

new south wales law reform commission

The latter half of 1996 saw the finalisation of five reports by the NSW Law Reform Commission. Two reports were tabled in the NSW Parliament in October 1996 and the other three are expected to be available in early 1997.

Directed Verdicts of Acquittal (Report No 77)

This Report required the Commission to consider whether the common law rule that there is no right of appeal by the Crown against a directed verdict of acquittal should be altered. The Commission's conclusion was that the law should not be changed. The primary issue which arose in submissions to the Commission was the degree of protection from prosecution which should be afforded to an accused person who has been acquitted by way of a directed verdict. Proponents of no change argued that the prevention of a Crown appeal is a fundamental safeguard of an accused person's rights. Supporters of a right of appeal argued that the protection given to an accused was too inflexible and that there should be exceptions based on the public interest. The Commission, while conceding that the arguments for and against a right of appeal are evenly balanced, concluded that the arguments for change were not compelling.

Provisional Damages (Report No 78)

In this Report the Commission recommends that provisional damages should be an option in all personal injury cases in New South Wales. The provisional damages regime recommended in the Report would be an alternative to the lump sum 'once-and-for-all' rule and is a variation of the concept of deferred assessment of damages. It would allow a person to make an application for a provisional award with the option of returning for a further assessment on the occurrence of a certain specified event, the possibility of which is foreseen at the time of assessment, such as development of a further medical condition or a significant deterioration of an existing condition.

Sentencing

Three Reports are programmed as part of the Commission's comprehensive review of sentencing laws. The first report focuses on the general

principles of sentencing. The next report, expected to be concluded by July 1997, will report on the sentencing of Aboriginal offenders.

Review of the Adoption of Children Act 1965

This report is the culmination of a review extending over three years. In addition to the report, two research reports will be published outlining details of two empirical studies undertaken by the Commission. One of these studies deals with the Aboriginal Child Placement Principle and the second with inter-country adoption.

People with Intellectual Disability and the Criminal Justice System

This report presents one of the most comprehensive reviews ever undertaken in Australia into people with intellectual disability and the criminal justice system. The Commission has published an Issues Paper, two Discussion Papers and three Research Reports as part of its research and consultation program. Two of the Research Reports outline the results of surveys undertaken by Professor Susan Hayes into the number of people with intellectual disabilities appearing in local courts in NSW.

Implementation

Two of the Commission's reports are under active consideration by the NSW Government.

Defamation

The Attorney General for NSW, the Hon J W Shaw QC, MLC has recently distributed an exposure draft Defamation Bill 1996 which substantially implements the Commission's 1995 report. The explanatory note to the Bill states that the Bill will alter the law of defamation in New South Wales as follows:

- (a) to require the falsity of a defamatory imputation to be proved in most cases to establish a cause of action for defamation, and
- (b) to ensure that the defence of comment is only available if the defendant proves that the comment represents the opinion of its maker, and

- (c) to provide a defence if a defendant publishes an adequate requested correction of a defamatory imputation, and
- (d) to enable a plaintiff to seek a declaration from the Supreme Court that a defamatory imputation is false and to have that declaration published by the defendant, and
- (e) to reorganise provisions in the present Act relating to absolute privilege, protected reports and official and public documents and records, and
- (f) to extend the defence relating to protected reports to proceedings of local councils and other public authorities, and
- (g) to limit the penalty for the offence of criminal defamation to 200 penalty units (currently \$20 000) or 3 years imprisonment (or both) for individuals and 400 penalty units (currently \$40 000) in other cases, and
- (h) to enable the Director of Public Prosecutions to commence proceedings for criminal defamation, and
- (i) to extend existing protections relating to the use of incriminating answers in defamation proceedings to de facto spouses.

It is expected that legislation will be introduced into the Parliament in the first session of 1997.

Police Powers

The Commission's Report entitled *Police Powers of Detention and Investigation after Arrest* is again the subject of media attention. The Opposition spokesman on Police, Mr Andrew Tink foreshadowed in October 1996 that he would introduce a Private Member's Bill to implement the Commission's report. The report, published in December 1990, recommended that the Police should have the right to detain a suspect for an initial period of up to four hours after arrest for the purpose of questioning or conducting other authorised investigative procedures. The period of time for investigative detention could be extended by

up to eight hours but only after approval by a court or a justice. If implemented in New South Wales this procedure would be similar to the rules which apply under Commonwealth laws and also in South Australia.

New reference

Aural and Visual Surveillance

The Commission has received a new reference relating to aural and visual surveillance. The Commission's terms of reference require it to review the *Listening Devices Act 1984* as well as to consider the need to regulate the use of video surveillance in public places. Video surveillance has become an issue of significant public interest in New South Wales as a number of local councils have, in conjunction with local businesses as installed video surveillance cameras as a crime prevention strategy. The Commission will be interested to survey the extent to which areas where cameras have been installed have shown any decrease in crime.

Other developments in New South Wales

The Minister for Police, Mr Paul Whelan, released a Discussion Paper in October 1996 outlining proposals for Accountability Conferences which will bring young offenders in New South Wales face-to-face with the victims of their crimes. The conferences would be available primarily for non-violent crimes such as graffiti, burglary, vandalism and petty theft. The victims consent would be required. The scheme is based primarily on a New Zealand family conference model. Legislation to introduce the scheme will be introduced in the first session of 1997.

Peter Hennessy
Executive Director

law reform in victoria

Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee has recently tabled a report *Review of the Evidence Act 1958 and Review of the Role and Appointment of Public Notaries* in the Victorian Parliament. Essentially the report recommends the adoption of the *Evidence Act 1994* (Cth). The adoption of the Committee's recommendations will be another step on the path to uniform evidence laws in Australia. The report also recommends the wholesale reform of the appointment of public notaries in Victoria.

In addition to its ongoing function of scrutinising every bill and regulation introduced, the Committee has one other current reference, the *Review of Redundant Legislation*. For the past two years, the Committee has systematically examined the Victorian statute book and made various recommendations as to the repeal of redundant and badly drafted legislation. There is no final reporting date for this reference, however the Committee periodically tables reports in the Victorian Parliament. It is envisaged that the reference will continue for the next two years.

Helen Mason
Senior Legal Adviser

queensland law reform commission

Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability

In June 1996, the Commission delivered its final report on this reference to the Attorney-General (R No 49, June 1996). The Commission recommended the creation of an independent statutory tribunal to hear and determine applications about decision-making by and for people with a decision-making disability. The recommended powers of the tribunal included not only the power to appoint a substitute decision-maker, but also an assistant decision-maker. The Commission recognised the important role played by the family members and friends of a person with a decision-making disability, recommending that certain family members and people in the person's support network be statutorily authorised decision-makers for health care decisions. The Report also dealt extensively with the making of enduring powers of attorney, and with the proposed Tribunal's powers to oversee enduring powers of attorney.

Contact: Ms Penny Cooper (07) 3247 4550.

Uniform Succession Laws for the Australian States and Territories

The Commission is co-ordinating a SCAG-initiated project on uniform succession laws for Australian States and Territories. During the last year, a committee of representatives of all Australian

Attorneys-General as well as a delegate from the New Zealand Law Commission reviewed issues relevant to the law of wills. Other topics, such as family provision and intestacy, will be reviewed in the future.

A number of papers were published for discussion and consultation purposes on issues relating to the law of wills. The committee met in May 1996 in Melbourne to discuss these issues and in October 1996, the Queensland Law Reform Commission, as co-ordinating agency for the project, provided the committee's report *The Law of Wills* to the Standing Committee of Attorneys-General. The Commission expects to provide a report later this year to the Queensland Attorney-General with its recommendations for amendment of the *Succession Act 1981* (Qld) in so far as it applies to the law of wills, so as to bring Queensland legislation into line with the desired uniform approach.

Contact: Mr Wayne Briscoe (07) 3247 4945.

Consent to Medical Treatment of Young People

In this reference the Commission has examined the law relating to the medical treatment of young people and, in particular, what aspects of the current law may impede young people's access to appropriate medical treatment. In its Discussion Paper (WP No 44 May 1995) the Commission made a number of preliminary recommendations on which comment was invited. These included what

the test for capacity to consent to medical treatment should be, who should be able to consent to the treatment of a young person, and whether a young person should be able to refuse medical treatment in any particular circumstances. The final report is expected to be released before the end of 1996.

Contact: Mr Wayne Briscoe (07) 3247 4945.

Criminal Justice Commission

Defendants' Experiences of the Investigation and Arrest Process

This report presents the finding of a survey undertaken in May and June 1996 of nearly 500 defendants appearing on criminal charges in Queensland Magistrates Courts.

The survey was designed primarily to collect information about police arrest, questioning and searching practices from the perspective of persons who had been the subject of the exercise of those powers. Respondents were also asked about their treatment by the police and whether, and to whom, they had made any complaint about this treatment.

The survey will be repeated at two-yearly intervals to facilitate ongoing monitoring of police investigative and arrest practices, the impact of proposed new police powers legislation, trends in police behaviour towards defendants, and defendants' use of, and attitudes towards, official complaints mechanisms.

Contact officer: Ms Ann Edwards (07) 3360 6215.

Claire Reithmuller
Director

Litigation Reform Commission to be abolished

On September 11 this year, the Queensland State Government announced that it intends to abolish the Litigation Reform Commission. The Commission will be merged with the Queensland Law Reform Commission in a move the Government has claimed will reduce duplications and save more than \$234 000.

The Litigation Reform Commission was established five years ago to promote reform of the court system in Queensland. During its existence it has made significant reforms including the introduction of court-annexed alternative dispute resolution and court appraisal systems, and the use of video and telephone evidence. It has also changed the rules governing the discovery of documents and given judges the power to dispense with rules of evidence which have prevented courts making just decisions.

legal reforms in south australia

Review of Juvenile Justice System

A major review of the State's Juvenile Justice System was recently completed, at the request of the South Australian Juvenile Justice Advisory Committee, by the Office of Crime Statistics.

The Review looked at the impact of the *Young Offenders Act*, which came into effect 1 January 1994. The Act provided new procedures for dealing with young offenders, including victim participation.

The Review consisted of two elements:

- **Statistical overview**

It provides a detailed statistical overview, for the 1994/95 financial year, of the numbers of young people coming to police attention, the way in which they are processed (ie, informal and formal cautions, family conferences and the Youth Court), and the outcomes received. It also details the type of offences committed, the demographic profile of offenders and some information on reappréhension rates.

• Qualitative assessment

Using information derived from personal interviews with key juvenile justice personnel, it provides some assessment of how the system is functioning from the perspective of those who have responsibility for administering that system or who are otherwise involved in its operation.

The Review identified several positive aspects of the new system, including:

- 60% of matters are being cautioned by police, enabling the matters to be dealt with speedily and effectively without the need to refer the young person deeper into the system;
- youths are now being held more accountable for their behaviour with tougher sentences being handed down especially for serious repeat offenders;
- delays have been reduced at all levels of the Juvenile Justice System.

The Review also identifies some areas which need fine tuning or further evaluation. They include the over-representation of Aboriginal youths in the system, inconsistencies across the State in how young people are dealt with and the provision and supervision of community work.

The Review recommends some legislative amendments and a number of changes to processes and practices to ensure that the system is being implemented as intended.

Criminal Assets Confiscation

The Government has recently introduced a new *Criminal Assets Confiscation Bill 1996*. In general

terms, the changes proposed by this Bill can be summarised as follows:

- a significant increase in the role and powers of the Administrator in relation to forfeited or restrained property
- explicit application of the powers in the Act to financial institutions
- statutory recognition of the essential difference for sentencing and forfeiture purposes between the profits of criminal activity, on the one hand, and property which is tainted because it was, for example, used in the course of the commission of the offence, on the other hand
- making it clear that a court may make an order for the forfeiture of a pecuniary sum which represents a part of the value of a tainted asset
- extension of the forfeiture provisions of the summary offences of being in possession of personal property reasonably suspected of having been stolen or obtained by other unlawful means and the offences of producing, selling, exhibiting, and dealing with indecent or offensive material, including child pornography
- extension of the powers of South Australian courts to deal with tainted property, wherever it may be, to the limits of the power of the Parliament to legislate extraterritorially
- the enactment of a scheme designed to limit access to restrained funds and assets in order to pay legal fees to cases in which there are no other assets or funds available to provide for defence representation
- enactment of a scheme of 'administrative forfeiture'.

Julie Selth

Senior Legal Officer, Attorney-General's Office

law reform commission of western australia

In the last issue of *Reform*, it was reported that the Commission had undertaken a busy publishing schedule during 1995. Between July and December it completed a report on *Enforcement of judgements of Local Courts*, and published discussion papers on *Restrictive covenants*, *Implied terms in the Sale of Goods Act*, *Equitable rules in contracts for the sale of goods* and *Financial protection in the building and construction industry*.

The report on *Enforcement of judgements of Local Courts* has been considered by a Ministry of Justice committee which is carrying out a review of the civil judgement debt recovery system, with the object of making recommendations for uniform enforcement procedures in civil courts. A further development, not previously reported, was the implementation of the Commission's report on Local body election practices (1975) by the *Local Government Act 1995* s 4.87. This brings the

number of Commission reports implemented to 52, out of a total of 87 reports recommending legislative change.

It was also reported in the last issue that two Commissioners whose terms of office came to an end on 31 December 1995 had not been replaced. Former Attorney-General Cheryl Edwardes had approved the re-appointment of the two outgoing Commissioners, but Peter Foss, who replaced her as Attorney-General in late December 1995, decided not to proceed with these appointments.

Only very recently, on 31 October 1996, have replacement appointments been announced. From January 1996 onwards, until the recent announcement, the Commission remained in a state of uncertainty as to whether replacement appointments would be made, and if so, when. The Commission had been operating with three members instead of the five specified by the *Law Reform Commission Act*. The failure to reappoint the former members meant that, as from the beginning of the year, it only had one member and was therefore unable to hold any meetings, submit any reports or make any policy decisions about the recommendations to be made on any reference.

As a result, several of the Commission's projects came to a standstill. Comments made on the discussion papers on *Restrictive covenants* and *Financial protection in the building and construction industry* were analysed, but it was not possible to make any decisions about the recommendations the Commission would make in its reports on these projects. The same applies to the issues raised in the two discussion papers on *Sale of goods*. However, work proceeded on other aspects of the *Sale of goods* reference not covered in these two papers, on the production of a draft report on *Writs and warrants of execution*, and in researching recent developments in the area of *Medical treatment for minors*, a reference which the Commission had been unable to work on since its 1988 discussion paper due to lack of resources.

The most important casualty of the situation which prevailed until the end of October 1996 was the Commission's report on *Limitation and notice of actions*. This report, at 488 pages, is the largest ever produced by the Commission. It makes recommendations for a new scheme of limitation rules to replace the antiquated provisions of the *Limitation Act 1935* (WA). Unlike nearly all other Australian jurisdictions, Western Australia has never adopted reforms of the kind first enacted in

England in 1939. One consequence of this is that the courts have no discretionary power to extend limitation periods in cases of latent injury (except, under a 1983 amendment, in cases involving asbestos-related diseases). The Commission's report was all but complete by mid-December 1995 and the Commission put the finishing touches to it early in January, in the expectation that its outgoing members would shortly be re-appointed. Since these re-appointments did not take place, there was no way in which the report could be submitted.

Though these problems were drawn to the Attorney-General's attention, nothing resulted until June 1996 when the Commission's situation became a subject of public debate. This stemmed from an ABC television news report on 29 May 1996 involving the actions for sexual abuse being brought against the Christian Brothers in New South Wales. The ABC reported that an attempt was being made to have the litigation transferred to Western Australia under the *Jurisdiction of Courts (Cross Vesting) Act*, and that as a consequence the plaintiffs' lawyer had called on the Premier of Western Australia to modernise the State's limitation laws to allow the plaintiffs a right to a fair trial. The news report referred to the fact that the Commission had completed its report but was unable to submit it due to lack of a quorum.

In a follow-up interview with the Attorney-General a week later, Mr Foss said that he intended to appoint three new members to the Commission. He was critical of the performance of the Commission in recent years, suggesting that recent appointments had not been of the calibre of earlier ones, and said that he wanted to 'revitalise it with some topflight appointments to restore its shattered reputation'. This was a reference to the Commission's 1989 report on *Incitement to racial hatred*, which Mr Foss had criticised when in opposition. Mr Foss's views about the Commission's work, and the reputation of its members, proved somewhat controversial. In the media and Parliamentary debate which followed these remarks, the Commission was supported by the Chief Justice, the Law Society, the Bar Association, opposition members of Parliament, and others.

The most encouraging aspect of this media debate was the statement by the Attorney-General that he intended to make three new appointments to the Commission. These appointments were eventually announced by the Attorney in a media release issued on 31 October 1996. The three new

members (all part-time) are Mr Wayne Martin QC, Mr Robert Cock and Professor Ralph Simmonds. In accordance with the Law Reform Commission Act, they have been drawn from the three major areas of the legal profession: private practice, the Crown and academia.

Mr Martin is a leading commercial silk from the Western Australian Bar. He was involved in law reform work at the Administrative Review Council before returning to private practice in Perth in 1981. Mr Cock is Crown Counsel for the State of Western Australia and has long experience of work in the Crown Solicitor's Office. Professor Simmonds, appointed the Foundation Professor of Law and first Dean of the Law School at Murdoch University in 1991, formerly taught at several universities in Canada, and worked with the Ontario Law Reform Commission as joint project director of its reference on wrongful interference with goods. All three appointments are for a term of one year. The appointments of Mr Martin and

Mr Cock take effect immediately; Professor Simmonds will replace Mr Peter Creighton, who for the last ten months has been the sole member of the Commission, when his term of office comes to an end on 18 January 1997. The two full-time member positions remain vacant. Dr Peter Handford, the Commission's Executive Officer and Director of Research, who was also a full-time member between 1993 and 1995, has not been reappointed as a member of the Commission.

There is much work for the new commissioners to do. Over the next few months they will have to get to grips with the unsubmitted report on *Limitation of actions*, the four discussion papers referred to above (plus comments and submissions thereon), and a research paper on *Medical treatment for minors*. Nonetheless, after a period of several years during which reviews and vacancies in membership have caused problems for the Commission, the light at the end of the tunnel is now shining much more brightly.

family law council celebrates 20th anniversary

This year the Family Law Council celebrates its twentieth anniversary. The Council which commenced operations on 26 November 1976, is a statutory authority established under section 115 of the *Family Law Act 1975*. It acts as an advisory body set up to advise the Attorney-General on the operation of the *Family Law Act* and related legislation, legal aid in family law and any other relevant matter. It examines matters referred to it by the Attorney-General, but it can also look into matters of its own motion.

The Council is a policy review body with an issues focus. It advises the Attorney-General through letters of advice or reports. Letters of advice are used when urgent advice is required or the issue under consideration is not a major one requiring wide public consultation. Being a comparatively representative body the Council is generally able to give a quick and representative view in such circumstances.

When it looks at major or complex issues the Council tries to consult as widely as possible before reporting to the Attorney-General. Consultation is usually through the release of a discussion paper

for public comment, after which it reports to the Attorney-General. It has produced a number of major reports on family law and related issues including such matters as: child sexual abuse, administration of the Family Court, parenting after separation, family mediation, arbitration in family law, representation of children in family law, bankruptcy and family law, Magistrates in Family Law, female genital mutilation, sterilisation of children and Family Court appeals.

To celebrate its 20th anniversary this year the Council has released a history titled *The Family Law Council 1976-1996: A record of achievement*. The Council claims that a high proportion of its recommendations have been implemented by successive governments. In its history the Council says that 435 of the 600 recommendations it made to government between 1976 and 1996 have so far been considered by government and over 80% of these have been fully or partly implemented. The Council regularly monitors progress on the implementation of its proposals.

The Council currently comprises 12 part-time members including judges, relationship counsellors, Commonwealth and State Government

employees, barristers and solicitors, social workers and others. Members are appointed for 3-year terms and re-appointments are rare, thus ensuring that the Council has a regular infusion of new ideas and enthusiasm.

The Council maintains close links with related agencies, including the Australian Law Reform Commission which is one of 4 organisations that have an observer on the Council.

If you would like further information about the Council or its published reports you are invited to write to, or telephone, the Director of Research, Family Law Council, Level 3, 50 Blackall Street, Barton, ACT, 2600. Telephone (06) 250 6375, facsimile (06) 250 5917.

Bill Hughes
Director of Research

Currently the work program of the Council includes the following major projects:

- The interaction of family law and State child and family services legislation;
- Violence and family law;
- The criminalisation of child abduction;
- Section 81 (the 'clean break' principle) of the *Family Law Act*;
- Penalties imposed under the *Family Law Act*; and
- the operation of the child support scheme.

copyright law review committee

The Copyright Law Review Committee was established in 1983 as a specialist advisory body to report to the federal Attorney-General on specific copyright issues referred to it from time to time for its consideration. From its formation until 1995, it was chaired by the Hon. Justice I.F. Sheppard AO, a Judge of the Federal Court of Australia and the President of the Copyright Tribunal. In 1995, Mr Peter Banki, formally a member of the Committee, was appointed as its Chair, but resigned in May 1996. Following the 1996 Federal Election the Attorney-General, Darryl Williams AO QC, decided to undertake a general review of the structure and function of the Committee. As part of that review, the Committee's Secretariat was relocated within the Attorney-General's Department in Canberra, so as to provide it with access to the acknowledged expertise of the departmental officers working in this field and the extensive research facilities of the Department.

Composition of the Committee

The Committee has six members. In September 1996, the Attorney-General announced the appointment of Professor Dennis Pearce as Chair. Professor Pearce is Emeritus Professor, Australian National University (ANU), visiting fellow at ANU

and a consultant with Phillips Fox solicitors. The Attorney-General also decided that the Committee's work would benefit from the appointment of a departmental representative to keep the Committee informed of the Government's copyright law reform agenda and its work in international forums such as the meetings of the World Intellectual Property Organisation. The departmental representative on the committee is the head of the International Trade Law and Intellectual Property Branch, presently Mr Chris Creswell. The other four members are: Dr Andrew Christie, Mr Malcolm Colless, Ms Victoria Rubensohn and Ms Rhonda Smith.

The Expert Advisory Group

The Committee also has the benefit of a panel of experts representing the interests of the creators and users of copyright material, from which it has been able to obtain ongoing advice. Recently, as part of the Attorney-General's review, the membership of the Expert Advisory Group was expanded. It now consists of Ms Libby Baulch, Ms Anne Fitzgerald, Mr Nicholas Hasluck QC AM and Mr Tom Cochrane Pro-Vice-Chancellor (Information Services) at the Queensland University of Technology. Mr Cochrane was

appointed in June 1996 to provide the Committee with a more complete range of views against which to test its ideas and provide a copyright users perspective on the Committee's work.

The Simplification Reference

The Committee is presently conducting a wide-ranging and detailed inquiry into the *Copyright Act 1968*. The impetus for the review was concern expressed that the Act had fallen out of step with technological and other developments and that it had become unnecessarily complex. The Attorney-General has asked the Committee to consider revised terms of reference to focus directly on revising the existing legislative framework having full regard to Australia's international obligations before proceeding further with its work on the Reference.

The Committee's first act was to publicise the Reference widely and to establish a comprehensive database of interested parties. The Committee then

identified particular issues in the Reference and began the process of public discussion and debate about reform options. In May 1995, the Committee called for submissions from interested parties and to date it has received approximately 120 initial submissions from individuals, private organisations and government bodies.

Between May 1995 and February 1996, the Committee convened a number of public meetings to consider specific issues and held informal meetings with large numbers of interested parties. In February 1996, the Committee released the discussion paper *Copyright Reform: A Consideration of Rationales, Interests and Objectives*, which was intended to stimulate debate on the arguments made in support of the modern copyright regime.

The Committee intends publishing a number of papers prior to presenting its final report in November 1997. These publications will consider more specific issues concerning the scope and forms of protection, the rights and the exemptions provided by the *Copyright Act 1968*.