishment of incorporeal interests;
- severance of joint tenancy and other issues of co-ownership, including the four unities rule, and the *Partition of Property Act*;
- restrictive covenants; and,
- the doctrine of implied grant.

Phase 2 will involve research in these areas and generation of consultative documents and a final report.

British Columbia Privacy Act

The BCLI completed this project in early 2008. The *Privacy Act* of British Columbia makes the violation of privacy a tort. The project is directed at updating and revising this statute in light of the many technological changes and evolution of social attitudes since it was passed in 1968. These changes include the promulgation of the Uniform Privacy Act as well as various federal and provincial enactments regulating particular aspects of privacy. A specific objective was to bring stalking within the scope of the Act.

A consultation paper was issued in July 2007. A consultation period followed, and a final report was submitted to the Attorney General in February 2008.

Defective contracts relief

The BCLI is examining issues connected with the implementation of the *Uniform Illegal Contracts Act* in British Columbia. The *Uniform Illegal Contracts Act* deals with the alleviation of hardship resulting from the rigidity of the common law rule that a contract affected by illegality gives rise to neither rights nor liabilities. The *Uniform Illegal Contracts Act* would empower superior courts to mitigate harsh and unjust results sometimes produced by the common law rules on illegality in contract.

The BCLI's report will be completed in the fall 2008.

Public Legal Education and Information Portal

The BCLI began activities in late 2007 to prepare for the advent of a Public Legal Education and Information Portal for British Columbians on the world wide web.

There are currently two projects related to the activities, one being "content development" and the second "technical support." Content development goals include commencing cataloguing and summarizing the BCLI publications for ease of use by the public. Technical support goals include the redesign of the BCLI's web site to make it more modern and user-friendly.

Both projects are to be completed by October 2008.

Canadian Journal of Elder Law

The BCLI will publish the Canadian Journal of Elder Law, the first Canadian periodical considering the issues of older adults and the law. The journal is a peer-reviewed publication supported by an editorial committee with international membership. The first issue, to be published this year, will feature leading papers presented at past Canadian Elder Law Conferences as well as contributions from national and international scholars.

Commercial Tenancy Act reform project

Commercial leasing and tenancy in British Columbia is subject to some of the most outdated legislation in the province. The *Commercial Tenancy Act* remains largely unchanged since its first enactment in 1897, which was comprised of a consolidation of British legislation from the 17th and 18th centuries.

The BCLI is examining the creation of a new and relevant legal framework for commercial leasing and tenancy in British Columbia. To this end, the BCLI is engaged in the study of topical reforms and will present tentative recommendations to the public for comment. A final report, including a draft of a new *Commercial Tenancy Act*, will be complete in June 2009.

Unincorporated Nonprofit Associations

The unincorporated nonprofit association is the default structural model of nonprofit activity. When individuals form a group to carry out one or more nonprofit purposes and do not incorporate or create a charitable trust, they form an unincorporated nonprofit association. Currently, the legal framework is fragmented and inconsistent across the country and throughout North America.

The BCLI is part of the Joint Project to

Create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America, which is comprised of: the Uniform Law Conference of Canada; the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws); and, the Mexican Center of Uniform Law.

The primary aim of the Joint Project is to provide unincorporated nonprofit associations with a modern legal framework to harmonize rules found in North America's two legal traditions and three national jurisdictions. To date, each of the national teams has drafted legislation based on a set of harmonized principles that were developed earlier in the project.

Board and Staff Changes

The BCLI welcomes new Chair Ron Skolrood, and thanks outgoing Director and past Chair Ann McLean for her invaluable contributions over a ten-year period.

The BCLI is pleased to welcome new distinguished Directors:

Geoff Plant, Q.C., Prof. Joost Blom, Q.C., and R. C. (Tino) Di Bella.

The BCLI is also pleased to welcome Carolyn Laws as a staff lawyer.

More information on the BCLI and all of its projects and activities is available online, at: <http://www.bcli.org>.

Law Reform Commission of Hong Kong

Publications

In January 2008 the LRC published a consultation paper on *Criteria for Service as Jurors*. The paper proposed reducing somewhat the categories of persons exempt from jury service and defining more clearly some of the criteria for eligibility for jury service set out in the Jury Ordinance, including the definitions of "resident" and "good character".

In March 2008 we published a final report on *Enduring Powers of Attorney* which recommended the relaxation of the execution requirements for an EPA by removing the need for a medical witness.

Current Projects include:

- Hearsay in criminal proceedings
- Criteria for service as jurors
- Double jeopardy
- Sexual offences (including consideration of a sexual offenders register)
- Causing or allowing the death of a child
- Class actions
- Charities (specifically, the regulatory

Law Commission for England and Wales

> One of the hallmarks of an advanced society is that its laws should not only be just but also that they should be kept up-to-date and be readily accessible to all who are affected by them.
>
> English Law should be capable of being recast in a form which is accessible, intelligible and in accordance with modern needs

These statements are as true today as when they were made at the time the Law Commission for England and Wales was created in 1965, perhaps even more so.

Our principal objective is to seek to achieve a body of law that is accessible to those who are affected by it. The task that faced our predecessors in 1965 was daunting, but the inexorable increase in the pace of legislation, and the increasing readiness of Government to seek legislative solutions to problems, has made the need for ongoing law reform so much greater.

We have recently begun our 10th Programme of Law Reform. In selecting the projects we wanted to include in the programme, we gave attention to those areas of the law most in need of reform and where reform would deliver real public benefit.

The list of projects on which we are now engaged includes:

- reforming the criminal law—topics such as bribery, conspiracy and attempt, corporate criminal liability, expert evidence, and other areas where the present criminal law might be simplified;
- property, trust and family law – topics such as easements, rights of third parties against trustees, intestacy rights, and marital property agreements;
- commercial law and common law—topics

such as rights of redress against unfair commercial practices, consumer remedies for faulty goods, insurance contract law, and illegal transactions;

- public law—topics such as adult social care, remedies against public bodies, and legal obligations relating to level crossings on the railways;
- statute law—keeping the statute book up-to-date and repealing obsolete provisions that serve only to complicate the application of the law both for practitioners and for the citizen.

Over the last year, we have completed projects on participating in crime; cohabitation rights; resolving housing disputes; and statute law repeals. In each case, we have recommended reform, or repeal, and our recommendations are awaiting a response from the Government. At the time of writing, our proposed Statute Law (Repeals) Bill has completed its 3rd Reading stage in the Upper House (House of Lords). It will then go to the Lower House (House of Commons), and we are expecting Royal Assent to be given in June/July 2008. This will be the latest in a series of 18 Statute Law (Repeals) Acts that the Law Commission has promoted.

Also during the last year, we have begun, and in several cases completed, public consultations on subjects relating to criminal conspiracy and attempts; bribery; insurance contract law; easements; the High Court's jurisdiction over criminal proceedings; and ensuring the responsible letting of property. We are continuing to work on these projects, with a view to formulating recommendations that we will in due course lay before Parliament.

During 2007–08, we have met with most Government departments, and we have been reassured that there is a continuing need for the work that we do. Unsurprisingly, this is particularly acute for those departments for whom we are actively working, who find the work we do useful and relevant to their plans for the future.

During 2008–09, we hope to publish recommendations on criminal conspiracy and attempts; bribery; intoxication; illegal transactions; ensuring the responsible letting of property; and capital and income in trusts. We also hope to begin new public consultations on remedies against public bodies; the admissibility of expert evidence in criminal proceedings; and consumer remedies against faulty goods.

Recent changes in the law resulting from Law Commission recommendations include:

Mental Capacity Act 2005, which came into force in April 2007, and implements the recommendations contained in our 1995 report.

Corporate Manslaughter and Corporate Homicide Act 2007, which includes the recommendations made in our 1996 report.

Serious Crime Act 2007, which includes the recommendations on inchoate liability for assisting and encouraging crime contained in our 2006 report.

On 28 March 2008, the Government announced that it accepted the recommendations we published in 2006 on the post-legislative scrutiny of new legislation.

The implementation rate for our recommendations, standing at 70%, is quite high. However, we currently still have 14 of our previous reports that the Government has accepted but not yet implemented. There have recently been two welcome announcements. First, on 25 March 2008, the Lord Chancellor announced in Parliament that he intended to introduce a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's view on all of the Law Commission's outstanding recommendations which have not yet been implemented, and also a statutory basis for the protocol which governs the Commission's relations with Government departments. Secondly, on 3 April 2008, the United Kingdom Parliament approved a new procedure for uncontroversial Law Commission Bills, under which a significant part of the legislative process in the House of Lords would be taken in Committee off the floor of the House. We intend to work closely with Government to develop these new arrangements, so as to accelerate the pace at which our recommendations may be considered and, where accepted, brought into force with much less delay than in the past.

The Law Commission currently has an extensive stakeholder database of those to whom we look for informed comment on our provisional proposals, based on many years of building up invaluable contacts in the legal, academic and judicial worlds. We cultivate good ongoing relations with the media and

press, so as to reach the wider community of the public and all the people who are affected by, and whom we believe will benefit from, our proposals. In the coming year, we intend to expand into even wider stakeholder fields, using online technologies to assist in this process.

As we look forward, we feel that we are entering a more encouraging environment for successful law reform than we have known for many years.

New South Wales Law Reform Commission

Reports completed

Six reports have been released in the last 12 months.

Disputes in Company Title Home Units (Report 115)

Under its Community Law Reform Program, the Commission undertook a review of the current law regulating disputes in company title home units. The review commenced in May 2006, and the Report was completed in April 2007. It was tabled in the Legislative Council in October 2007.

Prior to 1961, when strata title legislation was introduced in New South Wales, company title was the common method used for horizontal subdivision of space. It involved a form of community ownership. A person became entitled to live in a residential home unit by purchasing shares in an incorporated body (either a company or association). Company title units were often governed by restrictive constitutions, and disputes between owners could result in the Equity Division of the Supreme Court being required to adjudicate.

The Commission's Report 115 recommended that the Consumer, Trade and Tenancy Tribunal should be given jurisdiction to hear disputes arising in company title home unit buildings in relation to most types of disputes.

Uniform Succession Laws: Intestacy (Report 116)

Report 116 on intestacy was released by the Attorney General in July 2007. The Report was produced as part of the development of uniform national succession laws. All states (except South Australia) and territories participated in this review. This Report, written by the NSW Law Reform Commission on behalf of the National Committee, recommends a new, easier-to follow, set of provisions that:

- Give the whole estate of a deceased person to the surviving spouse or partner in cases where there are no children from another relationship. This accords with current practice in wills, and the general expectation that the surviving spouse or partner will leave the estate to the surviving children when he or she dies.
- Allow property to be divided between surviving spouses or partners and surviving descendants where some of the children of the deceased are offspring of another relationship.
- Broaden the rights of the surviving spouse or partner (where there are also surviving descendants of the deceased who are entitled) to elect to obtain particular items of property in the deceased estate. The current law in NSW only allows the spouse or partner to elect to obtain the matrimonial home.
- Extend the categories of relatives entitled to take on intestacy to first cousins of the deceased. In NSW, the categories of relatives entitled to take are limited to the deceased's aunts and uncles (but not their children). This brings NSW broadly into line with other States and with societal expectations that cousins should be entitled to take from an intestate estate in preference to the government.
- Allow a special regime for the distribution of estates of Indigenous people, where members of the deceased's family request it.

The final stage of the Uniform Succession Laws project, which deals with administration of estates, is being done by the Queensland Law Reform Commission. It will be completed during 2008.

Role of Juries in Sentencing (Report 118)

In February 2005, the Commission was asked by the Attorney General to investigate whether current sentencing procedures would be improved by involving juries in sentencing decisions. The Commission was asked to investigate the merits of allowing the presiding judge in a criminal trial to canvass the views of the jury when sentencing an offender. In addition, the Commission was asked to take into account whether allowing jury input in sentencing would enhance the public

confidence in the administration of justice. The suggestion for this inquiry was made by the Chief Justice of New South Wales, the Honourable James Spigelman AC.

The Commission's Report, which was tabled in Parliament in October 2007, recommended that there should be no changes to the current practice in New South Wales, and that jurors should not be involved in the sentencing process. It also recommended that further empirical studies should be done on public perceptions of the sentencing process.

The Attorney General has announced that the Government accepts the Commission's recommendations.

Young Offenders (Report 104)

Report 104, dealing with the sentencing of young offenders, was tabled in Parliament on 14 November 2007. The Report was completed in December 2005. At the time of release, the Government also published a statement outlining a detailed response to each of the Report's recommendations.

The main focus of the Report was the *Young Offenders Act 1997* (NSW) (YOA) and the *Children (Criminal Proceedings) Act 1987* (NSW). In New South Wales, young people between the ages of 10 and 17 years are sentenced under a separate system to adults. The Report examines the philosophy, practice and procedure of the juvenile justice system.

The Report strongly endorsed the objectives and approach of the YOA, which establishes a scheme for diverting young offenders from formal court processes through the use of warnings, cautions and conferencing. It recommends extending the scope of the YOA to make youth justice conferencing available in all but the most serious of offences. The Report also recommends:

- young offenders who commit serious offences should be sentenced in the usual way, but a sentencing judge should have a discretion to make an order that an offender be re-sentenced at a specified time in the future before the end of the non-parole period;
- the Children's Court should be renamed the Youth Court, with a District Court judge as its head (instead of a magistrate);
- separate criteria relating to the granting of bail should apply to young people.

While accepting a number of the detailed recommendations in Report 104, the Government has indicated that it does not support changing the name of the Children's Court, or the provisions relating to bail affecting young people.

Relationships (Report 113)

In 1984, NSW enacted legislation to deal with aspects of the breakdown of de facto relationships. The legislation was based on recommendations put forward by the Commission in a Report in 1983. This legislation, now called the *Property (Relationships) Act 1984* (PRA), was amended in 1999 to include same sex relationships and other close personal relationships. The legislation uses the phrase "domestic relationships" to incorporate the various relationships covered by it.

The Attorney General referred this review to the Commission in 1999, and its principal aim was to consider the adequacy of provisions dealing with financial adjustment orders that courts can make between persons in domestic relationships.

The nature of the review changed significantly when the decision was taken by NSW (as well as some other States) to refer its constitutional powers over de facto relationships to the Commonwealth in 2003. However, the Commonwealth then indicated that, if it legislated, it would only do so with respect to opposite sex de facto relationships. The Commission suspended work for a number of years, awaiting clarification on the scope of any proposed Commonwealth legislation. When it became apparent that legislation may take some considerable time to develop, the Commission decided to proceed to prepare a Report, but essentially limited to same sex de facto relationships and close personal relationships.

The major recommendations in the Report were as follows:

Financial adjustment orders. The PRA should follow more closely the approach in the *Family Law Act 1975* (Cth) and allow the court to consider both past contributions as well as the current and future needs of the parties.

- Definition of de facto relationship. Cohabitation should not be a prerequisite to establish the existence of a de facto relationship. However, generally a

relationship should exist for two years before property adjustment proceedings can be brought.

- Registration. There should be a system for de facto couples to register their relationships. This would not be the same as the "civil union" approach favoured by the ACT and adopted in NZ and the UK.
- Children and same sex relationships. For the purposes of the PRA, a 'child of a domestic relationship' should not be defined in the biological sense, but as 'children for whose day-to-day care and long-term welfare both parties exercise responsibility'.
- Financial agreements. Parties should be able to make their own financial agreements before, during and on termination of a relationship.

The NSW Government has announced that it will implement a number of the Commission's recommendations, including that a lesbian co-mother of an artificially-conceived child should be the parent of a child. Further implementation is likely to be considered in consultation with the other States and Territories and the Commonwealth.

Jury Selection (Report 117)

In this project, received in August 2006, the Commission had to review aspects of the *Jury Act 1977* (NSW), focusing in particular on the qualifications for jury service in NSW and the options for excusing a person from jury service.

The Commission published an Issues Paper in November 2006. The Report was completed in late 2007 and was released by the Attorney General on 8 January 2008. The Report contained 74 recommendations directed at significantly expanding the categories of persons eligible for jury service. The main recommendations are set out below.

Lawyers should generally be eligible for jury service unless they work in the provision of legal services in criminal cases.

People employed in the public sector in the administration of justice should be eligible.

No person should be entitled to be excused from jury service solely because of his or her occupation, profession or calling (eg, doctors, dentists, pharmacists).

Potential jurors should be allowed an opportunity to defer jury service and nominate another date within the next 12 months.

The Report also recommended increasing the attendance and travel allowances for jurors, strengthening the employment protection provisions for jurors, giving the court the power to appoint up to three additional jurors, and giving the court the power to discharge a juror without discharging the whole jury in special circumstances.

Other projects

Jury Directions in Criminal Trials

In February 2007, the Attorney General requested that the Commission inquire into the directions and warnings given by a judge to a jury in a criminal trial. The Commission is required to have regard to:

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge;
- whether other assistance should be provided to jurors to supplement the oral summing up;
- any other related matter.

The Commission has invited preliminary submissions, and is preparing a consultation paper which will be published in mid-2008.

Consent of Minors to Medical Treatment

In June 2004, the Commission published Issues Paper 24, *Minors' Consent to Medical Treatment,* as part of a review which is considering when young people, below the age of 18, should be able to make decisions about their medical care by themselves. The Paper examines who should be able to make medical decisions for minors on their behalf, and what the legal liability of medical practitioners should be who treat minors without valid legal consent.

The Commission conducted consultations in the second half of 2006, and conducted a full-day seminar in November 2006, jointly organised with the Law School at Macquarie University.

The Commission's Final Report should be available in mid-2008.

Privacy

The Commission published Consultation Paper 1 (CP 1), entitled *Invasion of Privacy*, in May 2007. The Paper considers the question whether a new cause of action based on invasion of privacy should be enacted in New South Wales. The Paper considers the elements of such a cause of action, the defences and the remedies.

Since the publication of CP 1, the Australian Law Reform Commission (ALRC) has published Discussion Paper 72, a very detailed review of Australian privacy law which tentatively supports a new cause of action based on invasion of privacy. The ALRC completed its review on 31 March 2008.

The NSW Law Reform Commission will publish a Report in July 2008 dealing with the issue of whether there should be a new cause of action.

The Commission will also be publishing another Consultation Paper in June 2008 which examines aspects of New South Wales privacy legislation (primarily the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002).*

People with Cognitive or Mental Health Impairments

The Commission commenced two projects in early 2007 under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system. The first was to review section 32 of the *Mental Health (Criminal Procedure) Act 1990.* This provision gives a magistrate very broad powers (including diversion from the criminal justice system) when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chp 3 of the *Mental Health Act 1990.* The second project was to review the principles of sentencing offenders with cognitive or mental health impairments.

In September 2007, the Attorney General issued the Commission with new, expanded terms of reference. As well as the matters already being considered, the Commission is now also required to consider 'fitness to be tried' and the 'defence of mental illness'.

The Commission will be publishing a Consultation Paper in July 2008.

Complicity

In January 2008, the Commission published a Consultation Paper on the law of complicity. Complicity refers to rules that widen criminal liability beyond the main perpetrator of a criminal act to another person or persons who may have assisted the main perpetrator to commit an offence. The secondary participant can be held equally guilty of the crime committed. The concept is often referred to as derivative or secondary liability. The law of complicity in NSW is still based on the common law, unlike most states, territories and the Commonwealth, which have codified the relevant principles.

The Commission's Paper focuses on two types of complicity: (1) extended common purpose; and (2) accessorial liability. The third type, which is not considered in any detail, is concerned with joint criminal enterprise.

The Paper outlines the criticisms which have been directed at these aspects of the law of complicity, particularly by Justice Kirby in a number of High Court cases.

The Commission will complete a Report on complicity in the latter half of 2008.

Queensland Law Reform Commission

A review of the provisions of the *Criminal Code* (Qld) relating to the excuse of accident and the defences of provocation

In April 2008, the Queensland Law Reform Commission received a reference to review the excuse of accident under s 23(1)(b) of the Criminal Code (Qld) and the partial defence of provocation under s 304 of the *Criminal Code* (Qld).
The review's main focus is the operation of these provisions in murder and manslaughter trials. In particular, the Commission is required to have regard to the results of an audit commissioned by the Queensland Attorney-General in 2007 into homicide trials in which the excuse of accident or the partial defence of provocation was raised as an issue for the jury. The Commission is also required to consider whether these provisions reflect community expectations.

The Commission has also been asked to review: the complete defence of provocation for assault offences under sections 268 and 269 of the *Criminal Code* (Qld);

- the use of alternative counts to charges of manslaughter, including whether section 576 of the *Criminal Code* (Qld) should be redrafted;
- whether there is a need for new offences, for example, assault occasioning grievous bodily harm or assault causing death; and
- whether the current provisions dealing with the excuse of accident and the complete and partial defences of provocation are readily understood by a jury and the community.

The Commission will release a Discussion Paper in June 2008 and complete its final report by 25 September 2008.

Reviews of jury directions and jury selection

In April 2008, the Commission also received two new references in relation to juries.
The first reference is a review of the directions, warnings and summings up given by judges in criminal trials. The Commission has been asked to recommend changes that will simplify, shorten or otherwise improve the current system. The final report for this review is required by 31 December 2009.

In the second reference, the Commission has been asked to review the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors. The final report for this review is required by 31 December 2010.

A review of the Peace and Good Behaviour Act 1982 (Qld)

The Queensland Law Reform Commission has recently completed its review of the *Peace and Good Behaviour Act 1982* (Qld).That Act presently enables a magistrate to make an order requiring a person to 'keep the peace and be of good behaviour'. The Act is very brief and leaves many issues unaddressed or in need of clarification. The Commission was asked to undertake a comprehensive review of the Act to establish whether it provides an accessible and effective mechanism for protecting members of the community from violent or threatening conduct. If the Act was found to be inadequate, the Commission was also asked to recommend whether the Act should be amended or replaced with new legislation. The final report will be available on the Commission's website once the report has been tabled in the Queensland Parliament.

Scottish Law Reform Commission

Criminal law

The Scottish Law Commission's Report on *Rape and Other Sexual Offences* (No 209) was published in December 2007, and is available on the Commission's website. The Scottish Government consulted on the Commission's proposals between December 2007 and March 2008, and is expected to introduce implementing legislation in the near future.

In November of 2007, the Commission received a new reference from the Scottish Government, in which it was asked to consider the law relating to: (1) judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such; (2) the principle of double jeopardy, and whether there should be exceptions to it; (3) admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and (4) the *Moorov* doctrine (that is, the doctrine that evidence of the commission of a crime from a single witness can corroborate evidence of the commission of another crime from a single witness provided that the crimes are sufficiently connected in time, character and circumstances to suggest that they form part of a single course of criminal conduct).

The Commission has commenced work on the first two projects to arise from this reference. Our Discussion Paper on *Crown Appeals* (No 137) was published in March 2008 and is available on the Commission's website. The Commission expects to submit its report on this, the first aspect of the reference, in the summer of 2008. Work is also underway on a discussion paper on double jeopardy, to be published towards the end of 2008. We currently expect to report on the remaining aspects of the reference in 2010 or 2011.

Consumer remedies

The Department for Business, Enterprise and Regulatory Reform has asked us to look at simplifying the remedies which are available to consumers when they purchase goods which do not conform to contract because, for example, they are faulty. We have also been

asked to look at remedies relating to the supply of goods. This is a joint project with the Law Commission for England and Wales.

The Davidson Review, which reported in November 2006, concluded that this area of law is unnecessarily complex due to an overlap of domestic and EU remedies. One result of this complexity is that consumers, sales staff and consumer advisers find the law difficult to understand.

The EU Commission is currently carrying out a general review of consumer directives, including the Consumer Sales Directive which was implemented in the UK in 2002. As part of this project, the Department has asked us to advise it on any issues which appear to be of relevance to that review.

Our aim will be to recommend appropriate remedies which make this area of the law easier for all users to understand and use. We plan to publish a joint consultation paper before the end of 2008. Meanwhile, an Introductory Paper is available on our website.

Insurance law

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

Insurance law in the United Kingdom has been criticised as outdated and unduly harsh to policyholders.

A joint scoping paper was published in January 2006 to seek views on areas of insurance contract law which should be included within the scope of this project. As a result of the helpful comments submitted in response to that paper, the project includes topics such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay.

We intend to publish two joint consultation papers, the first of which was published in July 2007. It deals with misrepresentation, non-disclosure and breach of warranty by the insured. The aim is to publish the second paper around the end of 2008. It will deal with insurable interest, damages for unjustifiable delay and post-contractual good faith.

Unincorporated associations

We are currently examining the law relating to unincorporated associations. Such bodies exist for a wide variety of purposes and in a wide range of sizes and structures. At one end of the scale they may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals joining together for temporary and specific purposes.

In Scots law, such associations are not recognised as having a separate legal personality. It is this absence of personality which can create difficulties and injustices. For example, problems have arisen in the following areas:

- The extent of liability of association members, and of association officials, under contracts with third parties, including staff, is uncertain.
- The extent of liability of association members, and of association officials, under the law of delict is uncertain.
- Title to heritable property must be held in the name of individuals who may cease to be members of the association's governing body, or of the association itself.

Under the present law, a non-profit making organisation which wishes to escape the consequences of the absence of legal personality has little choice but to incorporate. In many jurisdictions whose common law of associations was based upon English law, there have been statutory interventions by virtue of which clubs and associations have ceased to be treated as legal non-entities. The jurisdictions of the United Kingdom have been left behind in this respect. We think that it may be time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations. We will look at various options and put some forward for consideration in a discussion paper which we hope to publish by the autumn of this year.

Damages for wrongful death

We received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

Our Discussion Paper on *Damages for Wrongful Death* (DP No 135) was published on 1 August 2007 inviting comments by the end of November. The next stage in the project will be to analyse the responses and prepare a report and draft Bill, which we aim to complete

in 2008.

Property

The Commission continues to work on the 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 discussion paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The Commission is now working on the report.

The Commission's Report (No 208) on *Sharp v Thomson* was published in December 2007. At present someone buying property can, in certain circumstances, lose the property if a corporate seller becomes insolvent before the purchaser registers title to it. While the current law is satisfactory at protecting someone who purchases property against the risk that an individual seller might become insolvent, it is less satisfactory in the case of a corporate seller. With the aim of reducing the risk where a company sells property, the Report recommends that the rules be tightened; (1) to ensure that buyers can readily find out whether winding-up proceedings against a corporate seller have been initiated; and (2) to ensure that floating charges cannot attach to the property without the attachment having been publicly registered—the 'no attachment without registration' principle.

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. A public attitude survey was commissioned and a report of the results 'Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey' was published by the Scottish Executive in July 2005. The Commission's Discussion Paper on Succession (No 136) was published on 16 August 2007. It contained many proposals for reform on: intestacy where there was a surviving spouse or civil partner, stepchildren's rights on intestacy, and whether (and, if so, how) spouses and civil partners, cohabitants, children (including stepchildren) and others should be protected from disinheritance. The consultation period ended on 31 December 2007 and, after considering the responses, we are in the process of drawing up a report and draft bill. We are aiming at a publication date early in 2009.

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 final Phase 1 discussion paper, *The Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered the dual patrimony theory, the possibility of conferring legal personality on trusts and what juridical acts are required to constitute a trust as between the truster and the trustees/ beneficiaries and as between the truster and third parties. It dealt also with latent trusts of heritable property.

The second phase of the project will cover the variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It also looks at trustees' liability to third parties, on which we published a Discussion Paper (No 138) in May 2008, and enforcement of beneficiaries' rights. The Commission published a Report (No 206) on *Variation and Termination of Trusts* in March 2007 following a Discussion Paper in December 2005. The Report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

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 also has 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. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. Unfortunately, the project is currently suspended due to the need to give priority to other work but we hope to be able to publish a discussion paper by the summer of 2008.

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

Review of Administration Orders

Under the *Magistrates' Courts Act 32 of 1944*, a debtor who is unable to pay debts that do not exceed R50,000 may apply to a magistrate's court for an administration order. An administration order makes provision for the payment of debts in instalments or otherwise, and for the administration of the debtor's estate.

It has been argued that there are problems with administration orders. For example, it has been argued that: administrators overcharge for remuneration and expenses; unsuitable persons are appointed as administrators; administrators do not distribute funds regularly or account to creditors properly; administration orders are not regulated properly; and that administration orders can keep debtors in bondage for life.

Before the Commission could publish a discussion paper or other documents, the Project Committee was briefed on the National Credit Bill, which later became the *National Credit Act 34 of 2005*. A number of provisions of the *National Credit Act* have a significant effect on administration orders.

Accordingly, the Commission has invited comments from the public on its recommendation that administration orders should be abolished if certain changes are made to the National Credit Act. These changes will address over-indebtedness because of delictual claims; failure by a debtor whose debts have been rescheduled to comply with the debtor's obligations according to the rescheduling; and the duration of administration orders.

Review of the Law of Evidence

The Commission has completed has published an Issues Paper designed to generate debate about the issues to be considered during the review and to provide stakeholders with the opportunity to identify additional issues that should be considered by the Commission.

The Issue Paper contains a brief overview of the current law. It will be followed by Discussion Papers that analyse the issues identified for review and reform in detail and contain preliminary recommendations for reform.

The topics addressed in the Issues Paper include: the scope of the law of evidence; codification of the rules of evidence; the burden of proof and the duty to adduce evidence; the standard of proof; the cautionary rules; competence and compellability; private and state privilege; previous statements; hostile witnesses; similar fact evidence; opinion evidence; expert evidence; and informal admissions and confessions.

The Commission has also released a Discussion Paper on hearsay evidence and relevance. In the Discussion Paper, the Commission discusses the underlying rationale for the hearsay rule, and examines the nature of the rule in some other common law jurisdictions. It discusses a number options for reform of the rule in detail and invites comments and views on these options. Options for reform of the hearsay rule include: retaining the status quo (with, or without, the introduction of a notice requirement); removing the rule and allowing the free admission of hearsay evidence (with, or without, decision

rules pertaining to weight); and amending the rule so that there are different approaches to hearsay evidence in civil and criminal trials.

It its Discussion Paper, the Commission also outlines the concept of legal relevance. It discusses the difficulties with ascertaining relevance in the absence of a legislative definition of the concept. It proposes that legislative guidelines be introduced to define relevance and specify when relevant evidence is inadmissible.

Customary Law of Succession

The *Black Administration Act of 1927* did not codify or define African customary law. It simply singled out Africans as a separate segment of society, subject to a different, discriminatory set of rules and laws, under the apartheid system. It provided that all Africans were subject to African customary law. Therefore, the African customary law rule of male primogeniture applied.

The recommendations in the Commission's Report aim to reform the customary rule of male primogeniture, which the Constitutional Court has ruled to be unconstitutional. Prior to the release of the Report, the Commission published a Discussion Paper, which was widely distributed and elicited comments from interested parties. It also held a series of workshops which were attended by, among others, traditional leaders in all the provinces.

The Commission considers the approaches that have been taken to reform of the customary law of succession in other African countries—namely, Malawi, Ghana, Zimbabwe and Zambia. It then considers the legislation that governs the application of the customary rules of succession in South Africa, including the *KwaZulu Act on the Code of Zulu Law 16 of 1985* and the *Natal Code of Zulu Law, Proc R151 of 1987*.

In its report the Commission recommends the repeal of s 23 of the Black Administration Act of 1927. It also recommends that property rights relating to certain customary marriages be protected, that is, that the protection afforded to a widow whose customary marriage was dissolved by her husband entering into a civil marriage with another woman be retained (section 22(7) of the *Black Administration Act of 1927*). The discarded widows and children of these marriages should inherit on par with the civil marriage widows, provided that such customary marriages were contracted before 2 December 1988 (before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act of 1988).

The Commission also discusses various customary law arrangements that fall outside the customary marriage, including all related and supporting marital unions (ukungena, ukuzalela, ukuvusa and ancillary unions entered into by women) that are found in all African communities, in order to clarify the status of women in these unions. The Commission recommends that the women and children in such unions should share in the estate of the deceased, who, or on whose behalf, the union was entered into.

Generally, Africans do not adopt children in accordance with the prescripts of the *Children's Act 38 of 2005*. The *Intestate Succession Act, 1987* places adopted children of a deceased in the same position as other children for purposes of intestate succession. It is recommended that children adopted in terms of customary law should also inherit from their adoptive parents.

Provision is made for property accruing to a woman or her house under customary law by virtue of her customary marriage to devolve in terms of a will. If she dies without a will, her property will devolve in terms of the Intestate Succession Act, 1987. Any reference in a will of such a woman to a 'child' and any reference in s 1 of the Intestate Succession Act to a 'descendant' in relation to such a woman who dies without a will, will be interpreted to include any child born out of any ancillary union entered into in terms of customary law for the purpose of raising or increasing children for such woman or her house.

In Western societies, the law emphasises the interests, rights and liberties of individuals. On the contrary, African customary law is genera , traditional and aimed at preserving group interests. Accordingly, it is foreseen that the rigid application of rules of succession will not always meet the needs of the persons concerned. The Commission has recommended a procedure for resolving disputes and uncertainties about the devolution of family property, among others. These disputes or uncertainties will be determined by the Master of the High Court having jurisdiction.

The report contains draft legislation which is intended to modify the customary law of

succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard. The adoption of this draft Bill by Parliament will go a long way in creating legal certainty with regard to the intestate succession of women and children.

Trafficking in Persons

The Commission is in the process of completing its report on trafficking in persons. The trafficking investigation seeks to develop specific legislation to combat human trafficking. Currently human trafficking provisions have been integrated into laws relating to children, while trafficking of persons for sexual exploitation is covered in the new *Sexual Offences Act*.

There is no integrated trafficking statute that covers trafficking offences that transcend children's rights violations and sexual offences. This means that South Africa only partially complies with its international obligations under the *Convention for the Suppression of the Traffic in Persons and of Exploitation of Prostitution of Others*, the Palermo Protocol and related international treaties. The Commission's Report, which will be released in the next few months, will include draft legislation and administrative measures which will assist South Africa to achieve a holistic response to human trafficking.

Other current investigations

The Commission will also soon be releasing reports on the following:

- Protected Disclosures;
- Assisted Decision-making: Adults with Impaired Decision-making Capacity;
- Sexual Offences: Adult Prostitution;
- Privacy and Data Protection;
- Stalking (Submitted).Other developments

Commission processes reviewed

In the past year, the Commission decided to review its research, consultation and reporting processes, within the ambit of the enabling statute. The main focus of the process review is to enhance public participation, including participation of historically marginalised communities, in law reform processes. The Commission's process review also seeks to improve the turnaround time between the referral of an investigation by the Minister for Justice and Constitutional Development and the finalisation of the Commission's Report. In summary, the process review involves:

- aligning the Commission's research programme to South Africa's legislative priorities as a developmental state;
- ensuring that the process of compiling the Commission's research agenda is inclusive;
- streamlining research processes to reduce turn-around time; and
- enhancing inclusive participation in research processes.

Recent laws based on commission reports

The following Commission reports have formed the basis of recent statutes and Bills:

- The Domestic Partnerships Report (formed the basis of the Domestic Partnerships Bill 2007 and the *Civil Unions Act*);
- The Sexual Offences Report (formed the basis of the *Criminal Law (Sexual Offences) Amendment Act)*;
- The Child Care Report (formed the basis of the *Children's Act* and Children's Amendment Bill); and
- The Juvenile Justice report (formed the basis of Child Justice Bill)

Ismail Mahomed Law Prize

A few years ago the Commission, in partnership with Juta, established the Ismail Mahomed Law Prize (honouring the late Chief Justice). The aim of the competition is to encourage critical legal writing by students while generating ideas for the reform of the law in our new constitutional democracy.

The competition involves essay writing, and the winning essay is selected by a panel of judges. The prizes for 2008 include a laptop valued at R15, 000, credit vouchers, a year's subscription to South African Law Reports 1947–date on CDRom, and a one year subscription to Juta Statutes and Regulations of South Africa and the Juta Statutes in print. Entries will soon be invited for the 2008 competition.

Personnel Changes

President Thabo Mbeki appointed a new group of Commissioners at the beginning of January 2007. Justice Yvonne Mokgoro (Constitutional Court) retained her position as Chairperson.

Justice Willie Seriti (Pretoria High Court) was appointed Vice-Chairperson. The new Full-time Commissioner is Ms Thuli Madonsela (Waweth Law and Policy Research Agency).

Part-time Commissioners are:

- Justice Dennis Davis (Cape Town High Court);
- Prof Cathi Albertyn (Witwatersrand University);
- Mr Thembeka Ngcukaitobi (Attorney);
- Advocate Dumisa Ntsebeza SC (Cape Bar)
- Prof Pamela Schwikkard (University of Cape Town);
- Advocate Mahlape Sello (Johannesburg Bar).

The Commission also welcomed three new Senior State Law Advisers to its full-time staff. Mr Linda Mngoma was appointed on 1 February 2008 and Ms Nerisha Singh and Mr Tshepang Monare on 1 May 2008.

Tasmanian Law Reform institute

Completed Projects

Human Rights Project

In 2006, the Tasmanian Government invited the Tasmanian Law Reform Institute to investigate how the fundamental rights Tasmanians hold as significant might be further enhanced and legally secured. As part of the community consultation process, the Institute released an Issues Paper in September 2006 and members of the Human Rights Consultation Committee undertook 66 community consultation meetings, briefing sessions and presentations with a wide range of community groups.

In October 2007, the Institute released Final Report no 10 that recommended that a Charter of Human Rights be enacted to enhance human rights protection in Tasmania. The Institute received 407 submissions from individual citizens and organisations. This is the largest number of original submissions received on any project undertaken to date by the Institute. The majority of submissions received (94.1%) supported the enactment of a Charter of Human Rights. The Institute considers that a Charter of Rights will provide a single, comprehensible statement of the fundamental rights applicable in Tasmania, foster community awareness of human rights and encourage the systematic development and observance across all arms of government of processes responsive to human rights. The Report contains 23 recommendations, including recommendations that:

- economic, social and cultural rights be included in the Charter as well as civil and political rights;
- the Charter only bind 'public authorities';
- the Charter contain specific enforcement provisions;
- establish an independent office of Tasmanian Human Rights Commissioner;
- the most appropriate form for a Tasmanian Charter would be an ordinary piece of legislation.

Ongoing projects

Criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or other serious injury: *Jiminez.*

In September 2007, the Institute released Issues Paper No 12 that considered the appropriate role for the criminal law in cases where a driver falls asleep and causes death or serious injury as a result of a motor vehicle crash. The Issues Paper examined the application of the principles articulated in *Jiminez* to the framework currently in place in Tasmania. An examination of the legal consequences of falling asleep at the wheel highlights the tension between two competing views. On one hand, there is a reluctance to apportion criminal liability to acts over which a person has no conscious control. On the other hand, the community is becoming increasingly aware of the dangers posed by drivers affected by tiredness or some other medical condition which may cause a person to fall asleep. The community has an interest in seeing that drivers are deterred from driving in circumstances where they pose a danger to themselves and other road-users, and are punished if they do so and cause harm or death to others. A final report is being prepared.

Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases

This project considers the operation of sections 97, 98 and 101 of the *Evidence Act 2001* in the context of sexual offence cases. The rules governing the admissibility of tendency or coincidence evidenlce continue to cause difficulties for complainants, prosecutors and

judges, particularly in cases of sexual assault involving multiple complainants with some association. Consideration will be given to the need for amendments to the law in order to lessen the exposure of complainant's to repeated cross-examination, and to avoid repeated voir dires, appeals and retrials. An issues paper will be prepared for release in 2008.

New projects

Easements and analogous rights

The project was approved by the Board in August 2007 and commenced in March 2008. It will review the current laws of easements and analogous rights to determine whether they currently meet community expectations and needs. The review will provide a report of the current law of easements and outline possible areas for reform, consider the current legislative requirements in Tasmania for the creation, variation and termination of easements, and consider the interaction of the legislation with the current common law requirements. An issues paper will be prepared for release in 2008.

Male circumcision

The project was approved by the Board in February 2008. It will review the current law regulating the circumcision of male children in Australia, with particular reference to Tasmania. The project will examine the criminal and civil responsibility of those who perform, aid or instigate the procedure. In relation to civil responsibility, the project will examine the requirement of informed consent and the unique nature of the procedure. Questions of who may consent or authorise the procedure when children are involved will also be addressed. The possible constitutional, equal protection from the law and discrimination issues that arise depending on whether circumcision is lawful or unlawful currently will also be investigated. In examining these issues, the project will take account of the law in foreign jurisdictions and international law. An issues paper will be prepared for release in 2008.