Reform

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

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Administrative Review Council

The scope of judicial review

In March 2003, the Council is to release a Discussion Paper on the scope of judicial review. The Discussion Paper deals with a number of issues related to judicial review including:

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

Taking into consideration comments received on the Discussion Paper, the Council proposes to develop a set of guidelines for agencies, legislators and commentators relating to the appropriate scope of judicial review.

Copies of the Discussion Paper may be obtained by contacting the Council (see details below).

Automated assistance in administrative decision making

The Council is also shortly to publish an Issues Paper on automated assistance in administrative decision making. The Issues Paper considers the implications

of the use of expert systems for primary decision making, particularly the potential de-skilling of decision makers, and how administrative review is undertaken of decisions made using expert systems.

An expert system is a computing system which, when provided with certain basic information and general rules instructing it how to reason and draw conclusions, can then mimic the thought processes of a human expert in a specialised field. In particular, the Council's Issues Paper focuses on rule-based systems which are generally the kind of expert system used by Commonwealth government departments when making administrative decisions.

Copies of this paper will be available from the Council.

Coercive powers of government agencies

The Council has recently begun work on a project examining the coercive powers of the Australian Consumer and Competition Commission (ACCC), the Australian Taxation Office (ATO), Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Customs Service (ACS) and Centrelink.

Coercive powers are legislative powers empowering an agency to require certain actions to be undertaken, such as, the furnishing of information, answering questions, and/or production of documents or books.

In exercising coercive powers, agencies make administrative decisions which are subject to judicial review and some legislation also includes merits review procedures. While the coercive power provisions of each agency often have similar features, they can nonetheless be quite different in important respects. Such differences raise issues as to the extent to which consistency is possible and/or desirable and the extent to which differences in coercive powers may or may not be warranted.

The primary outcomes of the project will be:

a) illumination of coercive powers and their use by the six specified agencies;

b) identification of the key elements to be considered in the development and use of coercive powers and the appropriateness of a model set of coercive powers; and

c) recommendations to Government directed to:

- ensuring that coercive powers are exercised within an appropriate accountability frame work;
- ensuring that there are appropriate protections in place for those subject to the exercise of such powers; and
- the appropriateness of a model set of coercive powers.

Revised statements of reasons publications

In November 2002, the Council revised its *Practical Guidelines for Preparing Statements of Reasons* and the *Commentary on the Practical Guidelines for Preparing Statements of Reasons*. The revision of the publications was necessary given recent changes in case law and legislative provisions. In particular, the publications have been modified to take into account the High Court's decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

Copies of Council publications can be obtained by contacting the Executive Director at the Administrative Review Council, Robert Garran Offices, Barton, ACT 2601, Phone 02 6250 5800, Fax 02 6250 5980, e-mail arc.can@ag.gov.au, or by viewing the website at <http://www.ag.gov.au/www/arcHome.nsf>.

Copyright Law Review Committee

The Copyright Law Review Committee's (CLRC) report ***Copyright and Contract*** was released by the federal Attorney-General on 1 October 2002. The report

analyses the relationship between copyright and contract, finding that contracts are being used to set the terms and conditions of access to, and use of, copyright material in the digital environment.

There has been substantial interest in the report. In addition to wide-ranging press coverage, various functions have been held to discuss the report. The Copyright Society of Australia hosted forums in both Sydney and Melbourne in October, where members of the CLRC provided an overview of the report and its recommendations. There was a strong level of interest at these events and over 50 people attended the Sydney function. The CLRC Secretariat also spoke at a meeting of the Copyright in Cultural Institutions Group at the National Museum of Australia and provided a presentation to the Victorian Society for Computers and the Law (VSCL) on 20 February 2003. The Report was also be the subject of two separate addresses at the copyright conference in Brisbane on 14 February 2003 hosted by the Intellectual Property Research Centre and the Australian Centre for Intellectual Property in Agriculture.

The interest in this issue and the level of discussion at these functions provide a useful starting point for the Government's consideration of the report. The Government is expected to respond to the report this year.

The CLRC anticipates that a new reference will be provided by the Attorney-General soon.

Copies of the report are available from Commonwealth Government Bookshops and from the CLRC website at <www.ag.gov.au/clrc>.

Family Law Council

Child and Family Services (CAFS) Committee

With the launch of its much anticipated final report, ***Family Law and Child Protection***, on 27 October 2002 by the Attorney-General, The Hon Daryl Williams AM QC MP, the work of this Committee concluded.

This report is available on the Council website and in hardcopy from the Family Law Council Secretariat.

Paramountcy Principal Committee

The Paramountcy Committee is continuing with its review of the operation of section 65E of the *Family Law Act 1975* (Cth), which sets out the 'best interests of the child' principle, commonly known as the paramountcy principle.

Violence Committee

The Committee is liaising with the Family Court of Australia concerning its review of its family violence policy.

Approved terms of reference

The Attorney-General has recently approved terms of reference for the Family Law Council to undertake work in response to the Family Law Pathways Advisory Group's Report *Out of the Maze* — published in August 2001.

The references concern:

1. The Aboriginal and Torres Strait Islander Issues Committee
This project is to investigate implementation of recommendation 22 of the Pathways report *Out of the Maze*. The Committee is currently consulting with interested groups and considering their submissions. Following this exercise it is envisaged that a letter of advice to the Attorney-General will be drafted.

2. The Child Representative Committee
This Committee has been tasked with revisiting the findings and recommendations of the Family Law Council's 1996 Report, *Involving and Representing Children in Family Law*, in light of the significant social trends and judicial developments since its release, and also in response to recommendation 21 of

the Pathways report *Out of the Maze*. The Committee has commenced work on drafting a Discussion Paper.

3. The Guidelines Committee

This Committee has been established as a result of the Pathways report *Out of the Maze*, and its recommendation 4(a), calling for: "the development of a national code of conduct for lawyers practising family law to reflect the principles outlined in this report and to include a commitment to actively promote non-adversarial dispute resolution and other good practices. Lawyers who subscribe to and observe the code should be readily identifiable to clients and service providers." The Committee includes members from the Family Law Section of the Law Council of Australia. A consultation draft is being prepared.

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

New South Wales Law Reform Commission

Cross-examination in sexual assault cases

In August 2002, the Commission published Issues Paper 22, which considers whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine the complainant in person and, if not, what alternatives are available.

At present in New South Wales, the law does not prohibit an accused from representing himself or herself in any criminal trial. In most criminal trials, accused persons are represented by lawyers, but it is not uncommon for an accused person to be unrepresented, either because they are ineligible for legal aid, or because they choose not to engage a lawyer. Concerns have been raised as to whether in sexual assault cases an unrepresented accused may use cross-examination unfairly as an opportunity to intimidate or humiliate the complainant.

The Issues Paper notes that persons standing trial for a criminal offence have the right to appear and to test the evidence tendered by the prosecution case against them. Any restrictions on this right must be carefully considered. On the other hand, placing restrictions on cross-examination by an unrepresented accused may reduce the distress suffered by victims in court, and could lead to an improvement in the quality of their evidence.

The Issues Paper sets out a number of matters for consideration. These include:

- Should there be any explicit limitation on cross-examination in person, or would greater judicial control of proceedings be sufficient?
- If an explicit limitation were adopted, should it be mandatory, presumptive, or discretionary?
- If a defendant is prevented from cross-examining the witness in person, what procedure should be followed?
- Should the court have the power to decide whether or not it is necessary, in the interests of justice, that the witness' evidence be tested, or should it, in every case, provide an alternative means of questioning the witness?
- If the accused is prevented from asking the questions in persons, and the questions are put to the witness by another person, must this person be a legal practitioner?

The Commission is currently finalising its Report, which it expects to be published in May 2003.

Apprehended violence orders

The Commission published Discussion Paper 45 in November 2002, as part of a review of the system of Apprehended Violence Orders, known as AVOs, set out in Part 15A of the *Crimes Act 1900* (NSW).

Introduced in 1982 in New South Wales, AVOs were originally designed as a means of stopping existing domestic violence, and preventing future acts of violence in the home. Over the last 20 years, the law

dealing with AVOs has been amended to make them easier to obtain. For example, a person may apply for an AVO if they fear not only physical violence, but also intimidation, stalking or harassment.

Also, the categories of people who are eligible to apply for an AVO have been expanded. Under the current law, anyone may apply to the local court for an AVO, regardless of whether they are in a domestic relationship with the alleged perpetrator. However, the law recognises that different issues may arise in domestic violence, and so provides for two types of AVOs: Apprehended Domestic Violence Orders (ADVOs), for people living in a domestic relationship, and Apprehended Personal Violence Orders (APVOs), for all other circumstances.

The last decade in particular has seen a marked increase in the numbers of AVOs being applied for and granted by the courts. In 2001, over 26,000 final AVOs were granted by local courts in New South Wales, compared with just under 1,500 granted in 1987. This increase has fuelled controversy surrounding the issue of whether or not AVOs are too easy to obtain. This question is examined in the Discussion Paper released by the Commission, together with the following:

- How effectively do AVOs work as a means of preventing violence, intimidation or harassment?
- Are they being sought for inappropriate reasons and, if so, how can the law address this?
- How beneficial are AVOs to people in more marginalised groups, such as Aboriginal, rural and ethnic communities, children and older people, and how can AVOs be made more accessible to such groups?
- How effectively is the law being implemented by the police and the courts?
- How adequate are the relevant support services?

The Commission is currently conducting consultations with interested organisations and individuals. It has already visited Moree, Bourke, Orange and Griffith in regional NSW.

Other developments

The Commission is continuing work on three projects relating to sentencing. Reports on ***Sentencing: Corporate Offenders***, and ***Sentencing: Young Offenders*** are expected to be released in May 2003. A Discussion Paper on ***Legislative Sentencing: Mandatory Penalties*** is also anticipated to be released in May 2003.

The Commission has also completed a Report on Contempt by Publication. This Report is a comprehensive review of the law, and contains draft legislation to implement the Commission's recommendations. The Commission also anticipates this Report being available in May 2003.

The Commission has commenced work on three other projects:

- To review aspects of the *Jury Act*, in particular, whether people who are blind or deaf should be able to serve on juries.
- To review the law relating to the consent by minors to medical treatment.
- To review the *Community Justice Centres Act 1983*.

One of the recommendations in the Commission's Report on ***Sentencing*** (Report 79, 1996) was recently implemented in the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002*. As its name implies, the Act specifies general sentencing principles that the court should apply when imposing a sentence on an offender.

Details of projects and publications of the New South Wales Law Reform Commission can be found at <www.lawlink.nsw.gov.au/lrc>.

Queensland Legal, Constitutional & Administrative Review Committee

The Legal, Constitutional and Administrative Review Committee is a committee of the Queensland Parliament with a broad range of law reform responsibilities granted under the *Parliament of Queensland Act 2001*.

Meeting with the Queensland Ombudsman

On 26 November 2002, the Committee met with the Queensland Ombudsman and senior officers of the Ombudsman's office to discuss issues arising from the Ombudsman's *2001/2002 Annual Report to Parliament*.

On 12 December 2002, the Committee tabled in the Parliament Report No 36 on its meeting with the Ombudsman. The report included questions on notice the Committee had asked of the Ombudsman prior to the meeting and the Ombudsman's responses to those questions, together with a transcript of the meeting of 26 November 2002.

Hands on Parliament Inquiry

An inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic processes.

The consolidation of the Queensland Constitution has been ongoing for many years. Much of this work culminated in the report of the Queensland Constitutional Review Commission (QCRC) which was tabled in the Queensland Parliament on 29 February 2000.

One of the recommendations of the QCRC was that, during the life of the next Parliament, the Legal, Constitutional and Administrative Review Committee 'conduct an inquiry into the possibility of special representation for Aborigines and Torres Strait Islanders.' Aboriginal and Torres Strait Islander peoples are the original inhabitants of Australia and represent more than 3% of the Queensland population, yet only one Indigenous person has ever been elected to the Queensland Parliament — Mr Eric Deeral.

The Committee considers the issue to be an important one and has acted on the recommendation of the QCRC. There are strategies which can help to increase the involvement of Indigenous Queenslanders in the development of legislation and government policy which directly affects their rights and interests. The strategies examined in the Committee's issues paper are just a few examples of what could be considered. The Committee is also seeking other suggestions from members of the community.

The issues paper was released in December 2002. This paper sets out the background to the inquiry, examines issues arising and examines some strategies which might enhance the participation of Indigenous people in Queensland's democratic processes.

The five strategies outlined in the issues paper are as follows:

1. Enhancing participation in existing processes through, for example, civics and voter education, political party encouragement, mentoring and youth parliaments.

2. Direct input into Parliament: Systems whereby a representative body (either a new body or an existing body such as the Aboriginal and Torres Strait Islander Commission [ATSIC] or the Aboriginal and Torres Strait Islander Advisory Board [ATSIAB]) could provide direct input to Parliament might help to ensure issues relevant to Indigenous people are heard in Parliament. This direct input could take many forms including asking questions on notice of ministers, reporting to Parliament on the implications for Aboriginal and Torres Strait Islander peoples of bills and addressing Parliament on bills directly affecting Indigenous interests. Some Canadian provinces allow public input into bills and question time. A joint parliamentary/community committee might be another mechanism to provide direct input into Parliament.

3. An Aboriginal and Torres Strait Islander Assembly could operate in parallel to the Legislative Assembly and meet and report back to the Queensland Parliament. Norway has a separate assembly for the Sami people. In the United States, Indigenous tribes have formed the National Congress of American Indians to form consensus based policy to present to government.

4. Dedicated seats: A set number of seats could be set aside in the Parliament for Indigenous members. Such members could have all the same rights and privileges as those members in general seats or their rights or role could be limited to speaking, voting and/or asking questions on

matters directly relevant to Indigenous peoples. Dedicated seats are used in New Zealand to ensure Maori representation. Maori people can elect to be on the general electoral roll or the Maori electoral roll. In Maine, USA, two seats are reserved in the state legislature for the main Indian tribes. These representatives can sponsor legislation but are not entitled to vote.

5. Changes to the electoral process: The current electoral system in Queensland does not necessarily achieve representation of the broad range of interests within society. In particular there is a risk that minority groups will be underrepresented especially if the group is geographically spread throughout the state. The electoral system in New Zealand, the Mixed-Member Proportional system, or some other system may provide an opportunity for a more representative legislature. A fundamental change to the electoral system would raise issues which would extend far beyond the scope of the current inquiry. However, if the Committee receives evidence that changes to the electoral system would be advantageous and appropriate it could recommend a review of the electoral system, either by a future Parliamentary committee or some other body.

The issues paper discusses each of these strategies in more detail, outlines advantages and disadvantages of each and raises issues for comment. The Committee hopes that the issues paper will stimulate discussion about the issues and that people will make submissions which generate further options for the committee to consider.

Over the coming months the Committee will undertake face to face consultation with relevant organisations and in communities throughout Queensland through public hearings, community meetings and visits to some regional areas.

Although the inquiry relates to the Queensland Parliament, the Committee is interested to hear the views of *Reform* readers on this important issue.

The first round of submissions to the inquiry closed on 28 March 2003. Copies of these submissions are available by contacting the Committee secretariat. Further rounds of submissions will be invited throughout the inquiry. Please join the subscriber list at <http://www.parliament.qld.gov.au/Committees/LCARC/LCARCHandsonParl.htm> if you would like updates about the inquiry.

Other constitutional reform

Specific content issues

On 27 August 2002, the Committee tabled report no 37 titled *The Queensland Constitution: Specific content issues* which reported on a range of issues including incorporation of constitutional principles, conventions and practices, a Lieutenant-Governor for the State, the members' oath or affirmation of allegiance to the Crown, indicative plebiscites, initiation of legislative amendment, summoning Parliament, the number of parliamentary secretaries and certain issues relating to the judiciary. The Committee received 37 submissions to this inquiry. The report concluded the first stage of a review of certain issues of constitutional reform including recommendations made by the Queensland Constitutional Review Commission in its February 2000 *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.*

Entrenchment

The second stage of the review of certain issues of constitutional reform relates to whether, and to what extent, the Queensland Constitution should be entrenched. On 27 August 2002, the Committee tabled a paper containing proposals for comment in relation to this issue. The paper called for public comment on the Committee's proposals. The Committee plans to table a report in early 2003.

Information on the Queensland Legal, Constitutional and Administrative Review Committee inquiries and reports is available at <www.parliament.qld.gov.au/committees/legalrev.htm> or by contacting the Committee's secretariat on (07) 3406 7307.

Tasmania Law Reform Institute

Physical punishment of children

This controversial project was proposed in September 2001 by the Children's Commissioner, Patmalar Ambikapathy. The Institute's Board agreed that the project be undertaken in February 2002. An issues paper was released in November 2002, examining the current law relating to the physical punishment of children which allows parents, or a person in the place of a parent, to use force to punish a child as long as that force is 'reasonable in the circumstances'.

Because the current law is unclear, the Institute recommends reform. There are two options:

- The first is to prohibit the use of physical punishment. The arguments for and against this are discussed in detail.
- The second option is to clarify the law by saying specifically what type and/or degree of punishment is reasonable or unreasonable. Limits are suggested relating to the type of punishment, parts of the body to which force may be applied, the degree of harm that may be inflicted, age of the child and persons who may apply the punishment.

Fifty-five responses to the issues paper have been received. It is anticipated that the final report with recommendations will be given Board consideration in April 2003.

Bail

In 2001, the Attorney-General of Tasmania referred issues relating to bail to the Institute. The main areas of concern were:

- offenders re-offending while on bail;
- the factors given consideration when deciding to grant bail and whether these needed codification; and
- how breach of bail is being dealt with.

Due to difficulties in data access a detailed study of offending whilst on bail in Tasmania is not feasible at this time. An initial investigation was approved by the Institute's Board and was begun in September 2002. This involved analysing data from the Police Online Charging System, Supreme Court bail data, and Magistrates Court bail data. Some of the questions to be answered are:

- what percentage of those granted bail were charged with another offence while on that bail?
  - were they on police or court bail?
  - what type of offence were they on bail for?
  - what type of offence were they charged with while on bail?
- how many offenders were charged with breach of bail and failing to appear?
- what was the outcome of those charges?

It is intended that a research paper will be published in the first quarter of 2003.

Commissions of Inquiry Act

In March 2002, the Attorney-General requested that the Institute undertake a project looking at certain criticisms of the *Commissions of Inquiry Act 1995* (Tas) made in the *Report of the Commission of Inquiry into the Death of Joseph Gilewicz* (released in October 2000). The Act was criticised and amended during the Gilewicz Inquiry, however in the Inquiry's report Commissioner Mahoney made it clear that the amendments were unsatisfactory.

The Institute is examining the need for reform of s 18 of the Act, which attempts to enshrine in legislative form the 'Salmon Rules' by setting out detailed and strict requirements in relation to giving notice of an allegation of misconduct and making a finding of misconduct. Many practical problems with this section emerged during the Gilewicz Inquiry. Those problems arose in four main areas:

- What constitutes 'misconduct' and who may make an allegation of misconduct under s 18(1)?
- The 48 hour blanket notice requirement in s 18(2).
- The form of notice required under s 18(3).
- The operation of s 18(6) (Commission must not make a finding of misconduct against a person unless the person has been given notice and the opportunity to respond in accordance with this section).

In addition, the need for an extension of the powers of commissions of inquiry will be examined — particularly whether the Act should provide for the power to use listening devices.

Consultation has been conducted with interested parties. A final report was expected to be released in April 2003.

Adoption by same sex couples

In November 2002, the Attorney-General requested that the Institute undertake a law reform project on same sex adoptions. An issues paper was released on 7 February looking at whether the *Adoption Act 1988* (Tas) should be amended to allow same sex couples to adopt children. The paper examined the current law and practice relating to adoption generally and specifically in relation to adoption by same sex couples. National and international developments in this area were discussed. Of particular note, last year Western Australia amended its *Adoption Act* to allow lesbian and gay couples to adopt. Such adoptions are also permitted in the UK and the Netherlands and by a number of US states and Canadian provinces.

Evidence was examined which indicates that lesbian and gay men are just as capable and suitable parents as other men and women. The Family Court of Australia has also repeatedly held that sexual orientation is not in itself a criterion that negatively affects the quality of parenting. Furthermore, studies were discussed which have found that children raised by lesbian and gay couples are not affected developmentally — nor are they more likely to be sexually abused or to grow up to be lesbian or gay themselves.

Three options for reform were considered by the issues paper:

1. Allowing same sex couples to adopt in all circumstances; or
2. Allowing same sex couples to adopt only in circumstances of 'known' child adoptions (such as their partner's child from a former relationship or donor insemination);
3. Change the qualifications for adopting couples by extending the length of the relationship for eligibility (which is currently 3 years).

Public responses to the issues paper were due by 10 March 2003. Over 500 responses were received. The majority were against reform. The Institute intends to release its final report by 30 April.

Custody, arrest and police bail

The final report for this project was released in March. It recommends changes to the definition of a person in custody under the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) in order to adequately protect those in police custody regardless of whether they have been formally arrested. These changes will bring the Tasmanian law in this area closer in alignment with the common law and the law in New South Wales, Victoria, Queensland and the Commonwealth. Changes are also recommended to extend protections such as being cautioned, being informed of the right to communicate with a friend or relative and being provided with an interpreter when necessary to all people (including volunteers) being questioned as suspects in relation to an indictable offence. This follows the law in Queensland under the *Police Powers and Responsibilities Act 2001* (Qld).

The final report also makes recommendations to amend s 301 of the *Criminal Code* (Tas) in order to make it clear that the failure to state the reasons for an arrest makes that arrest unlawful.

Other Institute projects

Sentencing: An issues paper was released in September 2002. Twenty written responses have been

received. The Final Report should be released in the first half of 2003.

Suspended sentences: The Institute has applied for an Australian Research Council (ARC) Linkage Grant to undertake work on this topic.

Review of the law of negligence — medical indemnity: The Institute participated at the Tasmanian level in consideration of the first report of the Ipp Committee's *Review of the Law of Negligence*.

Obsolete offences: This project will examine the need for the repeal of obsolete crimes and offences such as blasphemy.

Mechanism for the review of police complaints: Members of the public requested that the Institute undertake a project on this topic. Following preliminary research and consultation, the Institute's Board agreed not to undertake the project.

For further information on the Tasmania Law Reform Institute, visit the website at <www.law.utas.edu.au/reform/>.

Victorian Law Reform Commission

Sexual offences

The second stage of the reference on sexual offences has focused on community consultation, in addition to a number of empirical research projects into aspects of the way the law currently works in practice. The consultation process has explored issues in relation to reporting sexual assault to the police and considered ways of improving the experience of victims who are seeking a criminal justice response. The Commission has paid particular attention to the problems experienced by children in giving their evidence in sexual offences proceedings. In addition, the Commission has:

- conducted an analysis of Victoria Police statistics to determine the characteristics of reported rape cases;
- undertaken an analysis of prosecution outcomes for sexual offences other than rape;
- participated in the development of prosecutorial training;
- established a working group to develop a syllabus for judicial education in relation to sexual offences; and
- considered a range of procedural reforms designed to minimise the secondary victimisation often experienced by complainants in sexual offences proceedings.

The Commission will publish an Interim Report providing a description of the completed research findings and indicating areas where further research will be conducted. The Interim Report also seeks responses to some questions about the practical operation of the system and seeks responses to a range of initial draft recommendations, including those in relation to:

- admission of evidence in relation to the prior sexual history of complainants;
- admission of evidence drawn from confidential counselling communications;
- use of judges' directions, particularly '*Longman* warnings', to juries;
- use of judges' directions to juries in relation to consent;
- the offence of incest;
- alternative arrangements for giving evidence; and
- special hearings and services for child witnesses.

The Interim Report is expected to be tabled in the Victorian Parliament in April 2003.

Compulsory care and protection of people with intellectual disabilities

In December 2001, the Commission was asked to examine the need for a new legislative framework to allow compulsory care and treatment for people with intellectual disabilities who are a risk to themselves and the community. The reference also asked the Commission to comment on the relevance of such a

framework for people with other cognitive impairments, such as acquired brain injury.

The Commission published its Discussion Paper for this reference in July 2002 and conducted a series of public consultations during August and September. These consultations, which were attended by people with disabilities, parents, service providers and others, have raised a range of issues that have helped inform the Commission's work.

The Commission is currently working on the Report for this project. The Report will make a series of recommendations, including:

- the establishment of a framework for the making and review of compulsory care decisions for people with cognitive disabilities; and
- the establishment of a framework for the authorisation and monitoring of restrictive service practices (including physical restraint, seclusion, medication and confinement) used on people with cognitive disabilities.

The Report is expected to be tabled in the Victorian Parliament in May 2003.

Defences to homicide

The terms of reference for the Commission's project on defences to homicide include consideration of whether it would be appropriate to reform, narrow or extend defences such as self defence or partial excuses such as provocation, as well as considering whether the introduction to Victoria of defences such as diminished responsibility is warranted. In May 2002, the Commission published an Issues Paper which outlines the defences that a person who has killed another person can rely upon under Victorian law, and provides information on how the law is working at present. The Issues Paper was intended to provide a clear outline of the scope of the project and an explanation of the legal issues. The Commission also published an Occasional Paper, written by Associate Professor Jenny Morgan, which brought together a number of empirical studies of homicide in Australia and provided a factual context for assessment of law reform proposals. This research indicated that the majority of homicide offenders are men and that homicide often occurs in the context of family violence.

The Commission has been working to analyse the results of combining a number of sets of data in order to be able to better understand the contexts in which homicide occurs, and the defences used at trial. The data has been drawn from the Australian Institute of Criminology (AIC) as part of their National Homicide Monitoring Program, the Office of Public Prosecutions (OPP) from their own database and from information extracted by the Commission from individual OPP files for homicide cases which resulted in a committal hearing for murder, manslaughter or infanticide during the period 1997–2000. Together this information provides basic demographic and contextual information, information about the offence, the accused and the victim, and also information about the defences raised in each of those cases. The Commission is committed to approaching the process of legal reform in this area from a solid understanding about the social reality of homicide.

Preliminary findings from this research will be published in a Discussion Paper on defences to homicide which is scheduled for release in mid-2003. The paper will form the basis for community consultation.

Workplace privacy

In October 2002, the Commission published an Issues Paper in relation to the reference on workplace privacy, intended to provide information, promote discussion and solicit submissions. The Issues Paper discusses the meaning of privacy, provides examples of privacy issues which may arise in workplaces and discusses the existing laws relevant to these issues. It asks a series of questions and seeks comment from employers, workers and members of the public. An Occasional Paper, containing more detailed discussion of approaches to defining privacy, was also published. The Occasional Paper paid particular attention to the consequences of the definitional problems for the protection of privacy. The Paper argues that although privacy is notoriously difficult to define, legal theory must attempt to provide a working definition in order to establish a regulatory framework capable of protecting privacy. The Commission has received very positive feedback on both these publications and is currently receiving submissions in relation to the questions raised.

Reproductive technology and adoption

On 11 October 2002, the Attorney-General gave the Commission a new reference on assisted reproduction and adoption. In its March 1998 Report entitled *Same Sex Relationships and the Law*, the Equal Opportunity Commission of Victoria identified the issues of access to reproductive technology and adoption for people in same sex relationships as issues requiring further consideration and community consultation, before any changes are proposed. This reference provides an opportunity for the community to be consulted on and influence the discussion of these issues.

The terms of reference for the project ask the Commission to take into account:

- social, ethical and legal issues related to assisted reproduction and adoption, with particular regard to the best interests of the child;
- the public interest and interests of parents, single people and people in same sex relationships, infertile people and donors of gametes;
- the nature of and issues raised by arrangements and agreements relating to methods of conception other than sexual intercourse;
- the penalties which apply to people involved in provision of assisted reproduction; and
- the laws relating to eligibility criteria for access to assisted reproduction and adoption in other states and countries.

Family violence

On 1 December 2002, a reference on family violence was announced. Since 1987, the *Crimes (Family Violence) Act 1987 (Vic)* has been used to address domestic violence within Victoria. It has done this by providing a mechanism in the form of an intervention order, to keep an aggressor away from a victim without requiring an arrest for a criminal charge of assault. At the time the Act was passed, criminal proceedings were not seen as effective in preventing domestic violence because:

- they were backward-looking and provided sanctions for behaviour that had already occurred;
- they did not provide any on-going protection for the victim; and
- criminal offences require proof beyond reasonable doubt, which can be difficult in cases of domestic violence as the only witness is often the victim herself.

Since 1987, domestic violence (or family violence) has continued to be the subject of a great deal of research and reform, both legal and practical. After 15 years of operation, the Attorney-General considered it time to take another look at Victoria's *Crimes (Family Violence) Act* to determine whether, among other things, differing approaches that have been taken to combat domestic violence, both nationally and internationally, have any lessons for Victoria.

More information about these projects, including full terms of reference and copies of all publications, can be found on the Victorian Law Reform Commission's website <www.lawreform.vic.gov.au>.

Law Reform Commission of Western Australia

Aboriginal customary law

The Law Reform Commission's current reference on Aboriginal Customary Laws aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian legal system. Early in 2002, on the advice of a Reference Evaluation Group chaired by Dr Mick Dodson (AM), the Commission appointed a Project Team. The Commission also appointed an Indigenous male and female Special Commissioner and a 13 member Research Reference Council to advise on culturally appropriate processes and protocols.

In 2002, the Commission completed its pre-consultation phase in which members of the Project Team vis-

ited all parts of Western Australia to enhance awareness of the project and to seek permission to conduct further research consultations on Aboriginal land. In November and December 2002 the Commission conducted successful Community Research Consultations in the Perth metropolitan area.

During 2003, the Commission will travel to regional and remote areas within Western Australia to conduct similar consultations. The first of these consultations is due to begin on 28 February 2003 with an extensive trip planned for the Kalgoorlie/Warburton region. It is anticipated that by the end of 2003 the Project Team and the Commissioners will have visited as many remote Aboriginal communities as possible, to consult and receive submissions on the matters set out in the Terms of Reference. The information received will then be used to assist the drafting of a series of background papers to be published throughout the year.

Contempt

The Law Reform Commission of WA's reference on the Law of Contempt is drawing to a conclusion. Three Discussion Papers have now been published and distributed on the three topics that form the Terms of Reference. Various detailed submissions have been received from major stakeholders and interested parties. The Commission is currently considering these submissions and formulating its final recommendations. It is hoped that the Final Report will be completed and published in March 2003.

Judicial review of administrative decisions

On 6 September 2001, the Commission received new Terms of Reference from the WA Attorney-General, to inquire into and report on the inadequacies and deficiencies of the current law and procedures pertaining to the judicial review of administrative decisions, and to make recommendations for reform. In June 2002, the Commission published its Discussion Paper on the *Judicial Review of Administrative Decisions*. The Paper was well received and prompted a number of informative submissions from the legal profession and the public. The Final Report was submitted to the Attorney-General of Western Australia for his consideration and is due to be tabled in Parliament shortly. A formal launch of the paper has been arranged for 27 March 2003.

Past reports

In September 2002, the Commission completed the conversion of all of its past Reports, Working Papers and Discussion Papers to electronic format. The Commission has now released a 3 CD-Rom boxed set featuring all of its publications between 1972 and 2002. The CD set is a rich resource of research and historical value.

Please be advised that the Law Reform Commission of WA recently changed its website address. Publications can now be viewed at the new website address located at <www.lrc.justice.wa.gov.au>.

Law Commission of Canada

In search of security

The Law Commission of Canada is in the midst of a major research project that examines the relationship between public police and private security.

Modern society is sometimes described as a risk society. The perception is that no matter whether crime rates rise or fall, public unease remains high or climbs. As a result people take steps to minimise their exposure to risk. We assess risk according to our own personal experiences and from the information we gather through the media. In a networked world, people receive news about events in distant communities as they happen. Millions upon millions are made part of an extended family of victimisation as they watch another horrific school shooting, another riot, or even the horrendous collapse of the World Trade Centre.

These episodes make us feel helpless and often lead us to take steps to fortify our own sense of personal safety. Insecurity breeds the purchase of more private security.

Whether public unease with safety and security is indeed 'new' or 'heightened' in contemporary society compared to previous decades remains a contested claim. What is clear, however, is that certain segments of society are purchasing security and safety in the form of a commodity. We buy home intruder alarms and bars for our windows. We hire security guards to patrol our communities. We install surveillance cameras in public spaces. We do these things on an individual basis, as collectivities, or as businesses as a means of minimising risk of injury, loss and insecurity. Of course, some Canadians are in a better position to manage risk. Security, like any other commodity that is for sale on the open market, is available to those who can afford it.

Policing and security in Canada, and around the world, are in the process of transformation. The provision of policing services was once presumed to be the exclusive domain of the state. Increasingly, *complex networks of policing* are developing. These networks reflect a mix of public and private security providers. Private security firms patrol large tracts of space in urban areas; they make arrests for Criminal Code violations, as well as enforce provincial statutes. Private forensic firms are involved in complex fraud investigations. The private sector is engaged in activities typically associated with public police forces. It is becoming more and more difficult to differentiate between what is a private function and what is a public function: the line between public police and private security has blurred

The Commission's project examines the implications of the growth in *networks of policing*. Given the evolving nature of private and public policing, does the public/private distinction make sense any longer? To what extent does the current law reflect the reality of policing in Canada? The purpose of the project is to contribute to the development of a new framework for the governance of security in Canada.

In April, 2002 the Commission released a discussion paper titled ***In Search of Security: The Roles of Public Police and Private Agencies***. The discussion paper describes the networks of policing that have developed in Canada. Between April 2002 and March 2003, the Commission engaged in broad-based consultation with stakeholders including public and private policing professionals, government policy makers, unions, community groups and academics.

The Commission's consultations culminated in ***In Search of Security: An International Conference on Policing and Security*** that took place in Montreal in February 2003. The conference brought together over 400 delegates representing 22 countries to discuss the future of policing and security. Over 100 speakers participated in plenaries and workshop sessions that explored different dimensions of security.

Conference participants questioned how our desire for security is created, whether our desire for security is realistic, what are some of the perverse consequences of demanding greater security, and what role the market plays in creating a demand for security products. Can we have 'too much security?'

Participants noted changes in the provision of security to citizens all over the world. Rather than a single culture for policing and security, there are many sub-cultures representing different public or private agencies. These sub-cultures represent diversity but do not necessarily represent partnerships. At times, different policing agencies co-operate, at other times they are in competition for the provision of security services. Moreover, there have not yet developed good practices for sharing information among various organizations and institutions. However, since there are no universal standards or at least formal national standards to regulate private security agencies, participants noted that ground rules should be established to create or facilitate communication and cooperation among the various security providers that are already existent and functioning.

Participants stressed the importance of creating better communication and stronger partnerships among public police and private security agencies. Amongst the suggested steps to guide this process of change:

- **Cooperation** between public police and private security agencies was considered important for the public good.

- The **roles and responsibilities** of private security agencies should be clearly defined by insisting on the powers, liberties and responsibilities of private security agents. Also, there should be common legislation and procedures for public police and private security agents in all provinces. Therefore, a framework should be developed to encourage cooperation between public police and private security agencies where ground rules are established for each institution, in every province/region.

- **Communication tools and techniques** were considered to be important elements in facilitating cooperation between public police and private security agencies. Participants indicated the importance of a larger approach involving provinces, public police and private security agencies that would accommodate the various interests of each institution while insisting on the public good.

- **Accountability** was stressed as being a crucial element in the cooperation process between public police and private security agencies as well as a crucial element for the public and citizens. It was suggested that measures of performance should be established to ensure the accountability and transparency of private security guards. Therefore, laws could be adopted on the formation of the agents among other things. Transparency and accountability for private security need to be continually regulated in order to encourage trust and confidence in those agencies.

Participants cautioned, however, that such changes will take time to implement and that patience and cooperation are required from all sides involved.

The Law Commission of Canada is now in the process of consolidating its research findings and preparing a report to Parliament. The Commission anticipates that the report will be released in the (northern) Fall, 2003.

More information about the Law Commission's project is available at <www.lcc.gc.ca>.

Law Reform Commission of Nova Scotia

Recent publications

The Commission's three-year funding agreement with the Law Foundation of Nova Scotia required it to advance a proposal to the Law Foundation in respect of the Commission's mission, governance, staffing arrangements and operations. The Commission took this as an opportunity to engage in a comprehensive self-review. In carrying out the review, particular note was taken of the experience of other law reform bodies in Canada and elsewhere. This effort culminated in the Commission's Report, ***A Continuing Need for Law Reform: The Case For the Law Reform Commission of Nova Scotia***, which was published in December 2001.

The Report evaluates the position occupied in the legal and legislative landscape by the Commission, answering such questions as whether there is a need for such an entity, what have been its achievements, as well as what should be changed about the Commission. The Report argues that though most features relating to the current Commission have served Nova Scotians well and are not in need of change, a continuing weakness remains its long term funding arrangements. The Report concludes that the key to the Commission's future viability is for government to recognise the benefits of a permanent, full time, and independent law reform body by restoring to the Commission sufficient and regular financial support. In other parts of Canada, and indeed elsewhere in the world, where law reform bodies have been created, the important public nature of the service they provide has been acknowledged in the form of public funds, largely from government and, to a lesser extent, from local versions of law foundations. The Report argues that the situation in Nova Scotia should be no different as the Commission performs an essential public service, one which is not provided by any other entity.

In February 2002, the Commission published its Final Report, ***Mental Health Provisions of the Hospitals Act***. The *Hospitals Act* governs psychiatric facilities in Nova Scotia and, in particular, how people are admitted to psychiatric facilities, what rights and entitlements they have on admission, the conditions of their stay, and how they are discharged. In general, the Report's recommendations, if adopted, will shorten detention periods under the Act, facilitate access to psychiatric treatment and care, strengthen procedural protections for patients and people detained under the Act, provide guidance for substitute decision-makers, and specify certain obligations of health care professionals.

During 2001–2002, the Commission also examined the obscure common law distinction between a release and a covenant not to sue. At common law, a release provided by a plaintiff to one joint tortfeasor prevents a claim from being made against any other joint tortfeasors. This is generally known as the 'release bar rule'. Where, however, a covenant not to sue is provided, the plaintiff is not prevented from making a claim against any other joint tortfeasors. The distinction, which is not widely known, has been described as creating a trap for the unwary. Soon after the end of the fiscal year, the Commission decided to issue its conclusions in the Final Report, ***Joint Tortfeasors & the Common Law 'Release Bar Rule'***. The Commission recommends that the release bar rule, which serves no public good, and which could lead to unfair results, should be statutorily abolished in its application to all wrongdoers.

Future challenges:

There are three distinct but inter-connected challenges facing the Commission, all of which will impact significantly on its future:

Stable core funding: While the Commission still has two years of core funding remaining from a three-year grant awarded by the Law Foundation, the march of time will soon take the Commission to the final year. Stable core funding is essential to the healthy functioning of an independent law reform body. The Commission is actively seeking financial and related support from sources other than government and the Law Foundation. Although the Commission is cautiously optimistic that these efforts may produce some concrete results, it is clear that the long term viability of the Commission will depend on a renewal of financial support from government.

Work program: Ultimately, the work that the Law Reform Commission does must be helpful, and seen to be so. The Commission believes that it has completed a solid body of high quality and very credible work during its eleven years of existence. It must, however, continue to demonstrate its usefulness. The Commission has therefore sought views from far and wide as to what areas of the law are in need of reform and, specifically, what projects the Commission ought to undertake. As the fiscal year was coming to an end, the Commission was actively engaged in developing a long-term strategic work program taking into account the advice which it has received.

Base of support: Another vitally important challenge for the Commission is to broaden and deepen its base of support. A great deal of its external relations have been devoted to increasing the understanding of what the Commission does and how it goes about its work. As a result of these and other efforts, the Commission has received very positive and encouraging indications of support from the judiciary, the Canadian Bar Association-Nova Scotia, the Nova Scotia Barristers' Society, as well as individual members of the practicing bar and academic community. In addition, the Commission has received moral support and excellent cooperation from the Attorney-General and the Nova Scotia Department of Justice. The challenge is to increase and strengthen this support so as to provide a more secure and stable footing for the future of the Law Reform Commission.

In summary, the 2001–2002 fiscal year was a positive one, during which the Commission enjoyed stable funding, completed a number of important projects, and enhanced its profile in the community.

The work program and publications of the Law Reform Commission of Nova Scotia can be viewed at <www.lawreform.ns.ca>.

Malawi Law Commission

Criminal law (2002)

The Law Commission produced two Reports in the area of criminal law for the year 2002. The first one was a Report on the ***Review of the Corrupt Practices Act*** (Report No. 8). This project was initiated as a direct response to the worrisome trend in the increase of cases related to corruption in Malawian society. The recommendations in the Report seek to reinforce those areas of the law which are considered inadequate. Notable issues tackled include the doing away with the requirement of consent of the Director of Public Prosecutions before the Anti-Corruption Bureau, the body entrusted with the administration of the Act, can institute a prosecution. The reforms also recognise the need to protect 'whistle blowers' for the efficacy of implementing the new law.

The Commission produced a Report on the ***Review of the Criminal Procedure and Evidence Code*** (Report No. 10). In its quest to facilitate access to justice through efficient and speedy trials, the Commission has made a number of recommendations in this Report. The notable ones are the prescription of prosecution time limits and pre-trial custody time limits. This was a direct response to concerns that there are no rules regulating pre-trial remand and prosecution periods.

The Commission has also suggested the codification of the common law defence of alibi to facilitate quick disposal of cases where necessary. The other recommendation in the Report is the introduction of the concept of plea bargaining with attendant rules to regulate it.

Police law (2002)

The Commission in its Report on the ***Review of Police Legislation*** (Report No 9) has recommended a complete overhaul of police legislation to modernise it and ensure compliance with the Constitution and international human rights standards. The focus of the recommendations in this Report is to make the police, a service, answerable to the community it serves rather than a military force as is currently perceived.

Legal education and legal practitioners law (2002)

The Commission has reviewed one aspect of the law dealing with admission to practice law in the courts of Malawi. The essence of the recommendation is to widen jurisdictions that are to be recognised under the Act to enable a wide section of Malawian society trained abroad and possessing recognised law qualifications to be admitted to the Malawi Bar upon satisfying prescribed minimum requirements of the law.

Current projects

Legal Aid. The intention is to overhaul the law providing for state-funded legal aid by recommending a scheme that meets the needs of the poor people of Malawi. A discussion paper has been produced and the intention is to produce a report and draft Bills by December 2003.
Programme Officer: Janet L. Banda (Mrs)

Land Reform. Development of an Issues Paper is underway. The aim is to produce a legal framework to regulate land matters which complies with the Malawi Constitution and the National Land Policy adopted by Government in 2002.
Programme Officer: Chikosa Silungwe

Courts' Statutes. The programme will look at court structures and procedures with a view to streamlining and simplifying them to ensure easy access and speedy and effective remedies.
Programme Officer: Janet L. Banda (Mrs)

Basic Education. Under this project, the Commission seeks to overhaul the law regulating basic education in Malawi since it has proven to be inadequate. Development of a Discussion Paper is underway and it focuses on government policies on education, other documents regulating education in Malawi and education laws from other jurisdictions within the region.
Programme Officer: William Msiska

Economic laws. The project has prioritised bankruptcy and insolvency as an area of concern. A Discussion Paper was developed in 2002 to guide the reform work. The special Commission mandated to carry out the reforms has commenced work.
Programme Officer: Alison Mbang'ombe

Child Rights Related Law Reforms. This is an ongoing programme from the year 2001 and it seeks to review all the laws affecting children for compliance with the Constitution and the UN Convention on the Rights of the Child. It is divided into three thematic areas, namely 'Juvenile Justice', 'Child Care and protection' and 'Child Socio-economic Development'. The Commission is currently working on the Juvenile Justice thematic area and is expected to complete a Report and draft Bills on this area by August 2003.
Programme Officer: Alison Mbang'ombe

Gender Related Law Reforms. This is another ongoing programme from the year 2001 and it seeks to review all laws impinging on gender equality. It is also divided into three thematic areas namely, 'Health, Educational and Psychosocial Well Being', 'Family Relations' and 'Property Relations'. The special Commission carrying out the reforms has produced an Overview Paper highlighting areas of concern.
Programme Officers: Chikosa Silungwe and William Msiska

Information on the role and organisation of the Malawi Law Commission can be found at <chambo.sdnp.org.mw/ruleoflaw/lawcom/>.

Scottish Law Commission

Obligations

The Commission is currently examining the statutory protection provided against the penal enforcement of leases. The central question for consideration is whether the current provisions strike the right balance between providing adequate protection to tenants and retaining an effective remedy for breach of contract. A discussion paper (No 117) on ***Irritancy in Leases of Land*** was published in October 2001. Work is nearing completion on the report which will contain the Commission's final recommendations for reform.

At the request of the Department of Trade and Industry, a project is being undertaken on registration and priority of rights in security granted by companies. The Commission published a discussion paper (No 121) in October 2002 and will shortly be considering the consultation response.

Work is continuing, jointly with the Law Commission for England and Wales, on a review of the law of partnership. A consultation paper (No 111) was published in October 2000 seeking views on proposals for reform of the law on ordinary partnerships. It examines, in particular, the issues of separate legal personality and continuity of partnership and suggests a new mechanism for solvent dissolution. A second consultation paper (No 118) was issued in November 2001 dealing with the law on limited partnerships. This is a substantial project in which the main policy aim is to recommend reform that will create a modern, accessible structure for partnership law throughout Great Britain. A joint report will be submitted to Ministers later this year.

Another joint project with the Law Commission for England and Wales considers the desirability and feasibility of replacing the *Unfair Contract Terms Act* 1977 and the *Unfair Terms in Consumer Contracts Regulations 1999* with a unified regime which would be consistent with European legislation and which would also extend the scope of the 1999 Regulations to protect businesses, as well as consumers. A joint consultation paper (No 119) was published in August 2002. Work is now underway on finalising policy in light of the consultation response with a view to submission of a joint report at the end of 2003.

Persons

In response to a request from the Scottish Ministers, the Commission published a discussion paper (No 120) in August 2002 dealing with liability for psychiatric injury. Among the issues examined are: the requirement that the pursuer's injury must arise from a sudden shock; the need for foreseeability of psychiatric injury; and whether there should be a threshold of

severity for compensatable injury. Work is progressing on finalising policy in light of the consultation response. The Commission aims to submit its report in the summer of 2003.

The Commission has just started preliminary research on the law relating to judicial factors. It believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense.

Property

A discussion paper (No 112) on ***Conversion of Long Leases*** was published in April 2001. It proposes that ultra-long leases, that is, leases for more than 175 years, should be converted into ownership. It also seeks views on whether conversion should be available for leases of much shorter duration (50 years or more). A possible alternative for these leases would be to introduce some form of security of tenure. The Commission has prepared its final recommendations for reform in light of the consultation response and will submit its report as soon as drafting resources are available to complete the accompanying Bill.

The Commission 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. The Commission is also engaged on a project concerning completion of title to land following the seller's receivership. A discussion paper (No 114) on *Sharp v Thomson* (1997 SC (HL) 66), which is the leading case in this area, was published in July 2001. In it the Commission proposes special statutory protection for the buyer in this situation. The project is likely to be completed after the discussion paper on the *Land Registration (Scotland) Act 1979* has been published.

Another property project concerns review of the law of the foreshore and seabed. It concentrates on the technical issues involved in this area with a view to advising the Scottish Executive on options for reform to improve clarity and consistency in the law. The topics covered include Crown interest and public rights of access, including an analysis of newly created statutory rights of access over land contained in the *Land Reform (Scotland) Act 2003.* Interaction with these new rights will be central to the Commission's final recommendations. A discussion paper (No 113) was published in April 2001 and the Commission aims to submit its report by the end of March 2003.

Criminal law

At the request of the Scottish Ministers, the Commission is undertaking a review of the defences of insanity and diminished responsibility. It published its discussion paper (No 122) in January 2003. One of the main proposals put forward is the creation of a new statutory insanity defence of 'not guilty by reason of mental disorder'. This defence would apply where the accused was suffering from a mental disorder which had the effect that he lacked a full or correct appreciation of his conduct at the time of the offence.

Trusts

Work is underway on a wide-ranging review of the law of express trusts. The first part of the project concentrates on the powers, duties and liabilities of trustees and a seminar was held in November 2002 at which the Commission's provisional ideas were discussed. The Commission aims to produce a discussion paper on this topic by the middle of this year.

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

Name change

In terms of the *Judicial Matters Amendment Act* 55 of 2002, the *South African Law Commission Act* 19 of

1973 has been amended to effect a change of name to the South African Law **Reform** Commission.

Protected disclosures (Issue Paper 20)

Issue Paper 20 deals with the need for the extension of the ambit of the *Protected Disclosures Act* No 26 of 2000 (the PDA). The PDA purports to protect employees from the victimisation of employers.

A disclosure is protected only if it has been made in accordance with the provisions of the PDA. Specific categories to whom protected disclosures may be made are identified in the PDA. Disclosures made outside the requirements of the PDA are not protected. All the disclosures under the PDA are confined to the relationship between employer and employee in the public and private sectors. The PDA does not provide protection to disclosures outside the employer/employee relationship.

Whistle blowers who intend using the provisions of the PDA to conceal their own involvement in criminal activities are not protected. Where a law has been contravened, the PDA does not protect the employee from criminal prosecution or civil liability to third parties. Thus there is no exclusion of civil or criminal liability for making a protected disclosure.

The PDA does not provide for a remedy where an employee has been victimised as a result of a protected disclosure. In terms of the PDA, there are no offences in terms of which an employer would be committing an offence by unlawfully subjecting an employee to victimisation, and an employee would be committing an offence by making a false disclosure or by making a disclosure without knowing or believing it to be true.

In relation to all these concerns regarding the expansion of the ambit of the PDA, the Commission publishes the Issue Paper as the first step in public consultation in this investigation.

The closing date for comment on Issue Paper 20 was 28 February 2003.

Consolidated legislation pertaining to international cooperation in civil matters (Issue Paper 21)

The present position is that, subject to certain statutory exceptions, a foreign judgment is not directly enforceable in South Africa. The common law procedures are expensive, time-consuming and complex. In response to this the legislature enacted various pieces of legislation providing for international co-operation in civil matters. This is achieved by way of designation of countries under the different pieces of legislation.

To date only a few countries have been designated under the various pieces of legislation for the purpose of co-operation in civil matters. The introduction of statutory enforcement procedures was intended to overcome the cumbersome common law procedures but these have proved unsuccessful.

Issue Paper 21 focuses mainly on three aspects of international co-operation:

- The recognition and enforcement of foreign judgments.
- The reciprocal service of legal documents.
- Mutual assistance in the obtaining of evidence.

The closing date for comment on Issue Paper 21 was 28 February 2003.

Report on sexual offences

The report and draft Bill on sexual offences cover both the substantive and procedural law relating to sexual offences and follows on from extensive consultations.

These recommendations are divided into legislative and non-legislative recommendations. The legislative recommendations are embodied in the draft Bill and include the following:

- A codification of the common law offence of rape. This offence addresses the unlawful and intentional penetration of a person by the genital organs of one person into the anus or genital organs of another person.

- The creation of the related offences of sexual violation and oral genital sexual violation. These offences respectively provide for the unlawful and intentional use of an object to penetrate a person's anus or genital organs; and the penetration of a person's mouth by a person or animal's genital organs.

- Rather than to rely on the absence of consent to the sexual act, the Commission recommends that penetrative sexual acts (rape, sexual violation and oral genital sexual violation) will be deemed to be unlawful if coercive or fraudulent circumstances are present or if circumstances exist in which a person is incapable in law to appreciate the nature of the act.

- The Commission is of the opinion that intentional non-disclosure by a person that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person prior to sexual relations with another (consenting) person amounts to sexual relations by false pretences and would therefore constitute rape.

- Confirmation that a marital or other relationship is not a defence to the offence of rape, sexual violation or oral genital sexual violation.

- The creation of the offence of promoting a sexual offence with a child where a person manufactures or distributes an article that promotes a sexual offence with a child or where a person sells, supplies or displays to a child an article which is intended to perform a sexual act.

- The decriminalisation of offences relating to children and mentally impaired persons who are prostitutes and in certain circumstances children benefiting from child prostitution, for example, siblings in a child-headed household. A child is defined as a person younger than 18 years of age.

- The explicit criminalisation and severe penalisation of all role-players involved in child prostitution and the prostitution of mentally impaired persons. This offence targets pimps, clients, brothel-keepers and all other role-players involved in the commercial sexual exploitation of children.

- The organisation or promotion of child sex tours is specifically prohibited. This provision criminalises the actions of both persons and bodies that facilitate such tours within or to South Africa in any way, whether by making travel arrangements for potential perpetrators or advertising such tours.

- A provision is included which allows for extra-territorial jurisdiction in respect of all offences under the Act and not only those committed in relation to children. This means that the provisions contained in the Sexual Offences Bill will be made applicable to South Africans travelling abroad.

- The state is to provide appropriate medical care, treatment and counselling to persons who have sustained physical, psychological or other injuries as the result of an alleged sexual offence.

- The Commission has critically assessed the rules of evidence and procedure which govern and/or are applied in sexual offence trials and a number of recommendations are made in this regard.

Report on the review of the Child Care Act

From the outset the Commission interpreted its mandate as going beyond the confines of the present *Child Care Act*, 1983, to include all statutory, common, customary and religious law affecting children. Given this broad scope, the report and draft Bill cover a wide range of issues:

- The general principles underpinning the draft Bill, including the best interests of the child standard are defined; children's rights and responsibilities are enumerated; and it is recommended that the age of majority be advanced to 18 years.

- The diversity of family forms in South Africa; the shift from parental power to parental responsibility; the acquisition and loss of parental responsibility by persons other than biological parents; co-exercise of parental responsibilities and rights; and the termination of parental responsibility are dealt with.

- Aspects such as legitimacy of children; and the status of children born of artificial insemination and surrogate motherhood are considered.

- The draft Bill grants a new status and a wider jurisdiction to the existing children's courts in an effort to improve the experiences of children going through the formal system.

- Early childhood development and prevention and early intervention services are recognised as vitally important components of the child protection system.

- Formal measures for the protection of children from abuse and neglect are a central focus of the draft Bill. The draft Bill considers legal provisions and interventions which are designed to deal with children in especially difficult circumstances and situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect. Reporting of children in need of care and protection is made mandatory for certain professionals and voluntary for any other person. Elaborate provisions are made in respect of a national child protection register.

- Partial care; shelters and drop-in centres; children in alternative care, foster care and care by relatives; adoption; and residential care are issues that are dealt with.

- International issues affecting children are addressed. These include inter-country adoptions; trafficking of children across borders; child abductions; and refugee children.

- Issues of grants and social security for children are addressed; and the introduction of a monitoring system in the form of a children's protector to ensure the effective implementation of the draft Children's Bill is proposed.

A number of the more contentious recommendations contained in the report and draft Bill are that:

- childhood begins at birth;

- the age of majority be lowered to 18 years of age;

- more than one (even more than two) persons be allowed to acquire and manage parental rights and responsibilities, or components thereof, in respect of the same child at the same time;

- mothers and married fathers be accorded such parental rights and responsibilities automatically, while some unmarried fathers and other persons will have to apply to court to acquire such rights and responsibilities;

- a child and family court be established at regional court level;

- a register of persons unsuitable to work with children be created;

- children of all ages be provided with confidential access to condoms;

- the common law defense to reasonable chastisement be repealed;

- municipalities may establish and administer child and youth care centres;

- child-headed households be recognised by law; and

- a child grant be payable on a universal basis in respect of all children in need of care and protection.

Report on traditional courts and the judicial function of traditional leaders

The report contains draft legislation which is aimed at establishing customary courts and consolidating the different provisions governing chiefs' courts.

The administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law. There is a need to consolidate the different provisions governing these courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution.

The Bill recommends that customary courts should be established and that they should have full powers of

hearing and determining cases in both criminal and civil matters subject to limitations. It is recommended that Headmen's tribunals which are currently not recognised as courts should be granted formal recognition.

On the question of the composition of customary courts, the Bill recommends that they should continue to be presided over by traditional leaders. However, to avoid gender discrimination, the Bill provides that in constituting the court effect shall be given to the need for the reasonable representation of both men and women in such institutions.

In civil matters, customary courts should have jurisdiction over cases arising out of customary law. Issues relating to dissolution of marriage (whether customary or civil), custody and guardianship of minors, or maintenance, are excluded from the jurisdiction of these courts. As far as criminal jurisdiction is concerned, customary courts can handle offences which were committed in the area of the court's jurisdiction except offences listed in the Schedule attached to the Bill. A monetary ceiling on the jurisdiction of customary courts will be fixed by the Minister from time to time.

Legal practitioners are excluded from these courts. However, a person who is a party to a matter before a customary court may be represented by any other person of his or her choice in accordance with customary law.

A litigant who is dissatisfied with a decision of a customary court has a right of appeal to a higher customary court and subsequently to a customary court of appeal (if one is established) or to a magistrate's court and then to the High Court.

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

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

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