Reform roundup

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

Entries to Reform roundup are welcome.

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

Contents

Administrative Review Council

Automated assistance in administrative decision making

Following publication of its report on this topic in December 2004, the Council is now involved in discussion on means of implementing the recommendations contained in the report. The report contains a series of best practice principles designed to enhance the use of expert systems by government.

Scope of judicial review

The Council is continuing to work on completion of its report on the scope of judicial review. The report will document arguments about the appropriate scope and limitation of judicial review and consider the manner in which legislative limitations upon the scope of judicial review should be imposed.

Coercive investigative powers of government agencies

This project is considering whether greater consistency is either desirable or achievable in the type of powers provided to agencies to compel the provision of information, and the manner in which those powers are used. The Council is currently working on a draft report as the basis for further discussion with agencies and other stakeholders.

Admin Review

Work has commenced on the next issue of the Council's administrative law bulletin, *Admin Review*, with a view to publication mid-year.

Family Law Council

Child Representative Committee

The Council completed its report concerning the role, and the basis of appointment of child representatives in family law proceedings involving children. The report is titled *Pathways for Children: A Review of Children's Representation in Family Law*. The report takes into account the Family Court's Practice Guidelines for Child Representatives.

No new references are currently planned and the Committee has been disbanded.

Aboriginal and Torres Strait Islander Issues Committee

The Council completed its report to the Attorney-General regarding kinship obligations and child-rearing practices in Indigenous communities.

No new references are currently planned and the Committee has been disbanded.

Paramountcy Principle Committee

The Paramountcy Committee prepared a discussion paper that focuses upon the nature and application of the legal principle that the child's best interests must be regarded as the paramount consideration in family law proceedings. The deadline for providing comments on the discussion paper was 6 May 2005.

A second discussion paper addressing the operation of the paramountcy principle in relocation cases will be commenced shortly.

Violence Committee

The Violence Committee completed a letter of advice for the Attorney-General examining the operation of provisions in the *Family Law Act* that deal with cases in which there is an actual or potential conflict between a *contact order* made under the Act and a *family violence order* made under state or territory domestic violence legislation.

Fresh terms of reference are being considered.

Family Law Act Committee

This Committee has been formed to consider the Government's much anticipated legislative response following consultations on its discussion paper, entitled *A New Approach to the Family Law System—Implementation of Reforms*, released on 10 November 2004.

Statistical snapshot 2002-04

The Council is preparing to release its second snapshot, which brings together information from a number of sources in the family law system, in particular the Australian Bureau of Statistics, the Federal Magistrates Court, the Family Court of Australia and the Family Court of Western Australia.

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

New South Wales Law Reform Commission

Time limits on loans payable on demand

Currently, a loan payable on request (that is, one where no time for repayment is specified or where the loan is stated to be payable 'on demand') creates an immediate debt. This means that the cause of action accrues at the first moment the lender can commence action. Such loans are, therefore, subject to a six-year limitation period from when the borrower receives the money. The application of the limitation period may cause injustice in the case of loans between friends or family members where the expectation is often that the money will not be repaid until the lender demands it.

The New South Wales Law Reform Commission (NSWLRC) has proposed amendments to the *Limitation Act 1969* (NSW) to ameliorate the situation in Report 105, *Time Limits on Loans Payable on Demand*. The main recommendation is that the *Limitation Act 1969* (NSW) should be amended to provide that the limitation period for a loan payable on demand should run as if the cause of action accrued at the time the demand for repayment was made.

Community Justice Centres

Community Justice Centres (CJCs) were first established as a pilot program in 1980 to provide a means of settling the sort of disputes that conventional court-based procedures are unable to resolve satisfactorily. The scheme was made permanent in 1983 with the passing of the *Community Justice Centres Act 1983* (NSW) (CJCs Act). CJCs assist in settling disputes through mediation. The mediation services that CJCs provide to disputing parties are available free of charge. The mediations are conducted by mediators who provide their services on a sessional basis (receiving

small remuneration) and who are, at least in theory, drawn from the communities where the services are provided.

Since CJCs were established 25 years ago, there has been an explosion in the provision of mediation services in New South Wales. Instead of being one of the few providers of mediation services, CJCs are now one of many.

In Report 106, *Community Justice Centres*, the NSWLRC considers CJCs' unique role as a government-funded, generalist mediation service that provides its services free of charge across the whole of New South Wales. The report also considers:

- *The scope of activities that CJCs can undertake.* These activities include not only the provision of the usual mediation service, but can also involve other dispute resolution and related activities, such as conflict management and community development, training mediators, and the development and promotion of alternative dispute resolution. The NSWLRC recommends the inclusion in the CJCs Act of an objects clause to reflect these activities.
- *The structure of CJCs.* The NSWLRC recommends a reconstituted CJCs Council to develop the strategic direction of CJCs, endorse policies, promote the role of CJCs, and provide advice, when required, to the Director of CJCs and the Attorney-General.
- *What matters should or should not be brought within the scope of mediation offered by CJCs.* The NSWLRC looks at what factors ought to be taken into account in deciding whether to exclude particular disputes from mediation at CJCs, with a particular focus on disputes that involve some form of violence in the background. The NSWLRC recommends a list of factors to be taken into account when deciding whether a particular dispute is suitable for mediation.
- *The process of mediation.* Matters considered include: the principle of voluntary participation by the parties; intake assessment and the need for appropriately skilled intake officers; the presence of others in a mediation, including representatives and agents, support persons and lawyers; and the question of the enforceability of any agreement that comes out of a CJC mediation.
- *The protections that have been included in the CJCs Act.* These protections safeguard, in appropriate cases, the mediators, the disputing parties and referring agencies, and include: the exoneration from liability of mediators for actions taken in execution of the CJCs Act; guarantees of confidentiality, subject to appropriate exceptions (for example, the protection of children from harm); and privileges with respect to defamation, the admissibility of evidence and the concealing of serious indictable offences.
- *Maintaining the high standards set by CJCs in the field of mediation.* Methods of achieving this include: setting up and enforcing competency standards, codes of practice, guidelines and other similar documents; training and educating mediators, conducting co-mediation, strengthening the role of coordinators, and providing more opportunities to mediate; informing consumer choice so that parties will have sufficient information to decide whether to participate in mediation; receiving and managing feedback, conducting research. and having complaints handling and grievance procedures in place.
- *Matters relating to mediators.* These matters include CJCs mediators' accreditation and re-accreditation, selection, initial training, status and remuneration and their continuing education.
- *Indigenous communities.* The NSWLRC concludes that there is nothing in the CJCs Act to prevent CJCs delivering appropriate services to Indigenous communities in New South Wales. The NSWLRC also considers some ways in which CJCs may collaborate with Indigenous communities and introduce or adapt services to meet their needs.

In July 2004, the NSWLRC, in conjunction with Community Justice Centres, conducted a survey of users of the Community Justice Centres mediation service. The results of this survey (Research Report 12, *Mediation and Community Justice Centres: An Empirical Study)* have informed the conclusions in the Commission's final report.

Uniform succession laws: Intestacy

If a person dies without a will or with a will that only disposes of part of their estate, the part of the estate that has not been dealt with will usually be distributed according to a set of statutory rules that apply to intestate estates. Different rules for distribution apply in different states and territories across Australia.

The New South Wales Law Reform Commission has released Issues Paper 26, *Uniform Succession Laws: Intestacy*, on the law relating to intestacy, as part of the work of the National Committee for Uniform Succession Laws. The National Committee was established by the Standing Committee of Attorneys-General to review the existing state laws relating to succession, and to propose model national uniform laws. This issues paper is the first stage of the review of the law relating to intestacy and raises, and invites comments on, a number of issues in relation to the law of intestacy in the different Australian jurisdictions. The law in New Zealand and England has also been included for the sake of comparison. The Commission is currently seeking submissions on the issues raised in the paper and also on any related matters to assist in the framing of a national model bill on intestacy.

Other developments

The Commission has a large number of reports nearing completion. In the next six months, it will publish the following consultation papers or reports:

- Sentencing: Young offenders (report)
- Relationships and the law (report)
- Surveillance (report)
- Blind or deaf jurors (report)
- People who guarantee other people's debts (report)
- Expert witnesses (report)
- Majority verdicts of juries in criminal trials (report)
- Evidence—in conjunction with the Australian Law Reform Commission and the Victorian Law Reform Commission (discussion paper).

Implementation

- The NSWLRC Report 94, *Set-off*, will be implemented in the Civil Procedure Bill 2005.
- The NSWLRC Report 101, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, was implemented by the *Criminal Procedure Amendment (Sexual Offence Evidence) Act 2004*.

Queensland Legal, Constitutional and Administrative Review Committee

Preamble for the Queensland Constitution

In its *Hands on Parliament* report, the Legal, Constitutional and Administrative Review Committee (LCARC) of the 50th Parliament (the former Committee) recommended that, as a step towards constitutional recognition of Aboriginal peoples and Torres Strait Islanders, the LCARC should consider the issue of a preamble for the Queensland Constitution and, in particular, inclusion in that preamble of due recognition of Aboriginal peoples and Torres Strait Islanders.

On 30 November 2004, the current Committee tabled its report on that inquiry, *A Preamble for the Queensland Constitution?* In that report, the Committee recommended that the *Constitution of Queensland 2001* should not contain a preamble at this stage. Reasons for that conclusion included: insufficient public support and consensus; concerns about the legal effect of a preamble; concern whether the extensive consultation required to develop the form and text of a preamble would be an effective use of resources; and the likelihood of having to revisit any preamble if there were a change to a republican system of government.

Although the Committee's decision not to recommend the enactment of a preamble meant that recognition would not be given to Aboriginal peoples and Torres Strait Islanders in a preamble, the Committee noted the significant support in submissions to its inquiry for constitutional recognition of Aboriginal peoples and Torres Strait Islanders. The Committee further noted a recent amendment to Victoria's Constitution, which provided recognition of the Aboriginal people of Victoria and suggested that the Queensland Government might consider a similar amendment to Queensland's *Constitution*.

A final ministerial response was due in late May 2005.

Monitoring of *Hands on Parliament* recommendations

In its response to the former Committee's *Hands on Parliament* report, the Government

indicated support for, and a willingness to implement, most of the Committee's recommendations. The Government noted the Committee's recommendation regarding a proposed evaluation of the strategies recommended in the report and stated that it would request the Committee to conduct an interim evaluation after the first full electoral cycle, with a full evaluation after three electoral cycles (or nine years).

In accordance with this request, the Committee continues to monitor implementation of the recommendations made by the former Committee.

Meeting with the Queensland Ombudsman

The Committee's responsibilities include monitoring, reviewing and reporting on the performance of the Queensland Ombudsman's functions. In fulfilment of this responsibility, on 23 November 2004 the Committee held its sixth general biannual meeting with the Ombudsman.

The Committee's report of the November meeting stated that the Office of the Ombudsman fulfils an important role in achieving administrative justice on behalf of the people of Queensland. In particular, the Committee noted research being undertaken about the nature of complaints and complainants; the provision of well-designed proactive advice, recommendations and training programs to effect improvement in the quality of administrative practice in public sector agencies in Queensland; and steps taken by the Office of the Ombudsman to increase public awareness of its functions and to improve the accessibility of its services to all Queensland people.

Publication of Committee proceedings

On 10 March 2005, report 48 of the Committee, *Publication of Committee Proceedings*, was tabled in the Parliament. That report related to an apparent unauthorised disclosure of Committee proceedings; namely, proceedings of a meeting on 22 February 2005 of the Committee, the Premier and Attorney-General, regarding the then proposed appointment of Ms Cathi Taylor as Information Commissioner.

On 7 March 2005, an article appeared in Brisbane's *The Courier-Mail* titled 'Beattie stands firm on FOI decision'. That article referred to the meeting of the Committee on 22 February 2005 and, in an apparent contravention of a Standing Order of the Parliament regarding Committee confidentiality, stated that the Committee 'had been briefed on Ms Taylor's appointment before it was announced "and no-one objected about the person appointed"'.

Report 48 stated that, for some members of the Committee, that apparent disclosure of the Committee's proceedings also raised the question of the accuracy of the report of the proceedings. A particular problem identified was the inability of individual Committee members to respond to the media account of the Committee's proceedings without themselves breaching the Standing Order.

The Committee concluded that, having considered all circumstances surrounding the media article, including the recommended procedure following an alleged unauthorised disclosure, the range of possible interpretations of the article, and a response that had been provided by the Premier, the most appropriate course of action was to:

- authorise the publication of the minutes of the Committee's meeting on 22 February 2005 concerning the appointment of the Information Commissioner;
- release all participants from the confidentiality of that proceeding; and
- report on the matter to the Legislative Assembly.

The non-government members of the Committee provided a statement of reservation to the report. It set out concerns about possible interpretations that could be placed on *The Courier-Mail* article and the response provided by the Premier.

Youth participation in Queensland's democratic processes

The Committee has resolved to inquire into the participation of young people in democratic processes in Queensland. This inquiry will be launched in mid-2005.

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

Victorian Law Reform Commission

Workplace privacy

An options paper containing two models for regulation of workplace privacy was released in September last year.

Unions, employers and regulatory theorists have provided feedback on different elements of the models through written submissions and face-to-face consultations.

Victorian Law Reform Commission (VLRC) researchers are now writing the workplace privacy final report to give to the government in the middle of this year.

The final report will put forward one model of regulation, which will aim to give workers a minimum level of privacy protection while still allowing employers to meet all their legal obligations.

Once the final report is handed over, the VLRC will begin work on the second stage of its privacy reference: surveillance in public places.

Family violence

The VLRC has been asked to review the *Crimes (Family Violence) Act 1987* and its intervention order system to determine whether it is the best legislative response to family violence.

A consultation paper was released in December at the 'What Women Want' forum, and has received more than 70 submissions from organisations and individuals who have experience with the system. The VLRC had already conducted a state-wide series of consultations with domestic violence services, courts and police before releasing the consultation paper.

Researchers are currently meeting with individuals and groups to take oral submissions and test interim recommendations. A forum to test relevant interim recommendations with leaders of the Indigenous community will be held in June.

The final report is due to be given to the state government before the end of this year.

Assisted reproduction and adoption

The first in a series of three assisted reproduction position papers was released in early May.

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

The first paper sets out the VLRC's position on changes to legislation governing access, including removal of discrimination from the legislation, the requirement for consent to posthumous use of gametes and the introduction of presumptions against treatment for people convicted of serious sexual and violent offences. The second position paper covers parentage and adoption and the third paper surrogacy.

Once submissions in response to the interim recommendations are received, researchers will begin work on the final report, which is due to be given to the government before the end of this year.

Bail

Preliminary consultations and research have begun on the VLRC's new reference on the state's *Bail Act*.

The government has asked the VLRC to consider whether the Act is consistent with the objectives of the criminal justice system and the Attorney-General's 2004 Justice Statement.

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

Researchers have already begun talks with legal centres, solicitors and prosecutors about any current problems or desired reforms of the Act. A consultation paper is planned for September this year.

Evidence

The Victorian government has asked the VLRC to review the state's evidence laws with a view to introducing the uniform Evidence Act.

A review of the uniform Evidence Act by the NSW and Australian law reform commissions is already underway and the VLRC will work with these bodies to produce a joint discussion paper and then a report by the end of the year.

Victoria released its own information paper at the beginning of this year to let people know how the Victorian inquiry would operate, and how it would fit in with the national review.

The VLRC will have to produce a separate report on exactly how current legislation should be amended to make way for the uniform Evidence Act. It will also work with the Victorian government, which has started a two-year review of the state's *Crimes Act*, to avoid any overlap.

Completed references

The VLRC's *Defences to Homicide* final report was tabled in parliament on 18 November 2004.

The government has already responded to the report by promising to abolish the partial defence of provocation in the spring session of parliament.

As well as recommending the abolition of provocation, the report calls for the reintroduction of excessive self-defence as a partial defence; the introduction of some hearsay and expert evidence about family violence to improve juries' understanding; and the introduction of duress and sudden or extraordinary emergency as full defences to murder and manslaughter.

In response to the VLRC's *Sexual Offences* final report, which was tabled in parliament in August 2004, the Department of Justice has set up a specialist unit to implement the report's recommendations.

The report called for sweeping changes to the way the state's justice system responds to victims of sexual crimes. Recommendations focused on reducing the trauma for all victims but particularly for children, people with a cognitive impairment, Indigenous people and people from a non-English speaking background.

Law Reform Commission of Western Australia

Aboriginal customary law

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

During 2002-03, the Commission carried out extensive community consultations, including travel to various remote and regional areas within Western Australia. The purpose of these visits was to consult and receive submissions on the matters set out in the Terms of Reference. The information received at these consultation visits was drafted into a series of thematic summaries and returned to the various communities for feedback and approval. The thematic summaries are available on the Commission's web site at <www.lrc.justice.wa.gov.au>.

In 2004, the Commission set about publishing and distributing the following background papers, which are now available from the Commission's web site:

- *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* by Victoria Williams;
- *Caught in the Middle: Indigenous Interpreters and Customary Law* by Michael Cooke;
- *The Value of Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area* by Greg Marks;
- *Family Law and Customary Law* by Tony Buti and Lisa Young;
- *Aboriginal Customary Laws Reference – An Overview* by John Toohey;
- *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne - A Case Study* by Kathryn Trees;
- *Aboriginal People and Justice Services: Plans, Programs and Delivery* by Neil Morgan and Joanne Motteram;
- *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia* by Harry Blagg;
- *Aboriginal Customary Law: Can It Be Recognised?* by Greg McIntyre;
- *International Human Rights Law and the Recognition of Aboriginal Customary Law* by Megan Davis and Hannah McGlade;
- *Customary Law, Human Rights and International Law: Some Conceptual Issues* by Chris Cunneen and Melanie Schwartz; and
- *Indigenous Cultural and Intellectual Property and Customary Law* by Terri Janke and Robynne Quiggin.

The topics covered by the background papers provide additional information on issues relevant to the project and will assist the preparation of the discussion paper. The background paper series will be completed in the next few months with the publication of three additional papers on the areas of Aboriginal women and customary law; Aboriginal customary law in the context of Western Australian constitutional law; and Aboriginal people, criminal law and sentencing.

Problem-oriented courts and judicial case management

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

- the extent to which, and the circumstances in which, persons are referred to problem-oriented courts and judicial case management; and
- the extent to which problem-oriented courts and judicial case management fit within the traditional court model.

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

The Commission has since appointed a project writer and a research assistant to commence work on the reference. The Commission anticipates the final report will be submitted to the state Attorney General in December 2005.

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

Alberta Law Reform Institute

Major project reaches final phase

The Alberta Law Reform Institute is now entering the final phase of it Rules Project, with drafting and the Rules of Court Committee review in full play.

We have set an ambitious schedule to complete all policy directions by September of this year, all drafting instructions by the end of October, drafting by the end of December, and Rules of Court Committee review by March 2006. (In Alberta, the Rules of Court Committee has the formal authority to make recommendations to the Lieutenant Governor in Council for an order in council promulgating the new rules.)

A series of packages will be forwarded to the Rules of Court Committee, allowing it to see the consultation document, the responses, the final policy decisions, the drafting instructions and the final draft. We expect to produce about 12 of these packages, going out at monthly—or slightly less than monthly—intervals.

Each of these packages will confirm the breadth of research, the comprehensiveness of responses and their treatment, and the development history of the draft rules. For example, the first package on discovery and experts consisted of 82 double-sided pages.

Work has also begun on the design and drafting of forms to accompany the new rules. Principles have been approved and design guidelines are currently being developed.

A career milestone

Many law reform agencies have not even existed for 35 years, let alone have an employee who can say that they have spent all of their professional career working in law reform with the same agency.

On 31 August 2005, Margaret Shone QC will formally retire from the Institute after 35 continuous years of service.

Margaret has been counsel on a wide array of subjects from family law to evidence, class actions to competence and human reproduction.

Recently, Margaret received a Distinguished Service Award, conferred jointly by the Law Society of Alberta and Canadian Bar Association (Alberta Branch). She has also been honoured by the Government of Alberta, the Alberta Human Rights and Citizenship Commission, and the University of Alberta.

Margaret will work part time for two years on project work for the Institute after her retirement. We congratulate her on her distinguished and lengthy career and wish her the best in the next phase of her activities.

Manitoba Law Reform Commission

Recent publications

In October 2004, the Commission submitted its report, *Substitute Consent to Health Care* (Report 110) to the Minister of Justice and Attorney General of Manitoba.

In its report, the Commission recommends a number of steps that should be taken to improve Manitoba's laws relating to substitute consent to medical treatment. This new report complements the Commission's recent report on the withholding or withdrawal of life sustaining medical treatment.

Although *The Health Care Directives Act* permits people to designate proxies to make treatment decisions on their behalf in the event of incapacity, it appears that few people take advantage of this option. As a result, the Commission has recommended that the Act be amended (with concomitant amendments to *The Mental Health Act* and *The Vulnerable Persons Living with a Mental Disability Act*) to include clear and consistent rules about who is authorised to make treatment decisions for persons who are unable to do so for themselves and who have not appointed a designated proxy. It sets out the hierarchy of persons from whom consent to treatment (or its withdrawal) should be sought in these situations; the qualifications and scope of authority of substitute decisions makers; guidelines to be followed in making decisions, resolution of disputes among substitute decision makers and a review and appeal process.

The Commission also recommends that the Province undertake an on-going campaign of public education about the options available to deal with these situations.

The Commission believes that its recommendations will provide much-needed clarity and assistance to health care professionals, as well as to incapable patients and their families and friends.

Current projects

The Commission is currently working on several projects:

- Title insurance—a joint project with the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission.
- Powers of Attorney—a joint project with the British Columbia Law Institute, the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission.
- A Review of *The Garnishment Act*—a reference from the Minister of Justice and the Attorney General. Outside consultants were retained for this project and a draft paper has been completed and is now being distributed internally within the Department to individuals dealing with the process on a day-to-day basis. Feedback is expected by mid-May after which final recommendations will be drafted for the Commission's consideration.
- Court costs—an outside consultant has been retained for this project and research is underway. We hope to have a draft paper ready for the Commission's consideration by mid-2005.
- Common building schemes—the Commission is considering an amendment to *The Real Property Act* to allow an owner of two or more parcels of land, for example, a residential development, to register a scheme of building restrictions, by unilateral declaration, on title to all lots in the development prior to sale. We hope to have an informal report ready by the end of June 2005.

Ghana Law Reform Commission

Restorative justice

This project on restorative justice and alternatives to custodial sentencing is being undertaken in close collaboration with the Commission on Human Rights and Administrative Justice.

The aim of the project is to research and make recommendations for reform of the Ghanaian penal system, so that first time offenders and juveniles are not sent to prison, for minor legal infringements.

Law and poverty

This project is focused on researching gender as a main determinant of poverty. Inequitable laws and poverty have excluded Ghanaian women from society over the years, causing great harm. With government policy focusing on poverty reduction, gender equity has come to be seen as the panacea for the reform of laws on property.

Consumer protection

Rapid advances in science and information technology have left the Ghanaian legal regime

behind. Consumers are, therefore, greatly exposed to hazard and cheating. The consumer protection law project is a bold initiative to amalgamate all consumer protection laws into one organised legal system to assist in the fight for the rights of the often vulnerable and practically defenceless.

Law Reform Commission of Hong Kong

Civil liability for invasion of privacy

The report, released in December 2004, recommends that civil liability should attach to two types of privacy invasion: (a) intrusion upon the solitude or seclusion of another; and (b) publicity given to an individual's private life.

Under the LRC proposals, any person who intentionally or recklessly intrudes (physically or otherwise) upon the solitude or seclusion of another (or into his or her private affairs or concerns) in circumstances where that other has a 'reasonable expectation of privacy' would be liable in tort provided that the intrusion is 'seriously offensive or objectionable to a reasonable person'. The legislation would specify the factors that the courts should take into account in determining whether the plaintiff has a reasonable expectation of privacy at the time of the alleged intrusion and whether the intrusion would be seriously offensive or objectionable to a reasonable person. The defendant would not be liable if he or she could rely on the defence of consent or could show that the act was necessary for:

- the protection of the person or property of the defendant or another;
- the prevention, detection or investigation of crime;
- the prevention or redress of unlawful or seriously improper conduct; or
- the protection of national security.

The LRC also recommends that any person who gives publicity to a matter concerning the private life of another should be liable in tort if: (a) the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person; and (b) he or she knows or ought to know that the publicity would be seriously offensive or objectionable to such a person. The defendant would not be liable if the publicity was in the public interest or would have been privileged had the action been for defamation.

Privacy and media intrusion

This report, also released in December 2004, seeks to protect individuals from unwarranted invasion of privacy by newspapers and magazines. The LRC considers that the existing voluntary Hong Kong Press Council is ineffective because it has no jurisdiction over magazines or the three most popular newspapers, which account for more than 75% of newspaper readership in Hong Kong. The Council members and local newspapers may also be sued for libel if they criticise a non-member newspaper for breach of media ethics.

The LRC considered numerous alternatives to regulation by a statutory press commission for the protection of privacy but concluded that they were ineffective, impracticable or undesirable. After satisfying itself that a statutory Press Complaints Commission would not unduly inhibit press freedom if it was independent, self-regulating and had safeguards against abuse, the LRC recommends the creation of a statutory but independent and self-regulating Commission to deal with complaints about unwarranted press intrusion and complaints about inaccurate or misleading information about an individual reported in the press.

The proposed Commission would have jurisdiction over all newspapers and magazines. Press members would be nominated by the newspaper industry, the magazine industry, the journalists' associations and journalism academics. Public members would be nominated by professional bodies and non-government organisations that are independent of the press industry and the Government.

The proposed Commission (and specifically the press members of that Commission) would be under a duty to draw up a Press Privacy Code. It would only be breaches of that code, not of any other standards, which would be subject to the Commission's sanctions. The Commission would adjudicate on complaints about breaches of the Press Privacy Code and may warn or reprimand an offending publisher and require it to publish a correction or its findings, but may not impose fines or award compensation. Where a publisher fails to publish a correction or the findings as required, the Commission may apply to the court for an order requiring the publisher to take specified action. Newspapers and magazines (but not the complainants) would have a right to appeal to the Court of Appeal against the Commission's adjudications.

Commission members (but not the Commission itself) would be immune from libel actions. The Commission would be funded partially by a levy on the press industry and partially by public funds.

Child custody and access

In March 2005, the LRC published the fourth and final report under its reference on guardianship and custody of children. The *Child Custody and Access* report includes a wide range of recommendations to introduce the 'joint parental responsibility' model into Hong Kong's family law. Following the approach taken in a number of other jurisdictions, the report recommends replacing the existing court orders for 'custody' and 'access' (with their focus on the respective rights of divorcing parents over their children) with a range of new, more child-focused 'residence', 'contact' and other orders. The report includes recommendations to enhance the voice of the child in family proceedings and to expand the rights of close relatives to apply for court orders affecting children. Changes are also recommended to improve the existing law and procedures for dealing with family violence cases.

The LRC's three earlier reports in the series are *Guardianship of Children* (January 2002), *International Parental Child Abduction* (April 2002) and *The Family Dispute Resolution Process* (March 2003).

Law Reform Commission of Hong Kong publications are available online at <www.hkreform.gov.hk/>.

Scottish Law Commission

Criminal law

Following public concern about recent rape cases in Scotland, the Commission has been asked by Scottish Ministers to review the law relating to rape and other sexual offences. Among the issues being considered is whether the definition of rape should be extended to include sexual assaults against male or gender-realigned victims. The Commission is also considering the defence of consent and whether models of consent used in other jurisdictions could be adopted. In addition, it is looking at a *Draft Criminal Code for Scotland* (published under its auspices in 2003) to see the extent to which it could provide a model for this project. The Commission aims to produce a discussion paper by the end of 2005.

Interest

The Commission has been asked by Scottish Ministers to examine the law on interest on debt and damages. While the current law is reasonably certain in many respects, it lacks any coherent principle. In a discussion paper (No 127) published in January 2005, the Commission proposes the introduction of a statutory right to claim interest during the period when a claimant is deprived of the use of his money, whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The Commission is about to start analysing consultation responses with a view to finalising its policy for reform.

Limitation in personal injury actions

The Commission is undertaking a review of the provisions of the *Prescription and Limitation (Scotland) Act 1973* concerning limitation in personal injury actions. The project looks at the so-called 'knowledge test' and at the power of the courts to override the limitation period if it is equitable to do so. Concern has been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised as to whether the Act should be amended to specify factors to which the court should have regard in exercising its discretion. The Commission aims to publish a discussion paper by the end of 2005.

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 hopes to submit its report in 2005.

The Commission is working on a review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A discussion paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second discussion paper, to be published in the middle of 2005, will look at the three core issues of registration, rectification and indemnity against the background of the conceptual framework

set out in the first paper. A third paper will follow, considering various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register.

The Commission is also engaged on a project concerning protection of purchasers buying property from insolvent sellers. A discussion paper (No 114) on *Sharp v Thomson* (1997 SC (HL) 66), which is the leading case in this area, was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. The Commission is considering how best to draw this project to a conclusion. There may be scope for dealing with some of the remaining proposals in the land registration project.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. In its view the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. The project will concentrate on issues relating to intestacy and protection from disinheritance. As a first step, a public attitude survey has been commissioned to help shape provisional proposals for reform.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two discussion papers were published in September 2003 as part of this phase—one on breach of trust (No 123) and the other on apportionment of trust receipts and outgoings (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts (No 126) was published in December 2004.

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

The Commission 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. The Commission aims to publish a discussion paper by the middle of 2006.

Recent reports and other publications

Seventh Programme of Law Reform: The Commission's *Seventh Programme of Law Reform* (Scot Law Com No 198) was published in February 2005, setting out the main basis for its work over the next five years. Some work—in relation to property law, trusts and judicial factors—is carried forward from the *Sixth Programme*. The new Programme also includes projects on succession, assignation of and security over incorporeal moveables, unincorporated associations and on the criminal defences of provocation, self-defence, coercion and necessity.

Obligations: A report on *Unfair Terms in Contracts* (Scot Law Com No 199) was published jointly with the Law Commission for England and Wales in February 2005. It recommends replacing existing legislation with a single statute setting out the law in a clear and accessible way that consumer advisors and businesses will find easier to understand. Guidelines are included on how to decide whether a contract term is unfair. The report also recommends a separate scheme to protect small businesses by allowing them to challenge a range of non-negotiated terms.

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

Trinidad and Tobago Law Reform Commission

Addressing the intentional transmission of HIV

Cognisant of the serious threat which the AIDS pandemic poses to the world and in particular the Caribbean region, which the World Health

Organisation (WHO) has identified as having the second highest HIV infection rate, the Law Reform Commission undertook research and examined the various options available to assist in curbing the spread of AIDS in Trinidad and Tobago.

The Commission recognises that the AIDS epidemic is primarily a public health issue and that non-legislative measures such as education, counselling and the promotion of responsible sexual behaviour would be effective tools in reducing the spread of the disease. We are, however, of the view that the criminal law has a distinct role to play in protecting society.

The Commission is concerned that some individuals, through their irresponsible behaviour, either deliberately or recklessly expose others to the risk of infection and that concomitant with our social and public health initiatives, other steps are necessary to combat the spread of HIV.

The Offences Against the Person (HIV) (Amendment) Bill, which is now before the Parliament, would make it mandatory for people who know, or ought to know, that they are infected with the virus to disclose their positive status to any person with whom they engage in intimate conduct and who, as a consequence, is exposed to the virus and, therefore, to the risk of infection. The Bill, in essence, would attach criminal responsibility for non-disclosure. It is to be noted that the offence created is not one of transmission but one of intentional exposure to the virus, as it would be difficult—at times even impossible—to prove that transmission actually took place, having regard to the fact that the virus has a hibernation period of up to five years.

The Bill, therefore, seeks to create the offence of intentional or reckless exposure of another to the HIV infection. This offence would be committed where people know, or ought reasonably to know, that they are infected with the HIV virus and engage in conduct and fail to disclose that they are HIV positive, thereby exposing another to the virus and to the risk of infection. Conduct would include intimate conduct with a person; the transfer or donation of blood, tissue, semen, organs or potentially infectious body parts or fluids for transfusion, transplantation, insemination or other administration to a person; or the transfer of any intravenous or intramuscular drug paraphernalia that a person has used since they had knowledge of their infection.

A person convicted of the offences of intentional or reckless exposure of another to the infection would be liable to imprisonment for 10 or seven years respectively.

If a person dies as a result of either intentional or reckless exposure, the legislation provides for the offence of manslaughter to be proffered. The maximum penalty for manslaughter in this jurisdiction is life imprisonment. However, it would be a defence where the person exposed to the infection knew from the accused person of the infection yet consented to the conduct anyway.

Where a person is charged with the offence of intentional or reckless exposure, the enquiring Magistrate may order the taking of a blood sample from the accused person and the other person for forensic testing if the evidence of the case so warrants. Where either person refuses without reasonable cause to give samples of their blood for testing, the court may draw such inferences as appear proper.

The Bill would also create the offence of negligent transmission of HIV. This offence is committed where an individual, corporation or institution undertakes the supply or transfer, transfusion or transplantation of tissue, organs, blood, body fluid etc to or into a person and that person becomes infected with HIV owing to gross negligence on the part of the individual, corporation or institution. In this case the individual, corporation or institution would be liable to a fine of $TT500,000 and, in the case of a corporation or an incorporated institution, the court may order that the operating licence of that body or institution be revoked. This measure is intended to encourage the highest standards of care and precaution in medical procedures to guard against the spread of the infection.

The Law Reform Commission looks forward to the early enactment of these provisions, as it would be a major step in the fight against HIV/AIDS.