Reform ROUNDUP

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

Contents

Administrative Review Council

The scope of judicial review

The scope of judicial review project reached a significant milestone with the publication and distribution of a discussion paper in March 2003. The paper explores a number of aspects of judicial review, including the constitutional aspects of the scope of judicial review and other relevant factors such as:

- justiciability;
- deference;
- the nature of certain grounds of judicial review;
- resource-related considerations;
- the nature of the decision maker;
- the nature of the decision;
- alternative remedies; and
- ways of legislatively limiting or excluding judicial review.

On the basis of responses to the discussion paper and related consultations, the Council will commence work shortly on the second stage of the project—development of a set of guidelines.

Automated assistance in administrative decision making

The Council's issues paper, *Automated Assistance in Administrative Decision-making* was released in June 2003. Submissions on the paper closed at the end of August.

The paper surveys the current use of computer based 'expert systems' for primary decision making within the Commonwealth agencies and considers the implications for administrative decision making of the use of this technology. The paper raises issues such as the potential 'de-skilling' of decision makers, and the relationship between the administrative law system and decisions made by computer-based systems.

The Council is currently planning stakeholder consultations, which are likely to include public forums over the next few months in several cities. Input from a wide range of interested parties is being encouraged.

A final report will be published taking into account submissions in response to the issues paper and forum outcomes. It is anticipated that the report will serve as a guide to Government on the appropriate use of expert systems in administrative decision making.

Coercive investigative powers of government agencies

The Council has commenced a new project that will look at the range of investigative powers conferred by legislation on Commonwealth agencies which have penalties attached to compel compliance. The project will focus on those powers of agencies that require the production of documents and answers to questions, where the decision to exercise the power does not involve an application to the courts.

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

The Council anticipates that a discussion paper will be produced outlining the current range of coercive investigative powers conferred on Commonwealth agencies and the issues surrounding the possibility of establishing a model set of coercive investigative powers.

Procedural discretions of review tribunals

The Council has commenced research into aspects of procedural discretions of review tribunals, which have been the subject of legislative innovation in recent years. This paper is focussing on three areas of tribunal discretion, time limits, standing and stays of decisions.

The project will identify and categorise the current variations in these three areas across Commonwealth legislation, and the reasons for these variations, with a view to achieving increased consistency across legislation.

A possible outcome of the project will be recommendations to government on suitable amendments to the procedural discretions provided to tribunals and the circumstances when such amendments are appropriate.

Council membership

Several new members have recently been appointed to the Council. Ms Sue Vardon, CEO of Centrelink, Ms Melanie Sloss SC, Barrister and Mr Andrew Metcalfe, Deputy Secretary of the Department of the Prime Minister and Cabinet have all joined the Council in the past six months. Professor John McMillan, as Commonwealth Ombudsman has also recently joined the Council in an ex officio capacity.

Departing members in the past six months include Mr Bill Blick PSM, Inspector-General of Intelligence and Security, Ms Christine Charles, Group Executive, External Affairs, Newmont Australia and the former Commonwealth Ombudsman, Mr Ron Mcleod AM.

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

Family Law Council

Pathways References Committees

Guidelines: The Family Law Council and the Family Law Section of the Law Council of Australia recently finalised a draft of the *Best Practice Guidelines for Lawyers Doing Family Law Work* and distributed copies to a range of interested persons and organisations for consultation.

This *Pathways* recommendation was provided as a reference to the Family Law Council, to be undertaken as a joint enterprise with the Law Council of Australia, by the federal Attorney-General.

The joint Committee agreed to take as a model a recently released publication from the Law Society of the United Kingdom, *Family Law Protocol* (2001). The Committee obtained the Law Society's permission to use the *Family Law Protocol* as a template and substantially adapted its content to reflect Australian circumstances.

Indigenous child-rearing practices and kinship obligations: The Council is finalising a letter of advice to the Attorney-General which makes recommendations relating to the recognition of fundamental elements of Aboriginal and Torres Strait Islander family structures in the context of the mainstream family law system.

The Council has taken into account the work being done by the Family Court of Australia through its Indigenous Consultant's Programme, and the effect this has had in terms of positive education of the Court, government, Aboriginal and Torres Strait Islander peoples and the public at large.

Child representation: The Council is finalising a report to the Attorney-General which makes recommendations targeted at clarifying the role of child representatives in family law proceedings. The report will take into account the Family Court's recent promulgation of Practice Guidelines for Child Representatives. It will also make recommendations concerning national training standards for child representatives.

Other references

The Paramountcy Principle: This principle is contained in s 65E of the *Family Law Act* and provides, 'In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration'.

The dimension of the project increased recently when the Attorney-General approved an additional term of reference concerning issues relating to relocation cases. There have been significant developments in relation to the operation of the paramountcy principle in the context of relocation cases culminating in a recent High Court decision *U v U* (2002) 191 ALR 289.

Parliamentary inquiry—joint custody: The Council will be formulating its position with respect to the inquiry launched by the House of Representatives' Standing Committee on Family and Community Affairs on 24 June. Of considerable interest to the Council is whether, as set out in the terms of reference, there should be a presumption that children will spend equal time with each parent and if so, in what circumstances such a presumption could be rebutted.

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

New South Wales Law Reform Commission

Cross-examination in sexual offence trials

In July 2003, the New South Wales Law Reform Commission released Report 101 on the questioning of complainants by unrepresented accused in sexual offence trials. The report, in response to a reference from the Attorney-General in March 2002, follows extensive consultation, and evaluates the law and practice in other jurisdictions.

The right to a fair trial is a fundamental element of the criminal justice system. This includes testing, by cross-examination, the prosecution's evidence. Normally, the accused's lawyer will conduct the cross-examination, but, where the accused does not have a lawyer, the accused is entitled to cross-examine witnesses in person, including the complainant. In a sexual assault trial, this means that alleged offenders could cross-examine their alleged victims and cause them great distress.

The report recommends that:

- accused persons should not be able to cross-examine complainants in sexual offence trials in person;
- a legal practitioner must cross-examine the complainant where the accused is unrepresented; and
- where the accused fails to provide for a lawyer, the court can order the Legal Aid Commission to provide assistance.

The report further recommends that all complainants in sexual assault trials should be able to give evidence by means of closed circuit television.

The Attorney-General announced that he would implement the Commission's report, and legislation was introduced into the Parliament on 2 September 2003. The legislation was fast-forwarded through the Parliament, and the *Criminal Procedure Amendment (Sexual Offences Evidence) Act 2003* (NSW) commenced operation on 3 September 2003. While the Act implements the substantive recommendation of the Commission, there are some significant departures from the Commission's recommendations. The Act allows the Court to appoint a person to examine a complainant, but this person does not have to be a legal practitioner, as the Commission recommended. Furthermore, the person appointed by the Court may not give any legal or other advice to the accused person.

Sentencing: corporate offenders

Report 102, *Sentencing: Corporate Offenders*, was released in September 2003. The report focusses on the extent to which corporations, being legal abstractions without a physical presence, can be punished for breaking the criminal law. Unlike its officers or employees, a corporation cannot be imprisoned. In practice, the fine is the major sentence imposed on corporations in New South Wales.

The report recommends that courts should generally have the power to impose additional or alternative sanctions on corporations. At present, this power is only available in the context of specific statutes, principally concerned with environmental protection, occupational health and safety, and fair trading.

The report proposes that the penalties generally available in sentencing corporations should (in addition to, or in place of, a fine) include:

- **Incapacitation orders**, which wind up a corporation ('dissolution'), or prevent a corporation from carrying out certain commercial, trading or investment activities or from participating in government contracts ('disqualification');
- **Correction orders**, also referred to as 'probation orders', which require a corporation to alter its systems, policies and procedures (its 'corporate culture') to prevent re-offending; or to undertake internal discipline measures;
- **Community service orders**, which direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community; and
- **Publicity orders**, which involve the publication of a conviction (including information about the offender, the offence and its consequences, and any other penalty imposed) to a specific group of people or the general community.

Contempt by publication

A major report, *Contempt by Publication* (Report 100), was tabled in the New South Wales Parliament by the Attorney-General on 16 September 2003.

The report recommends that media outlets, journalists and radio broadcasters who publish material about pending court cases should not be liable for contempt unless they are at fault.

One way to achieve the right balance in the law of contempt is by formulating a more precise test of liability for contempt. Another is by reversing a long line of court decisions making members of the media guilty of contempt even if they did not know that there was a case pending in court, which might be affected by their publication or broadcast.

The report endorses a proposal by the NSW government to make media organisations contribute to the costs incurred by the accused, the government and

others where a court case is discontinued as a result of prejudicial media publicity.

However, under the Commission's recommendations, publishers and others responsible for the publication must be prosecuted and convicted for contempt before they can become liable for the costs. Moreover, it must be proved that the contemptuous publication was either the sole or a substantial cause of the termination of the trial. Consequently, the situations in which a costs order could be made would be rare.

The report also extends, as well as defines more precisely, the circumstances in which journalists and members of the public may obtain access to documents used in court proceedings. This enables the public to exercise its right to scrutinise and criticise courts and court proceedings. On a practical level for the media, it enables better reporting of legal proceedings.

Other developments

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

- Review of the *Community Justice Centres Act 1983* (Discussion Paper)
- Sentencing: Young Offenders (Report)
- Relationships and the Law (Report)
- Legislative Sentencing (Discussion Paper)
- Eligibility of Jurors: Should People Who are Blind or Deaf be Able to Serve on Juries? (Discussion Paper)
- Surveillance (Report)
- Informed Consent to Medical Treatment by Minors (Issues Paper)

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

Legal, Constitutional & Administrative Review Committee (QLD)

Queensland Ombudsman

The Committee's responsibilities include monitoring, reviewing and reporting on the performance of the Queensland Ombudsman's functions. In fulfilment of this responsibility, on 29 April 2003 the Committee met with the Queensland Ombudsman to discuss issues relating to the office. These issues included complaint closure rates, the effect of office restructuring, and budgetary issues.

On 6 June 2003, the Committee tabled a report to Parliament on its meeting.

Entrenchment of the Queensland Constitution

In its February 2000 report, the Queensland Constitutional Review Commission recommended referendum entrenchment of the most fundamental aspects of the Queensland Constitution, and that certain procedural requirements should apply to all sections of the Constitution. The Committee is currently considering these recommendations.

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 report to the Parliament in August 2003.

Hands on Parliament

One of the recommendations of the Queensland Constitutional Review Commission was that the Committee

'conduct an inquiry into the possibility of special representation for Aborigines and Torres Strait Islanders'. The Committee broadened the scope of this inquiry to Aboriginal and Torres Strait Islander people's participation in democratic processes and released an issues paper, *Hands on Parliament—Inquiry into Aboriginal and Torres Strait Islander Peoples' participation in Queensland's democratic processes*, in December 2002 to stimulate public submissions to its inquiry.

From March 2003 to July 2003 the Committee engaged in an extensive program of face-to-face consultation throughout Queensland by way of public meetings and meetings with key bodies and individuals. The Committee has tabled submissions made to the inquiry and a summary of consultation. The Committee plans to report to the Parliament in September 2003.

Treaty making—review of tabling procedure

The Committee's predecessor conducted a review into the role of the Queensland Parliament in treaty making. As recommended by that Committee, the Premier tables in Parliament advice from the Commonwealth Parliament's Joint Standing Committee on Treaties concerning proposed treaty actions under negotiation and tabled in the Commonwealth Parliament, together with other information relating to the proposed treaty actions under review.

The current Committee recently reviewed this procedure and, in its report tabled in July 2003, recommended that in the absence of any evident difficulties the procedure continue.

Review of the FOI fees and charges regime

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

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

In late 2002 the Committee sought to gather information to inform its review of the new regime. After reviewing information gathered from various sources, the Committee has decided that there is insufficient information regarding the operation of the new regime for it to proceed with its review at this stage. However, the Committee intends to reassess this position in the short term.

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

Tasmania Law Reform Institute

Adoption by same sex couples

The Institute released its final report on this topic on 19 May 2003. This followed the release of an issues paper in February considering whether the current law should be amended so that same sex couples are eligible to apply to adopt. More than 1,300 responses to the issues paper were received, many of them took the form of duplicate letters. Of the original responses, 134 were against any change to the law and 61 in were in favour.

The final report considers:

- changing family structures and attitudes to same sex parenting;
- adoption law, process, trends and rates; and
- whether same sex couples should be eligible to adopt.

The Law Reform Institute carefully considered the arguments put forward in response to the issues paper.

Despite the limited practical impact of changes the issue is clearly an emotive one as the volume and tone of the responses to the issues paper demonstrate. While most of the responses opposed same sex adoption, it is the Institute's view that to continue to deny same sex couples eligibility to adopt is not in the best interests of children and unjustifiably and unfairly discriminates against gay and lesbian couples and their children. The beliefs of those opposing same sex adoption are no doubt strongly and sincerely held. However, underlying this opposition is a view that homosexuality is wrong and unnatural, an inability to divorce the issue of sexual orientation from that of parenting, and fear that same sex parenting poses a threat to society. It is no longer the majority view that homosexuality is wrong and unnatural and the suggestion that same sex parenting poses a social threat is implausible. Adoption decisions are made on a case-by-case basis and gay and lesbian couples should be evaluated individually as suitable parents for a particular child rather that being denied eligibility because of their sexual orientation.

The Institute recommended that:

- section 20(1) of the *Adoption Act 1988* (Tas) be amended to permit a couple to apply for adoption regardless of the gender or marital status of the partners making up the couple;
- the profile of potential adoptive parents include the sexual orientation of the adoptive couple;
- the preferences of relinquishing parents as to sexual orientation of the adoptive couple be taken into account in the selection of adoptive parents;
- both step-parent and relative adoption should be available to the same sex partner of a parent or relative of a child;
- the *Status of Children Act 1974* (Tas) s 10C be amended to apply the conclusive presumption of parenthood to the same sex partner of a woman who, with her partner's consent, conceives a child as the result of an artificial fertilisation procedure; and
- that the length of the relationship of adoptive couples remain at three years for eligibility to adopt and that no qualifications be required in addition to the current qualifications.

The Institute did not recommend allowing same sex adoption in the 'known child' category only. The Institute agreed with those respondents to the issues paper who argued that to so limit adoption would not address the issues of stigmatisation of lesbian and gay people and their children in particular, nor the issues of human rights and discrimination.

Since the release of the Institute's final report the Tasmanian Attorney-General has introduced the Relationships Bill 2003 and the Relationships (Consequential Amendments) Bill 2003 to Parliament. The latter Bill would amend the *Adoption Act* to allow same sex couples to adopt where they have been the parties to a significant relationship, which is the subject of a deed of relationship registered under the *Relationships Act* 2003. However, contrary to the recommendations of the Institute, the Bill limits the eligibility of same sex or unmarried couples to adopt to the 'known child' category. This is done by providing that an adoption order may not be made in favour of a person who is in a significant relationship unless the other party to the relationship is the natural or adoptive parent of the child proposed to be adopted, or either party to the relationship is a relative of the child proposed to be adopted.

As of August 2003, the Bills had been passed by the Tasmanian House of Representatives and were due for imminent consideration by the Legislative Council.

The forfeiture rule

This project considers the operation of the common law forfeiture rule and the need for the enactment of legislation to modify this operation. The forfeiture rule can be described as a fundamental principle of justice, embodied in one form or another in most—if not all—legal systems. In relation to succession law, the principle can be said to embody the view that if a person is criminally responsible for the death of another, and that death is a material fact in the vesting of property in favour of that person, then the interest in that property is forfeited. The effect of the rule is that the killer cannot inherit from the deceased

either by will or intestacy, nor can a benefit be obtained over property through the right of survivorship. A person 'shall not slay [their] benefactor and thereby take [their] bounty'.[1]

Over time the forfeiture rule has been modified. Circumstances in which the courts have found that the forfeiture rule does not apply (or at the very least should be modified) include deaths resulting from suicide pacts[2] or in response to serious domestic violence (although not necessarily amounting to self-defence).[3] While most would see such modifications as just, the common law took a sharp right turn in 1994 when it was held by the New South Wales Court of Appeal in *Troja v Troja*[4] that 'all felonious killings are contrary to public policy and hence, one would assume, unconscionable'. The project examines whether this decision has the potential to result in injustice when women lose any entitlement to the property left by a deceased husband when they have killed following a history of domestic abuse. New South Wales, the ACT and the UK have introduced legislation to alter this effect.

It has argued that 'other jurisdictions would be best to turn to legislative action to address this problem' and recommended that the forfeiture rule be placed on the agenda for detailed consideration by the National Committee for Uniform Succession Laws,[5] however this recommendation has not been followed.

Different options for the possible legislative reform of the rule in Tasmania are discussed by examining the different forfeiture acts in NSW, the ACT and the UK and the *Draft Succession (Homicide) Act* proposed by the New Zealand Law Commission in 1997.

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

For further information on the Institute or any of its projects visit <www.law.utas.edu.au/reform>.

Endnotes

1. *Hall v Knight and Baxter* [1914] P 1 at 7 per Hamilton LJ.
2. *Permanent Trustee v Freedom from Hunger Campaign* (1991) 25 NSWLR 140; *Dunbar v Plant* [1997] 4 All ER 289.
3. *Public Trustee v Evans* (1985) 2 NSWLR 188; In *Re K* [1985] Ch 85.
4. (1994) 33 NSWLR 269 per Meagher JA at 299.
5. K Mackie 'The Troja Case—Criminal Law, Succession and Law Reform' (1998) 5 *Canberra Law Review* 177.

Victorian Law Reform Commission

Sexual offences

As noted in the last edition of *Reform*, the Commission is currently undertaking a comprehensive reference in relation to sexual offences. In June 2003, the Commission published its interim report on *Sexual Offences*. The report makes recommendations for legislative, administrative and procedural changes to ensure that the criminal justice system takes sufficient account of the needs of complainants in sexual offences cases. The recommendations span the entire criminal justice process, from disclosure to reporting, interviewing and charging, through to prosecution and complainants' experiences in court.

Giving evidence: The Commission's consultations revealed widespread dissatisfaction with the criminal justice process among complainants and organisations that provide support to victims of sexual assault. The report contains recommendations to reduce the trauma that complainants often experience in giving evidence.

The major recommendations include that:

- closed-circuit television (CCTV) should be the standard way in which complainants in sexual offences cases give evidence at committal or trial;
- a person charged with a sexual offence should be prohibited from personally cross-examining complainants and other 'protected witnesses';

- there should be further restrictions on the admissibility of evidence about complainants' prior sexual history; and
- there should be limitations on the admissibility of evidence of the contents of a complainant's confidential counselling communications.

The needs of children: Child complainants face particular barriers to participation in a criminal justice system that was designed for adults. The report makes a series of recommendations designed to improve the ability of children to participate, including that:

- specialist child witness support should be provided to child witnesses and their families;
- child witnesses should be able to give their evidence in its entirety at a special hearing in advance of the trial at which the judge presides and both prosecution and defence are present. The evidence should be recorded and introduced at the eventual trial as the child's evidence. This process should also be available for witnesses with impaired mental functioning (a similar process operates successfully in Western Australia);
- children should be deemed competent to give sworn evidence if they understand the obligation to tell the truth; and
- hearsay evidence of children should be admissible in sexual offences cases, where the court is satisfied that the evidence is of sufficient probative value to justify admission.

The culture of the criminal justice system: Education that fosters cultural change within the criminal justice system is an essential component of the reference. The report recommends:

- continuing education for prosecutors in sexual offences cases; and
- that the Judicial College of Victoria provide a program for judges and magistrates to facilitate discussion of issues that commonly arise in sexual offences committals and trials.

A specialised sexual offences jurisdiction? The interim report also discusses the possible advantages of establishing a specialist sexual offences jurisdiction in Victoria, similar to the specialist court, to try sexual offences against children currently being trialled in New South Wales.

The Commission is undertaking extensive consultation in relation to the recommendations contained in the interim report, as well as further legal and empirical research. A final report is planned for the first half of 2004.

Eligibility for assisted reproduction and adoption

The Commission has recently released a consultation paper for its reference relating to eligibility for assisted reproduction and adoption. The Commission has been asked to consider the desirability and feasibility of changes to the *Infertility Treatment Act 1995* (Vic) and the *Adoption Act 1984* (Vic) to expand eligibility criteria for both assisted reproduction and adoption. In addition, the reference involves some issues in relation to altruistic surrogacy, including clarification of the legal status of any child born of such an arrangement. The terms of reference require the Commission to take into account a range of factors, including social, ethical and legal issues, with particular regard to the best interests of children. The Commission has also been asked to take into account the public interest and the interests of parents, single people, people in same-sex relationships, infertile people and donors of gametes.

This reference is linked to earlier changes to the law to remove discrimination against people in same-sex relationships. In its March 1998 report, *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. The *Infertility Treatment Act 1995* and the *Adoption Act 1984* were not amended in 2001, when 50 pieces of Victorian legislation were amended to recognise same-sex relationships.

This reference provides an opportunity for the community to be consulted on and to influence the law relating to access to assisted reproductive technology and adoption. The consultation paper explains the current eligibility criteria for both assisted reproductive technologies and adoption, and canvasses the issues raised by expanding eligibility criteria. This paper asks Victorians to respond to the questions and issues raised both by the current system and by possible law reform in this area.

The current eligibility criteria have the most direct effect on people who are single or in same-sex relationships and who wish to have children. Some people who are not eligible for treatment in Victoria may seek the assistance of services interstate where different eligibility criteria, or no eligibility criteria at all, apply. Others may remain in Victoria and have children through donor procedures without going through the clinic system. The legal status of donors of gametes and of parents of children conceived in these ways is one of the issues that will be considered in this inquiry.

One of the key adoption issues concerns 'known' child adoption: that is, adoption of a child to whom the person wishing to adopt is already in the position of parent. Where a lesbian couple has a child, for example, the woman who has not given birth may wish to adopt the child. The inquiry, however, is not limited to this aspect of adoption, but covers all eligibility criteria in relation to adoption, including inter-country adoption.

There is considerable community interest in this reference, and the Commission has begun to brief interested groups on the scope of the inquiry and to invite people to make submissions. During this consultation phase, the Commission will encourage broad community involvement as well as contributions from those communities most affected by the current laws.

Defences to homicide

The Commission has released an options paper for its reference examining the law relating to defences and partial excuses to homicide. Under the terms of reference this examination is to include consideration of the appropriateness of reforming, narrowing or extending existing defences or partial excuses to homicide including self-defence, provocation and diminished responsibility. As part of its review, the Commission has also been asked to consider options for procedural reform and also whether plea and sentencing practices need to be made more flexible.

The options paper further explores the historical development of particular defences, the legal and social contexts in which defences and partial excuses to homicide are raised in Victoria and their current operation, together with a number of options for reform. Defences and partial excuses considered include provocation, self-defence, and infanticide as well as defences open to accused with 'impaired mental functioning' such as mental impairment, diminished responsibility and automatism. Possible evidentiary and procedural changes to improve the operation of existing defences are also discussed.

The findings of research conducted by the Commission into homicide prosecutions in Victoria proceeding beyond the committal stage over the period 1 July 1997 and 30 June 2001 have been referred to extensively in the paper. This research has assisted the Commission to develop a richer understanding of the extent to which men and women who kill rely on particular defences, the comparative success of men and women in relying on these defences, and the circumstances in which these defences are successfully raised in Victoria.

Key issues explored in the options paper include the extent to which existing defences reflect community standards of culpability and operate fairly in response to the different circumstances in which men and women kill. For instance, there have long been questions raised about the ability of current defences, and particularly self-defence and provocation, to adequately take into account the circumstances of women who kill in the context of domestic violence. The options paper discusses possible reforms to these existing defences and arguments for and against particular reforms.

Consideration is also given in the paper to the introduction of a partial defence of diminished responsibility for accused with 'impaired mental functioning'.

While this defence is not currently available in Victoria, it has been introduced in a number of other Australian jurisdictions. The Commission's homicide prosecutions study found that in a significant number of cases the person charged with homicide was suffering from a mental condition that did not amount to a mental illness sufficient to form the basis of a mental impairment defence. The introduction of diminished responsibility in Victoria would provide these accused with an alternative defence.

The Commission will be using the options paper as a basis for more detailed consultations. A final report will be released by the Commission in 2004.

Publications and further information about the activities of the Victorian Law Reform Commission are available at <www.lawreform.vic.gov.au>

Law Reform Commission of Western Australia

Aboriginal customary laws

Work on the Law Reform Commission's complex and historic reference on Aboriginal customary laws has continued throughout 2002/2003. The project aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian legal system and provides the Commission with the opportunity to revisit the work of the Australian Law Reform Commission (*The Recognition of Aboriginal Customary Laws* (ALRC 31)) in light of subsequent developments in law, research and policy as they relate to Western Australia.

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

Since February 2003 the Commission has carried out extensive community consultations, involving travel to various remote and regional areas within Western Australia. To date the Commission has visited the Kalgoorlie/Warburton region, the Pilbara region, Geraldton, Carnarvon and Broome. It is anticipated that by the end of 2003 the Project Team and the Commissioners will have also visited Wiluna, Meekatharra, Kununurra and the Great Southern region. The purpose of these visits is 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 remainder of 2003 and into 2004, with the final report setting out the Commission's recommendations to be published some time in 2005.

Contempt

The Commission's reference on the law of contempt has now reached a conclusion, with discussion papers having been published and distributed on the three topics that form the terms of reference. The various detailed submissions received from major stakeholders and interested parties have helped the Commission to finalise its recommendations and to complete the final report which will be published and distributed in the coming months. The three discussion papers and the final report will also be available as a complete set on CD-Rom for electronic access and ease of distribution.

Judicial review of administrative decisions

On 6 September 2001, the Commission received new terms of reference from the Attorney-General, to inquire into and report on the inadequacies and deficiencies of the current law and procedures pertaining to the judicial review of administrative decisions, and to make recommendations for reform. In June 2002 the Commission published its discussion paper, *Judi-*

cial 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 tabled in Parliament on 25 February 2003. A formal launch of the report took place on 27 March 2003 and was attended by various members of the judiciary, the legal profession and academia. The final report has since been published and distributed and is available on the Commission's website.

Publications of the Law Reform Commission of Western Australia can be viewed online at <www.lrc.justice.wa.gov.au>.

Uniform Law Conference of Canada

Since little has been written in *Reform* about the Uniform Law Conference, non-Canadian readers may find it helpful to have a bit of background. The Conference, founded in 1918, has a proud history of work in improving the laws of Canada. Its objective is to harmonise the laws of the provinces and territories with each other and with federal laws enacted by the Parliament of Canada. It also makes recommendations for changes to federal criminal legislation based on identified deficiencies, defects or gaps in the existing law or based on problems created by judicial interpretation of existing law. As a national organisation in a country that embraces the legal traditions of both the common law and the civil law, and which operates in two official languages, this is a daunting task but one which the Conference has cheerfully accepted.

The Conference meets once a year in August for five working days at a location that is rotated to give every province and territorial jurisdiction an opportunity to act as host. In 2003, the Conference met in Fredericton, New Brunswick and in 2004 it will be held in Regina, Saskatchewan. Normally, between 80 and 100 Commissioners (delegates), representing each of Canada's 10 provinces and three territories as well as the federal government, meet to discuss the Conference's work that has been developed over the previous year. The Conference is largely a volunteer organisation and its strength lies with its Commissioners who come from all walks of the legal community including private and corporate practice, the criminal defence bar, the academic community, government legal services and the judiciary.

The work behind the scenes that takes place between the annual meetings is most critical to the success of the Conference. Project work is carried out through working groups whose members (mainly volunteers) are drawn from as many jurisdictions as possible and reflect both bi-jural and diverse experiences. It is this collective wisdom and experience that contribute to a valuable end product.

Although the Conference receives some funding from federal, provincial and territorial governments of Canada, the Commissioners serve independently and the sponsoring governments are not bound to adopt any of the recommendations passed by the Conference.

As a testament to its value, many of the Conference's model and uniform acts and recommendations for criminal law reform have been adopted in legislation. Now in its 85th year of operation, the Conference is proud of the role it has played in improving and shaping Canadian law.

The Conference sits in two sections: the Civil Law Section and the Criminal Law Section. In some instances both the two sections will work together in a plenary session where their interests overlap.

Civil Law Section

The main work of the Civil Law Section lies in the development of uniform legislation that is adopted and recommended for enactment by the jurisdictions. In the year 2000 the Section embarked upon an ambitious new project to modernise and harmonise Canada's commercial laws. This project, known as the Commercial Law Strategy for Canada, has garnered the enthusiastic support of Industry Canada, Justice Canada, and all provincial and territorial governments. It continues to gather support from business, legal and consumer advocacy groups.

The Section met in 2003 to consider ongoing proposals and also new developments emanating from the Strategy. These included proposals concerning uniform amendments to the *Personal Property Security Act*, a *Uniform Franchise Act*, *Uniform Securities Transfer Act*, Public Inquiries, *Uniform Enforcement of Money Judgments Act*, Criminal Rates of Interest, Illegal Contracts, Documents of Title, Electronic Cross Border Consumer Transactions, *Uniform Enforcement of Foreign Judgments Act*, *Uniform Unclaimed Intangible Property Act*, Security Interests in Intellectual Property, and *Uniform Wills Amendment Act*.

At its 2003 meeting, the Conference identified a number of possible new projects. These include the question of standardisation of limitation periods, with particular consideration to the issue of ultimate limitation periods; the issue of forfeiture of property upon dissolution of corporations, and in particular the responsibility of the Crown when there are environmental concerns; implementation of uniform cost of credit disclosure legislation in Canada and the issue of cross-border enforcement of non-molestation orders in domestic matters. Working groups will be reviewing these matters over the next year and reporting to the 2004 meeting of the Conference.

Criminal Law Section

The work of the Criminal Law Section varies to a degree from that of the civil side. As criminal law is a federal matter, the *Criminal Code* and other statutes of interest to the Section already have course uniform application across the land. Generally the work of the Section is focussed on resolutions proposing amendments to the *Criminal Code*, to remedy procedural defects or in some cases to promote substantive change in the law. The Section also provides a forum that gives jurisdictions an opportunity to share consultation papers and consult with the Section members on draft positions.

In 2003 the Section reviewed close to 60 resolutions. It also considered two discussion papers, one on interlocutory appeal procedures and the other on sentencing issues.

Joint Session

At its 2003 meeting, the two sections met to consider reports from working groups dealing with the extraterritorial jurisdiction of police officers operating within Canada but outside of the province or territory of their appointment, and mandatory blood testing and disclosure where there is a risk that a person has been infected with a communicable disease in the course of their employment or while rendering assistance to another. The report from the working group on extraterritorial jurisdiction of police officers contained recommendations for a uniform Act. These were accepted by the Conference, which adopted the *Uniform Cross-Border Policing Act*, which will be recommended to the jurisdictions for enactment.

More information on the history and work of the Conference and its work may be found at its website at either: <www.ulcc.ca> or <www.chlc.ca>.

Manitoba Law Reform Commission

Wills and succession legislation

Since 1974, the Commission has issued 10 reports on various aspects of succession legislation. Report 108 *Wills and Succession Legislation* (March 2003), however, is the first time that all of the relevant succession legislation, including *The Wills Act*, *The Law of Property Act*, *The Intestate Succession Act*, *The Marital Property Act*, and *The Dependants Relief Act* has been considered as a whole.

The Commission approached the project with a view to ensure the integrity and relevance of the various succession statutes and that, as a whole, they operate as effectively and harmoniously as possible. The Commission has made 77 recommendations for legislative amendment, highlights of which include:

- reduction of the age at which a person can make a valid will from 18 to 16;
- prohibition of wills which exist only in electronic form;
- expansion of the *Wills Act* to include all requirements for a valid will (currently the requirements are found in both statute and common law); and
- implementation of the *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons.*

Life sustaining treatment

The Commission received 23 submissions to its discussion paper *Withdrawing and Withholding Life Sustaining Treatment* (June 2002). The Commission is now considering those submissions and working on its final report. The main challenge facing the Commission will be to achieve a fair balance between the autonomy and interests of both patients and health care providers.

While the Commission does not have the resources to make its publications available online, the Dalhousie Health Law Institute's End of Life Project has kindly made the discussion paper available on its website at **<http://as01.ucis.dal.ca/dhli/cmp_about/default.cfm>**.

Title insurance

Title insurance is a joint project with the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission. In the spring of 2002, the Minister of Justice and Attorney General wrote to the Manitoba Law Reform Commission requesting a review of and recommendations on the issue of private title insurers. Title insurance is a recent addition to the real estate conveyancing industry in Canada and the experience in both Canada and the United States has raised concerns about its potential impact on real property conveyancing. In particular, the Minister raised issues relating to the public interest including:

- a potential risk for the general public who may not obtain independent legal advice when entering into what may be the largest financial transaction of their lives;
- the actual need for and value of title insurance in a Torrens title system;
- the lack of regulation of title insurers; and
- the impact of undiscovered and/or uncorrected defects or problems in property boundaries, location of buildings, fences and other structures and the use of land.

The Commission is pleased to be collaborating with the Alberta Law Reform Institute and Saskatchewan Law Reform Commission on this project. Given the great similarity between our land titles systems and real property conveyancing practices of the three provinces and a general move in Canada towards greater uniformity of law and practice and mobility of professionals, a joint project on this issue was deemed worthwhile.

Substitute consent to medical treatment

Manitoba does not have legislation specifying who may give consent to medical treatment on behalf of a person who lacks capacity and who has not completed an advance directive or appointed a proxy. The Commission is considering whether substitute consent legislation, similar to that of Ontario and British Columbia, would be desirable in Manitoba. This project is on hold pending completion of the projects on withholding and withdrawing life sustaining treatment and title insurance.

Powers of attorney

This is a joint project with the British Columbia Law Institute, the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission. In February 2003, representatives of the law reform agencies of the four western provinces met to discuss collaborating in a joint project or projects. The benefits of such an effort include promoting consistency and uniformity in Canadian law and in combining our respective resources, capacities and competencies to increase the

profile of law reform agencies thereby encouraging increased support for law reform.

The inaugural project selected relates to powers of attorney and, in particular, the recognition between jurisdictions of powers of attorney and the legal obligations and duties of attorneys. With an increasingly mobile and aging population, issues relating to 'portability' of a power of attorney and the proper execution of an attorney's duties will arise more frequently.

As the Commission is presently engaged in two ambitious projects and has limited human and financial resources, it will participate on the project advisory committee. The British Columbia Law Institute and Saskatchewan Law Reform Commission will have a more active role in the project.

Implementation

The Commission was pleased to see three of its more recent reports implemented through legislation at the last Session of the Legislature including:

- *The Class Proceedings Act*, SM 2001-2002, c 14 (*Class Proceedings*, Report No 100, January 1999);
- *The Fatal Accidents Amendment Act*, SM 2001–2002, c 13 (*Assessment of Damages under the Fatal Accidents Act for the Loss of Guidance, Care and Companionship*, Report No 106, October 2000);
- *The Legislative Assembly and Executive Council Conflict of Interest Amendment (Conflict of Interest Commissioner) Act*, SM 2001-2002, c 49 (*The Legislative Assembly and Conflict of Interest*, Report No 106, December 2000)

The executive summaries of Commission reports No 97–108 are available, in English and French, on our website at <www.gov.mb.ca/justice/mlrc/>.

Copies of our reports are distributed to other law reform agencies and law faculty libraries in the Commonwealth on a complimentary basis upon release. Additional copies can be obtained from Statutory Publications at <www.gov.mb.ca/chc/statpub/pricelist/lawref.html>.

Law Reform Commission of Nova Scotia

The 2002-2003 fiscal year (1 April 2002 to 31 March 2003), its 12th year of operations, was positive and productive for the Law Reform Commission of Nova Scotia.

In the [northern] summer of 2002, the Commission began work on a civil justice reform/access to justice initiative, which consists of two distinct projects. One project involves a comprehensive review of the Nova Scotia *Civil Procedure Rules*. The proposed project envisages the Commission providing a secretariat, as well as substantive legal research and related assistance. In December 2002, the Commission submitted a funding request to the Nova Scotia Department of Justice. By the end of the fiscal year, there had been no indication as to whether the request for funding would be successful.

The second component, an access to justice project, is designed to address some of the issues which many people believe negatively affect the civil justice system. For this project, the Commission sought financial support from both the federal Department of Justice and the Law Commission of Canada. While both of those potential funding sources have responded positively to the project concept, to date only the Law Commission of Canada has committed itself to concrete participation. The Law Commission of Canada agreed to fund the Commission's attendance at an access to justice symposium organised by the Law Society of Upper Canada in May 2003. It is expected that further discussions with the Law Commission of Canada will take place in August 2003, at the meeting of the Uniform Law Conference of Canada.

In August 2002, the Commission distributed its final report, *Joint Tortfeasors and the Common Law Release Bar Rule*. This report involved the little-known common law distinction between a release and a covenant not to sue, in the context of joint tortfeasors. The Commission recommended that the Release Bar Rule should be explicitly abolished in its application to all wrongdoers, as it serves no public good and could lead to unfair results.

In the latter part of 2002, the Commission began to study the issue of court-ordered structured settlements in the context of personal injury damages awards. By the fiscal year end, an advisory group for this project had held its first meeting, and the Commission had completed significant work on an issues paper.

In January 2003, the Commission published a discussion paper on builders' liens in Nova Scotia. The Commission's proposals for reform included:

- the *Mechanics' Lien Act* should be extended to apply to the provincial Crown;
- guidelines for arbitration for a builders' lien dispute should be added to the legislation;
- trust fund provisions in the context of builders' liens should be adopted;
- the right of lien holders to seek information relative to their lien claims from owners and certain other parties should be expanded; and
- the ability to shelter ('piggy-backing' on another lien claim that has been made in time) should be eliminated, and the Act's title should be changed to the *Builders' Lien Act*.

During 2002-2003 the Commission also completed preliminary work relating to a discussion paper on reform of the *Province's Wills Act*.

In March 2003, the Commission and Saint Mary's University in Halifax, Nova Scotia agreed to a cooperative arrangement, which will allow both parties to pursue collaborative opportunities, assist the Commission in reducing its administrative costs, and enhance community outreach by Saint Mary's.

Although a public body created by statute, the Commission has operated without government funding for the past two years. Since the spring of 2001, the Commission's core funding has been entirely provided by the Law Foundation of Nova Scotia. The Commission is in its last year of a three-year Law Foundation grant. Without a restoration of provincial government funding, the Commission will likely not survive beyond its current fiscal year, which ends on 31 March 2004. To help prevent closure of the Commission, in 2002-2003 staff made significant efforts—through correspondence, meetings, presentations, and news releases—to ensure that the Commission and its work retained a high profile within government, the Bar, the judiciary, legal academe, and the province as a whole.

The Law Reform Commission of Ireland

DNA databank

The Attorney General has requested the Commission consider the issue of establishing a DNA databank in Ireland. Two specific matters have to be addressed: the broad and complex constitutional and human rights issues that may arise; and the more specific question of what classes of DNA profiles would make up any database. The Commission is preparing a consultation paper.

DPP appeals

The Commission is currently examining the question of whether the Director of Public Prosecutions should be conferred with the power to appeal unduly lenient sentences from the District Court, with particular attention to the use of the power of appeal from unduly lenient sentences in the Circuit Court conferred on the DPP under section 2 of the *Criminal Justice Act, 1993.* The Commission is also looking to other jurisdictions to examine how they avoid disparities in sentences in the lower courts.

Multi-party litigation (class actions)

The Commission has made provisional recommendations in a recently published consultation paper for legislation to introduce a new class actions procedure. This procedure would allow one or more representatives to sue on behalf of themselves and the members of a class of persons who have a similar claim. In other jurisdictions class action procedure has been a useful vehicle for civil rights and environmental reme-

dies. Any settlement reached or judgment secured would bind all the parties in the class action.

Judicial review procedure

The Commission has published a consultation paper setting out a number of provisional recommendations with regard to both conventional judicial review and the increasing number of statutory schemes for judicial review. Among the issues covered are the need for a leave stage, time limits, costs, case management, and the establishment of a single, unified order for judicial review.

Public inquiries

The Commission published a consultation paper on the subject of public inquiries in March 2003. In recent years, such inquiries have been established in Ireland to inquire into various matters of public concern. The most important are conducted under the auspices of a British (pre-Independence) statute, the *Tribunals of Inquiry (Evidence) Act 1921*. The Commission's paper includes but goes beyond this legislation.

A revenue court and a fiscal prosecutor

The Commission has recently published a consultation paper pursuant to a reference from the Attorney General. The main recommendations are: that the recent changes in arrangements for the prosecution of revenue offences should be given a trial period to prove their efficacy; a specialised civil revenue court should not be established as the current systems offer expertise, accessibility and efficiency; taxpayers should be able to appeal penalties to the Appeal Commissioners and in the Circuit Court.

Criminal law and procedure

A consultation paper, examining the plea of provocation, is in the course of preparation. The principal issue to be determined is whether the subjective test, which is currently applied in Ireland, should continue to apply in either its present form or some variation thereof, or whether a version of the objective test, which is applied in every other common law jurisdiction, should be introduced into Irish law. A further consultation paper is being prepared in relation to legitimate defence in cases involving homicide.

Corporate homicide

A consultation paper is being prepared which deals with the liability of corporations for the death of human persons. It is widely perceived that the law does not deal appropriately with corporations, and the persons who control them, in circumstances where corporate wrongs result in death.

Court poor box

A consultation paper is being prepared on the court poor box. This is a procedure that has been adopted by the courts, apparently without statutory support. Following a conviction, a District Court judge may decide it is not appropriate to enter a conviction and in such circumstances, the defendant is not convicted on the basis that a contribution is made to the court poor box, the content of which is then given to various charities. Concerns have been expressed as to the need to ensure equal treatment for offenders from different economic backgrounds, and also as to the lack of accountability regarding the use of the funds.

Restorative justice

A consultation paper on restorative justice and alternatives to custodial sentencing is in its early stages of preparation. Restorative justice is effectively a problem-solving approach to crime, involving the parties themselves and the community generally. It seeks to attend to the needs of the victim and to try to reintegrate the offender into the community and thus prevent re-offending.

e-Conveyancing

During 2002, the Commission reviewed conveyancing law and practice in areas where this could lead to sav-

ings for house purchasers. In the light of the Irish Government's commitment to e-Government in the 21st century, consideration is now being given as to how technological developments could substantially reduce the time taken in conveyancing transactions.

Landlord and tenant

During 2001, the Commission set up a Working Group on all aspects of landlord and tenant law. The Commission published its first consultation paper on *Business Tenancies* in March 2003.

Law and the elderly

Given the unsatisfactory state of the current mechanisms available to protect the elderly in Ireland, the Commission is recommending the introduction of a new system for their protection. This will replace the outdated Wards of Court system, and put in its place a system of Guardianship. When a Guardianship Order is made, a Personal Guardian will be appointed to the elderly person. A Public Guardian will be introduced, who will have the responsibility to protect and vindicate the rights of elderly people.

Rights and duties of cohabitees

The Commission is examining the law in relation to the rights and duties of cohabitees. The question (which has already been faced in some particular areas, like tax and welfare) is whether the law should recognise this relationship. The issue has various legal implications in the field of: rights to and transfer of property; enduring powers of attorney; life assurance; succession rights; and provision for children.

The Commission's publications are available online at <www.lawreform.ie>.

Law Reform and Development Commission of Namibia

Report on activities from 1992 to 2002

A report on the activities of the Commission from 1992 to 2002 was tabled in the National Assembly during September 2003.

Implementation

The Commission published two major reports in the past few years. Its *Report on the Law Pertaining to Rape* (July 1997) culminated in the *Combating of Rape Act, 8 of 2000.* As a result of the *Report on Domestic Violence* (December 2000), the *Combating of Domestic Violence Act* was expected to be promulgated by the time of publication.

Succession and estates

The Commission is committed to round-up its consultations and to publish its report, with recommendations to the Minister of Justice, towards the end of 2003 to enable Parliament to comply before 30 June 2005 with a judgment of the High Court delivered on 14 July 2003 (*Berendt* case; no (P) A 105/2003) in which existing pre-Independence legislation was declared unconstitutional.

The pre-Independence law (Namibia became independent in 1990) pertaining to succession and estate matters still discriminates on the basis of race. A 1928 statute still determines which law of intestate succession applies to black persons and it further provides for the administration of such intestate estates by magistrates instead of by the Master of the High Court, as is the case with all other estates. The Commission will make recommendations on issues, such as:

- customary law with regard to intestate succession as well as the administration of estates;
- some aspects of matrimonial property systems (an interim *Report on Uniform Default Matrimonial Property Consequences of Common Law Marriages* (Repeal of section 17(6) of *Native Administration Proclamation, 1928* (Proclamation 15 of 1928)) will be published during August 2003.);
- codification of the general law of intestate succession;
- protection of the interests of children and surviving spouses;
- decentralisation of the administration of estates by the Master of the High Court;
- some aspects with regard to wills; and
- the position of children born out of wedlock as well as adopted children.

Customary law marriages

A draft Bill providing for the full legal recognition of customary law marriages and the registration thereof as well as the application of Namibia's *Married Persons Equality Act, 1996* (Act No 1 of 1996) (which resulted from a report of the Commission), to such marriages, was during the past two years discussed by the Commission with traditional leaders. The comments of other stakeholders were also solicited. The Commission will now consider the results of this consultation process and will thereafter publish its report, with recommendations to the Minister of Justice.

Divorce

The main issue to be considered under this project is to bring Namibia's law on divorce in line with the latest developments in the world, in particular to replace divorce based on fault with divorce based on irretrievable breakdown, and to simplify the divorce process. The Commission is awaiting comments on a discussion document (with a draft Bill) from various stakeholders.

Other projects

Other ongoing projects of the Commission pertain to:

- publications;
- public gatherings;
- codification of the criminal law;
- compensation to victims of crime;
- criminal defamation;
- obsolete statutes; and
- consumer issues.

New Zealand Law Commission

Dispute resolution in the Family Court

On 25 March 2003 the Law Commission submitted its review of *Dispute Resolution in the Family Court* to the Minister. The government reference arose following widespread criticism in recent years of the Family Court, a specialist court first established in New Zealand in 1980. Criticisms included that the system contained gender bias; did not accommodate Maori values and practices; took far too long to resolve disputes; and that family court professionals lacked adequate skills and training. The reference required the Law Commission to consider what changes, if any, were necessary and desirable in Family Court administration, management and procedure.

Following initial consultations the Commission published a preliminary paper. It received 126 submissions on this from individual Family Court clients and representatives of most professionals who work there. It also consulted further with community client groups and professionals. Some of the recommendations that were ultimately made are set out below. Many others, not mentioned here, concerned administrative and management reforms aimed at impacting positively upon the speed and smoothness of the Court's operation.

Maori participation: Despite the guarantees under the Treaty of Waitangi of a partnership between Maori and the Crown and that Maori customs and cultural values would be protected, indications from research and consultations are that the Family Court is experienced by Maori as a monocultural pakeha (New Zealander of European origin) forum where personnel are unaware of tikanga Maori; where Maori processes for dispute resolution have no place and where many personnel show ignorance in even pronouncing Maori correctly.

In response the Law Commission recommended that as far as possible, qualified Maori service providers be contracted to work with Maori so that Maori clients can choose these services; standard introductory procedures complying with tikanga Maori should be introduced into the Family Court; and judges and other court staff should be trained in these procedures. Legislation should be amended so judges can, at their discretion, permit whanau (extended family members) to attend Family Court settlement conferences and hearings. Everyone working in the Court should be trained in Maori pronunciation and Maori cultural imperatives, to enable them to better serve Maori clients.

Gender bias: Criticisms of a pro-feminist and anti-male bias were made by male interest groups against all court players; namely judges, court staff, counsellors, lawyers, psychologists and counsel for the child. Women in non-traditional roles also complained of gender bias. The Commission reported that these perceptions are of concern as they undermine the Court's integrity. It also noted that the closed, private nature of Family Court proceedings has exacerbated these perceptions of bias. However, there is no one answer or solution to these complaints—because decisions are discretionary it is impossible to point to bias as being the reason for a decision being made.

The Commission made a number of recommendations aimed at ensuring any systemic bias that does exist is neutralised, including:

- specialist services should be provided to address men's and women's gender specific needs, and in particular post-separation parenting programmes should be provided for fathers;
- Family Court publications should be designed to represent men's and women's experiences; and
- gender issue education and training programmes should be incorporated into the training of all those working in the Family Court and efforts be made to encourage equal numbers of qualified men and women among those employed in or contracted to the Family Court.

The issue of openness of the court would be addressed in the Structure of the Courts project.

Counsel for the child: Criticisms were made that counsel for the child often does not meet with the child, or meets rarely; they do not have the skills to do the job properly; that they form biases against one parent and that a system of child advocates would better serve the needs and interests of children. The Commission, after examination, rejected the latter option as providing no greater advantage for the child. It also indicated that it was inevitable, on occasion, that in doing their job properly counsel will advocate for one parent over the other.

However, the Commission recommended more comprehensive prerequisite training. Counsel should be required to have training in child development, family dynamics and techniques for interviewing children. Further they should undertake regular refresher courses to keep up-to-date on social research about children and families. Two current year long distance learning courses were identified as ideal—one being the postgraduate diploma in Children's Issues and the other the postgraduate diploma in Child Advocacy. Both are run by the Children's Issues Centre in Dunedin. In addition to this theoretical training, lawyers wanting to act as counsel for the child should be required to attend at least three additional weekend practicums spread throughout the year. At these they would receive practical training in interviewing and talking with children. This training would be additional to existing legal training prerequisites for counsel for the child. Finally, counsel should always meet with the child.

Dispute resolution: Greater emphasis must be placed on resourcing and assisting parties to resolve disputes themselves. A new expanded 'conciliation

service' was recommended to operate out of the Family Court with its services available for a wider range of matters than it currently offers. The service would include information sessions for guardianship disputes and referrals for counselling, mediation and specialist counselling. Service delivery would be contracted out, but managed by the Family Court, which would oversee quality control.

General information sessions, offered in a variety of community settings, should be mandatory for separating couples with children who are seeking Court assistance with custody and access. Separate specialist courses, providing information on the process of parental separation and family transition, should be available and mandatory for children of separating parents.

Other Commission projects

- The structure of the courts (final phase)
- Powers of search and seizure (commencement phase)
- Status of parenthood—re surrogacy and assisted human reproduction
- Life insurance

Scottish Law Commission

Obligations

At the request of the Department of Trade and Industry, a project is being undertaken on registration and priority of rights in security by companies. The Commission published a discussion paper (No 121) in October 2002, which proposes that floating charges should continue to be registrable but should be constituted by registration rather than by the earlier granting of the deed. It also proposes that other rights in security that are already publicised in specialist registers, and assignations in security, should no longer be registrable at Companies House. The Commission is currently finalising its recommendations for reform with a view to submitting its report by the end of 2003.

Work is nearing completion on a major joint project with the Law Commission for England and Wales reviewing the law of partnership. The current law dates from 1890 and has failed to keep up with the expectations of those running and dealing with the businesses concerned. 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 new mechanisms for solvent dissolution. A second consultation paper (No 118) was issued in November 2001 dealing with the law on limited partnership. The main policy aim is to devise and recommend a modern, accessible structure for partnership law in the 21st century. A joint report will be submitted to Ministers in the [northern] autumn.

Another joint project considers the desirability and feasibility of replacing the *Unfair Contract Terms Act 1977* and the *Unfair Terms in Consumer Contracts Regulations 1999* with a single piece of legislation, written in a plain, accessible way, which would be consistent with European legislation and which would also extend protection to small businesses, as well as to consumers. A joint consultation paper (No 119) was published in August 2002. Work is progressing on finalising policy in light of the consultation response with a view to submitting a joint report in 2004.

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. The Commission aims to submit its report in 2004.

The Commission has recently started work on a project concerning the law relating to judicial factors. It

believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. The initial stages of the project involve empirical research into the current use of judicial factory and consultation with practitioners experienced in this field.

Property

A discussion paper (No 112) on *Conversion of Long Leases* was published in April 2001. It proposes that 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 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 aims to publish a first discussion paper dealing with general issues, such as the policy objectives of a system of registration of title, by the end of 2003. A second discussion paper considering matters of detail and taking account of responses to the first paper will follow.

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. The project is likely to be completed after the discussion papers on land registration have been published.

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 or she lacked a full or correct appreciation of his or her conduct at the time of the offence. The Commission intends to submit its report by the end of the year.

Trusts

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

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

Recent reports and other publications

The Commission's report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190) was published in April 2003. It concerns the common law public rights exercisable on the foreshore, sea and sea bed and the interaction of those rights with the statutory rights of access established under the *Land Reform (Scotland) Act 2003*.

The Commission's report on *Irritancy in Leases of Land* (Scot Law Com No 191) was published in June 2003. It recommends a new statutory regime controlling the landlord's right to terminate a lease on account of the tenant's breach of contract.

In September 2003 the Commission published a Draft Criminal Code for Scotland on behalf of a group of academic lawyers. While it has had no role in preparation of the Draft Code, the Commission considers that the authors have made a significant contribution to the literature on Scots criminal law and that public debate on the issues arising from the Draft Code should be encouraged.

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

Stalking

The South African Law Reform Commission's investigation into stalking emphasises the need to address the pressing and complex problems relating to stalking with a view to reforming the manner in which it is dealt with in terms of current law. The issue paper broadly defines stalking as any type of harassing and intimidating conduct that causes a person to fear for his or her safety. It identifies different categories of stalkers, for example, delusional erotomanics, 'former intimate' stalkers, sociopathic stalkers, disgruntled clients, cyberstalkers and debt collectors. The issue paper exposits the existing legal response to acts associated with stalking and explores possible reform of civil and criminal remedies.

The three options for reform are as follows:

- expand or enact similar legislation to the *Domestic Violence Act 1998*;
- amend and adapt section 384 of the *Criminal Procedure Act 1955* which regulates a binding over of persons to keep the peace;
- enact independent legislation criminalising stalking.

The closing date for comment on Issue Paper 22 was 30 September 2003.

Prescription periods

The issue paper considers the harmonisation of the provisions of existing laws providing for different prescription periods. A questionnaire is included in the issue paper. A few of the questions raised are the following:

- Should different prescription periods be retained or should different periods of prescription be avoided as far as possible?
- Are all or some of the different prescription periods in section 11 of the *Prescription Act* justified?
- Are all or some of the different prescription periods in other legislation justified?
- Should there be special protection for public authorities regarding prescription?
- If it is decided that there should be one uniform prescription period for all or most cases, how long should this period be?
- Should it be allowable to contract out of the legislative prescription regime or to modify it by agreement?
- The scope of this review is limited to prescription periods. Is there a need to review other aspects of prescription or prescription in general?

The closing date for comment on Issue Paper 23 was 17 October 2003.

Privacy and data protection

Privacy is a valuable aspect of personality. While potential invasions of privacy can come from many sources, a chief concern in recent years has been information privacy. Information privacy has been defined as the claim of individuals, groups or institutions to determine for themselves how, when and to what extent information about them is collected, stored or communicated to others. The recognition and protection of the right to privacy as a fundamental human right in the South African Constitution provides an indication of its importance.

The Commission is consequently considering proposals for possible law reform with regard to the following issues:

- whether privacy and data protection should be regulated by legislation;
- how the general principles of data protection could be developed and incorporated in the legislation;
- whether a statutory regulatory agency should be established; and
- if it is a viable option to promote a flexible approach in terms of which industries will develop their own codes of practice (in accordance with the principles set out in the legislation), which could be overseen by the regulatory agency.

The closing date for comment on Issue Paper 24 is 1 December 2003.

Domestic partnerships

The discussion paper deals with the question of the legal recognition and regulation of domestic partnerships—that is, established relationships between people of the same or opposite sex. The discussion paper does not come out in favour of any particular option and the idea is to canvass a number of options.

Marriage is currently the only legally recognised form of intimate partnership. Domestic partnerships, on the other hand, are virtually unrecognised and partners are excluded from the rights and obligations that attach automatically to marriage. The number of people living in these relationships has, however, increased worldwide and also in South Africa. This discussion paper, therefore, includes proposals for possible law reform to recognise and regulate various forms of domestic partnerships. The proposals are aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. The legislative proposals relate to marriage and civil unions; registered partnerships (same- and opposite-sex relationships); and unregistered partnerships (same- and opposite-sex relationships).

The closing date for comment on Discussion Paper 104 is 1 December 2003.

The following reports were submitted to the Minister for Justice and Constitutional Development on 22 July 2003 for consideration and promotion in Parliament.

Islamic marriages and related matters

The draft Bill contained in the report takes account of divergent views within the Muslim community. In the Commission's view the adoption of its proposed draft Bill by Parliament will go a long way in creating legal certainty with regard to Muslim marriages, will give effect to Muslim values and will afford better protection to women in those marriages in accordance with Islamic and constitutional tenets.

The draft Bill draws a clear distinction between an Islamic marriage and a civil marriage. It is only Islamic marriages that would fall within the ambit of the Bill, with provision being made for Muslims who are married by way of a civil marriage, to exercise an option to have the provisions of the Bill apply to them. Provision is also made for the regulation of proprietary consequences, changes to matrimonial property systems (with due regard to existing and vested rights) and the regulation of polygynous marriages. The draft Bill covers both monogamous and polygynous Islamic marriages which, if applicable, may exist alongside a civil marriage.

It is further recommended that, because the judges of secular courts are by and large non-Muslims, a judge be appointed from the ranks of existing Muslim judges or from Muslim legal practitioners to preside in legal disputes on an *ad hoc* basis, and that, on appeal, the views of two accredited Muslim institutions may be solicited for purposes of commenting on questions of law. The courts may also be assisted by assessors who are experts in Islamic law in the adjudication of all disputes relating to Islamic law.

The Commission's proposed draft Bill in addition addresses the registration of Islamic marriages, the

dissolution of such marriages through the pronouncement of a *Talaq* (which, in terms of the proposals, must be confirmed by a court), custody of and access to minor children and maintenance.

The use of electronic equipment in court

In its report on the use of electronic equipment in court proceedings (postponement of criminal cases via audiovisual link), the Commission recommends that:

- legislation be introduced to provide for the use of audiovisual equipment for the purpose of postponing criminal cases against accused persons who are in custody;
- the procedure provide for bail applications, both before conviction and after conviction pending an appeal;
- it should be in the discretion of the presiding officer to order the accused's physical presence in court;
- the procedure also be available for applications for leave to appeal and appeal proceedings in respect of accused persons in custody;
- the legislation be uncomplicated;
- technical matters be provided for in regulations (especially because of continuous changes in technology);
- juveniles (persons younger than 18) be excluded from the process; and
- the point of departure be to allow the procedure unless, in the discretion of the presiding officer, the accused must in the interests of justice be brought before a court.

Report on the *Apportionment of Damages Act 34 of 1956*

The major application of the *Apportionment of Damages Act 34 of 1956* has been in the field of delictual claims and mostly in the area of motor vehicle accidents. The Act has been severely criticised over the years. Since the Act was passed there have been major developments in the law. There is an urgent need for the Act to be changed to keep abreast with these developments. The draft Apportionment of Loss Bill contained in the report requires the courts to attribute the responsibility for the loss suffered in proportions that are just and equitable and gives the courts a wide discretion with regard to the method of determining appropriate proportions.

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