Reform Roundup

The New South Wales Law Reform Commission

The defence of diminished responsibility

The release of the Commission's report on the controversial question of when murder becomes manslaughter was accompanied by the almost simultaneous introduction into state parliament of legislation, adopting the substance of the Commission's recommendations.

Partial Defence to Murder: Diminished Responsibility (Report 82) is the first of two final reports on the Commission's inquiry into the partial defence to murder in New South Wales. The other two partial defences, provocation and infanticide, form the basis of the Commission's second report.

The idea underlying the defence of diminished responsibility is to provide a partial excuse to people who kill while significantly affected by some kind of mental impairment or disorder. If successful, these partial defences do not result in a complete acquittal, but instead reduce liability from murder to manslaughter.

Partial defences to murder have been subjected to strong criticism at various times, both by the legal profession and the public. One recurring concern is that it allows killers to 'get off' or escape liability. Such a claim appears to be based, at least in part, on a misunderstanding of the operation of the defence, which reduces liability rather than negates it completely. Another common concern, particularly expressed by some members of the judiciary, relates to the extent to which the defence appears to rely on psychiatric evidence, and the widely conflicting expert opinion that it generates.

The key recommendations of the Commission were that the defence of diminished responsibility be retained and clarified through reformulation. The Commission's recommended reformulation aims to clarify the test for diminished responsibility by defining the parameters of the defence with more precision, using terms which can be more readily understood by medical experts, and making it clear that the ultimate task of deciding whether murder should be reduced to manslaughter lies with the jury, and not the expert witnesses.

The recommended reformulation also contains a provision expressly excluding self-induced intoxication as a ground giving rise to the defence of diminished responsibility.

The government's response, the proposed Crimes Amendment (Diminished Responsibility) Bill 1997 abolishes the defence of diminished responsibility and replaces it with a new defence of substantial impairment by abnormality of mind. This new defence will operate as a partial defence to murder which, if successful, reduces a charge of murder to manslaughter. Although it abolishes the defence of diminished responsibility, the Bill substantially adopts the recommended formulation put forward in Report 82.

At the time of writing, there had been no further legislative action in relation to this Bill, which had received some positive responses from certain interest groups.

Providing legal advice to government

With the increasing 'corporatisation' of public sector legal advisers, greater participation by private lawyers in government work and the changing nature of government agencies, the question of who actually 'owns' legal advice provided to government has become difficult to answer.

The Commission is currently reviewing the provision of legal advice to government bodies in the 1990s. It has released an issues paper (IP 13), discussing matters relating to the circulation of legal advice to government, which it hopes will generate comment, particularly from private practitioners and government lawyers.

A final report will be delivered to state parliament in early 1998.

Watching the detectives

The recent report of the NSW Police Royal Commission stated that the "use of electronic surveillance was the single most important factor in achieving a breakthrough in its investigations". State and federal law enforcement agencies conduct covert or concealed surveillance to assist in their investigations. Private investigators and employers also make use of electronic surveillance. Concerns about the lack of regulation in some areas led to the Commission's inquiry into the law governing video surveillance and listening devices. The Commission has also been asked to look at electronic surveillance in the workplace.

The Commission is not concerned in this review with the need for, or the effectiveness of, electronic surveillance. Given that the types of devices used are becoming more sophisticated and hence potentially more intrusive, and the fact that surveillance is on the increase, the Commission is investigating the way that the use of surveillance is regulated and how privacy concerns can be addressed.

An issues paper (IP 12 *Surveillance*) was released in May 1997 and the Commission anticipates a report of its recommendations will be published early next year. ❑

Northern Territory Law Reform Committee

Alternative Dispute Resolution (ADR)

The Committee established four subcommittees to deal with this reference on the need for reform in the Northern Territory in relation to ADR measures:

- disputes involving possible infringements of the criminal law — see Report No. 17A— *Mediation and the Criminal Justice System*, March 1966;
- family and other domestic disputes (*see below*);
- disputes occurring in Aboriginal communities; and
- civil disputes (including commercial disputes and disputes relating to human rights).

ADR and family and other domestic disputes

The Committee met in May this year, adopting the recommendations made in the final report of the Family ADR subcommittee. The report draws heavily on the Commonwealth experience in its family jurisdiction, but focuses on the need for reform in the NT. In many cases, the subcommittee considered that issues raised should be referred to the Civil ADR subcommittee for broader consideration within the general civil law context. An important overlap with the juvenile justice jurisdiction and child welfare was identified, but most of the issues arising were outside the subcommittee's terms of reference.

Copies of *ADR in the Context of the Family & Other Domestic Disputes* (Report No. 17B) should be available soon.

The report recommended the NT negotiate with the Commonwealth government, to consolidate its family jurisdictions so that all disputes that concern couples, their relationships and their children, including child welfare, fall within the jurisdiction of one specialist court.

It also suggested the NT De Facto Relationships Act and, where applicable, the Supreme Court Act or Rules, be amended to ensure parties are informed about mediation and other ADR mechanisms and encourage use of those mechanisms.

As well, the report outlined proposed amendments to the Community Welfare Act, so that participative case management and family group conferencing are recognised as the preferred approach.

Other recommendations include that Family Matters Court should have the power under that Act to order parties to attend mediation, where the court believes this would be in the best interests of the child and to decide which parties, including the child, should be represented at such a conference.

Mediators involved in family and domestic disputes should be subject to specified training requirements and should be required to hold an annual licence, which is conditional

upon the mediator not being in breach of the requirement for confidentiality; annual recognition of ongoing expertise in the area of family and domestic disputes; and holding adequate professional indemnity insurance.

ADR and Aboriginal disputes

As it currently emerges, the final report of this subcommittee will focus on various options for the resolution of disputes in Aboriginal communities. The subcommittee is examining the Queensland model of mediation, although it acknowledges mediation may not be appropriate in every community, due to difficulties with community control and other reasons.

Other options include:

- an Elders Council;
- warden or night patrol schemes, which already operate in various communities;
- schemes similar to the Groote Eylandt experiment, where Elders sit on the bench with a magistrate; and
- the development of a Summary Justice Model utilising the current method of incorporation of community councils pursuant to the Local Government Act.

This last proposal will be discussed in detail, including jurisdiction, scope of bylaws, conflict between existing law and customary law, the elements of customary law, penalties, administrative support structures and legislation.

The result will be that each community will be able to develop its own Community Justice Plan, which applies each element of dispute resolution that the community wishes to use. A final report should be available later this year.

Civil disputes and ADR

Insufficient resources were available to convene the Civil ADR subcommittee during the year. It is likely that a new subcommittee will convene in 1997-98 and that the new subcommittee will approach the reference *ab initio* without constraints set by previous subcommittees. The subcommittee will also be required to consider various issues referred to it by the Family ADR subcommittee.

Property Law Review

The Property Law Review subcommittee is developing a draft Law of Property Act. The NT is the only Australian jurisdiction without such legislation. The draft will, as far as possible, be based on the Queensland *Property Law Act 1974* (as amended), the most recently drafted law of property Act in Australia. The subcommittee's recommendations are expected sometime next year. ❑

Queensland Law Reform Commission

Evidence of children

The state Attorney-General has requested the Commission review the capacity of the judicial system, both in its criminal and civil aspects, to properly receive the evidence of children. To date, the Commission has received 47 submissions identifying issues relevant to the project. A working paper, which will be used in its proposed consultation program, is due to be published soon.

The broad issues likely to be considered include:

- the competency of young people to give evidence;
- the use of out-of-court statements in court;
- videotaped evidence;
- the use of closed circuit televisions and screens to help young people in the presentation of their evidence;
- preparation of, and support for, young witnesses;
- pretrial hearings; and
- young witnesses with disabilities.

The Commission anticipates that it will complete its report by March 1998.

Evidence and technology

The Commission is investigating the capacity of the criminal and civil judicial systems to receive into evidence information stored and conveyed in electronic, magnetic or similar form.

The issues that are likely to be considered include the authentication of electronic documents, use of electronic simulations, and whether a transcript printed from a CD-Rom (as opposed to a certified copy of an original transcript) should be admissible.

Limitation of actions

Limitation legislation is generally seen as the province of litigation lawyers, of little interest or concern for ordinary members of the community. However, it involves significant and sometimes competing issues of public policy and has the potential to substantially affect the outcome of disputes that end in court action.

The Commission has been asked to review the *Limitation of Actions Act 1974 (Qld)*, with a view to simplify and amend the legislation to:

- give due recognition to the enhanced capacity of the medical profession to indicate the cause of disease and injury from events occurring outside current limitation periods;
- overcome difficulties caused by the general rule that a limitation period commences when a cause of action accrues; and
- provide for situations of latent damage to property or latent loss or damage resulting from reliance on negligent advice.

The terms of reference were finalised in April. Since then, the Commission has produced an information paper, which has been widely distributed to relevant organisations and interested individuals. A discussion paper will be published in the near future. The Commission anticipates reporting to the Attorney-General in April next year.

Justices of the Peace

An issues paper is being prepared on an inquiry into the role of Justices of the Peace (JPs) in Queensland. Topics likely to be addressed include the appointment and training of JPs, functions performed by them, independence of office, the role of JPs in Aboriginal and Torres Strait Island communities and access to JPs.

Uniform succession laws

The Commission continues to lead and coordinate a reference to develop uniform succession laws for Australia. This reference is an initiative of the Standing Committee of Attorneys-General (SCAG). A national committee has been established to ensure the project maintains an Australia-wide focus, with the New Zealand Law Commission also represented. To date, the work of the committee has focused on the law of wills and on family provision.

The law of wills: Following a meeting of the national committee in May 1996, the Commission finalised a report on the law of wills, which was presented to SCAG in October last year. The national committee met again in April and it was decided to prepare a consolidated report for SCAG. This consolidated report will include model legislation, based on the recommendations of the national committee.

Family provision: It is anticipated a report on family provision will be presented to SCAG by the end of 1997.

Wills

Because of the work undertaken on the law of wills as part of the uniform succession law reference, the Commission will report to the state Attorney-General on the changes that would need to be implemented in Queensland.

The report will make specific recommendations about Queensland provisions that do not have a counterpart in the draft uniform legislation, that is, whether those provisions should be retained or repealed. It will also identify the differences, if any, between the other sections of the *Succession Act 1981 (Qld)* and their counterparts in the draft uniform legislation and, where relevant, explain why the draft provision is considered an improvement on the current Queensland provision.

The report is due to be presented to the Attorney-General before the end of 1997. ❑

South Australia

Liquor licensing

The government had conducted a review and enacted new legislation dealing with the liquor industry. The Act is the first major reform of the liquor licensing law for 10 years. In November 1996, the Attorney-General released a report into the *Liquor Licensing Act 1985* prepared by Tim Anderson, QC. The report examined the Act in detail and recommended changes to give people better access to a wider range of facilities to simplify the administration of the laws and to ensure that local communities have more information about what is proposed for their communities. The resultant legislation, the *Liquor Licensing Act 1997*, is extended to encourage responsible attitudes towards the promotion, sale, supply and use of liquor and to minimise harm associated with consumption. There are also increased advertising requirements for the granting, removal or transfer of certain licences and for changes to some trading conditions. This is to ensure that members of the local community are informed of applications that may affect them.

Parliamentary Committees Act

Recent amendments to the *Parliamentary Committees Act 1991* have inserted provisions for the establishment of a Statutory Officers Committee. The Committee will be responsible for inquiring into, and reporting to the parliament on, the appointment of suitable persons to the offices of Ombudsman and Electoral Commissioner. Complementary amendments to the Ombudsman Act and the Electoral Act provide for the Ombudsman and the Electoral Commissioner to be appointed by the Governor on a recommendation made by resolution of both houses of parliament. It is government policy for a similar process to apply to the appointment of the Auditor-General.

Voluntary euthanasia

The Legislative Council recently referred a Voluntary Euthanasia Bill to a Select Committee. The Bill is a private member's Bill and was introduced by Anne Levy, MLC. The Bill provides for the administration of medical procedures to assist the death of patients who are terminally ill and who have expressed a desire for the procedures, subject to a number of safeguards. The Select Committee has called for submissions on the Bill.

Retail shop leases

The *Retail Shop Leases Amendment Act 1997* deals with a number of concerns identified by the Joint Parliamentary Select Committee on Retail Shop Leases in its 1996 report. The amendments are aimed at ensuring that lessees have as much information as possible prior to the making of a decision on whether or not to enter into a lease and sets out new rules of conduct to be observed at the end of a lease in a retail shopping centre. The new provisions will mean that, at the end of the lease, the lessee of the premises will usually be accorded a right of preference over other possible lessees of the premises. This is the first time such recognition has been incorporated in legislation.

Self-defence

The law relating to self-defence has also been the subject of recent legislative amendments. The law was codified in 1991. However, the provisions were criticised as being too complicated. The *Criminal Law Consolidation (Self Defence) Amendment Act 1997* clarifies the law so that a person who seeks to take the benefit of the defence will have to show that he or she genuinely believed he or she was under threat and used such force as was reasonably necessary and proportionate to the threat on the facts, as he or she believed them to be. ❑

Victorian Attorney-General's Law Reform Advisory Council

Expert reports

Since its establishment, the Council has completed more than 20 projects. In most cases, the Council has commissioned experts to write reports before making recommendations to the Attorney-General for any reforms to the law of Victoria that it considers necessary. The Council's projects have covered many areas of the law, ranging from areas of traditional legal concern (such as easements and covenants in property law) to matters of great social importance (such as the sexual reassignment of men and women).

This year, the Council decided to publish selected expert reports. The first such report, Dr Rosalind Atherton's 1994 report on Family Provision, was published in July. The next report in the series, due to be published in September, will deal with representative proceedings or class actions, a topic on which the Council has just finalised its work.

Review of Supreme Court Act

The main object of this review is to investigate the adequacy of the law relating to the contracts of minors. The review also encompasses those parts of the *Supreme Court Act 1986,* Part V, Divisions 3 and 4, which touch on the now defunct rule in *Rylands v Fletcher* and the *ignis suus* rule.

Jurisdiction over foreign land

This is a review of the rule in the Mozambique case, on reference from the Attorney-General, following a consideration of the rule in recent Victorian case law.

Testator's family maintenance or family provision

The Academic Secretary of the Council participates in the work of the National Committee on Uniform Succession Law. The work builds on the Council's Project on Testator's Family Maintenance, which was completed in 1994.

Current submissions

The Council's three specialist Committees (the Business Committee, the Community Committee and the Legal Committee) are constantly engaged in the evaluation of submissions for law reform to determine their suitability for consideration by the Council. The major submission before the Community Committee at the moment involves a potentially comprehensive review of the legal problems of the aged in Victoria. The Committee has commissioned an initial study of the area. The Legal Committee is considering submissions for broad reviews of the *Judgment Debt Recovery Act 1984 (Vic)* and the *Appeal Costs Act 1964 (Vic).*

Interaction with other agencies

At the request of the Attorney-General, the Business Committee is considering proposals arising out of the Commonwealth's Corporations Law Economic Reform Program (CLERP). The Committee has been briefed on the progress of CLERP by Julie Abramson, Principal Adviser to the Commonwealth Treasurer. The Committee's interest in CLERP is ongoing, and, where appropriate, it intends to have an input into the reform process.

The Business Committee has also considered the discussion paper on Regulatory Efficiency Legislation published by the Parliamentary Law Reform Committee in May 1997. The Chair of that Committee, Victor Perton MP, has addressed the Committee on the paper and has received feedback from the Committee. ❑

Victorian Law Reform Committee

Review of Exemptions under the Juries Act 1967

The Committee tabled Volume 1 of its final report, *Jury Service in Victoria*, in the Victorian parliament on December 4, 1996. Volume 1 contains the Committee's recommendations regarding exemptions under the *Juries Act 1967* as well as certain aspects of jury administration and management. In addition to advocating a complete overhaul of the categories of disqualification, ineligibility and entitlement to be excused as of right, the Committee recommended changes to the formation of jury districts, improvements in the processes of jury list compilation and the preselection of juries, and the introduction of a one trial or one day system of jury service. Other recommendations focused on improving the method for enforcement of fines under the Act, jury panel preparation, jury list vetting by police, the summoning of jurors, improving the conditions of jury service, and means of improving community attitudes towards jury service.

The Victorian government tabled its response on May 23, 1997. Many of the Committee's recommendations have been accepted, while others await further consideration pending a determination of their resource implications, further consultation or the outcome of other projects. However, some of the Committee's more controversial recommendations - such as removing the disqualification applying to undischarged bankrupts, continuing the eligibility for jury service of persons on bail and persons subject to intervention orders under the Crimes (Family Violence) Act, and the jury vetting function being carried out by the Sheriff, rather than the police - were not supported.

Volumes 2 and 3 of the report will be tabled in parliament in November 1997. Volume 2 is an extensive report on the operation of overseas jury systems, while Volume 3 will reproduce three research papers on jurisprudential and historical aspects of jury service in Victoria, juries and complex trials and gender issues, multiculturalism and the Victorian jury system.

The liability of the state of Victoria and health services providers

The Committee tabled its final report, entitled *Legal Liability of Health Service Providers*, on December 4, 1996. It recommended the introduction of 'good Samaritan' legislation in Victoria, limited statutory immunity for medical screening services and compulsory professional indemnity insurance for statutorily recognised health service providers. Major improvements to methods for the payment of compensation were also suggested, including the introduction of interim and provisional awards of damages and the periodical payment of compensation through structured arrangements for settlements and judgments. An extended alternative dispute resolution role for the Health Services Commissioner was advocated, and problems concerning a shortage of doctors in rural areas were addressed. The Victorian government is required to table its response to the Committee's report in the Spring parliamentary sitting.

Regulatory efficiency legislation

On June 28, 1996, the Committee received a reference from the Governor in Council on the most appropriate manner in which to frame Regulatory Efficiency Legislation (REL).

In Australia and overseas, REL has acquired a fairly precise meaning. The object of such legislation is to reduce the regulatory burden on business through the use of alternative compliance mechanisms (ACMs). REL has come to mean the introduction of ACMs that meet regulatory objectives without strictly complying with the prescriptive requirements of regulations. In general terms, an ACM provides a means for achieving regulatory objectives contained in regulations, using means that are not prescribed in those regulations. ACMs focus on the end, rather than the means, and allow for flexibility in the means of achieving regulatory objectives. In granting an alternative compliance mechanism, the government does not exempt a business from the regulations; rather, business may propose and government may approve an alternative arrangement,

which departs from the prescriptive details of the regulation while still meeting the objectives of the regulations.

The Committee published a discussion paper on Regulatory Efficiency Legislation in May and the final report was due to be tabled in state parliament on September 30.

The report will examine alternative compliance mechanisms and similar concepts in Australia, Canada and the United States, including accredited licences under the *Environment Protection Act 1970 (Vic.)*, third party certification under the *Building Act 1993 (Vic.)*, and proposals emanating from the National Road Transport Commission. The report will also examine the regulatory impact statement process under the *Subordinate Legislation Act 1994 (Vic.)* and the possibility of introducing a similar process for primary legislation. ❑

Law Reform Commission of Western Australia

Limitation and notice of actions

This major report was submitted to the Attorney-General in January 1997 and completes the Commission's reference on limitation of actions.

The report deals comprehensively with the rules relating to the time limits within which plaintiffs must commence civil proceedings, and allied notice requirements, which exist under particular statutory provisions. The deficiencies in the present law can, for the most part, be attributed to the fact that the *Limitation Act 1935* merely reproduces provisions enacted in England between 1623 and 1893. Modern reforms introduced in most other jurisdictions over the past 60 years have not been adopted in WA.

The Commission recommends the replacement of the *Limitation Act 1935* by a new Act which:

- adopts a uniform approach to all causes of action, in the interests of simplicity and fairness; and
- achieves a fair balance between the interests of the plaintiff and the defendant.

Plaintiffs should have a reasonable opportunity of discovering the existence of the claim before the limitation period runs against them. But there should come a time when potential defendants should be secure in their expectation that they will not be held to account for incidents that occurred many years ago. It is not in the community's interests that litigation should be delayed for many years, with the result that the recollections of witnesses grow dim, documents are lost and destroyed, and the chances of justice being done recede.

Under the Commission's recommendations, most civil claims will be subject to a three-year discovery period, which begins to run when the damage becomes discoverable, as well as a 15-year ultimate period, which runs from the date on which the claim arose. If either of these periods have expired and the plaintiff has not commenced legal proceedings, the defendant should be able to plead a defence of limitation.

These two limitation periods will not always achieve a fair result. Therefore, the Commission has recommended that courts should be able, in exceptional circumstances, to extend either the discovery period or the ultimate period in the interests of justice.

The Commission also recommended that special, more favourable limitation rules, which apply to actions against the Crown and public authorities, be abolished, leaving only ordinary limitation rules to apply.

These recommendations will apply to all civil claims, except actions to recover land, some actions relating to mortgages and a few other special cases. The report also recommends changes to limitation rules in certain

other statutes, such as the *Fatal Accidents Act 1959*, the *Law Reform (Miscellaneous Provisions) Act 1941* and the *Supreme Court Act 1935*.

Restrictive covenants

This reference resulted from various concerns about the existence and operation of restrictive covenants. Many restrictive covenants are inconsistent with local government town planning schemes and local laws. Another perceived problem is the cost of court action to enforce a breach of a restrictive covenant.

The Commission concluded that, notwithstanding the existence of town planning schemes, restrictive covenants still have a useful function. Accordingly, it recommended there be no abolition of restrictive covenants in general, or of particular types of restrictive covenants, such as those that restrict the use of certain building materials. It also recommended there should be no provision for town planning schemes and local laws to override restrictive covenants.

At present, a power to extinguish or modify a restrictive covenant in certain circumstances is conferred on the Supreme Court. The Commission recommended that this power be transferred to the Town Planning Appeal Tribunal.

The circumstances in which a restrictive covenant may be extinguished or modified at present are very limited. To allow account to be taken of the public interest in ensuring that land is used appropriately, as reflected in public land use controls and guidelines, the Commission made detailed recommendations liberalising the circumstances in which restrictive covenants can be extinguished or modified and to protect those who might be adversely affected by such decisions.

Restructure of the Commission

On the eve of its 30th anniversary, major changes are planned for the Commission. These changes represent a significant break with the past, both as regards the structure of the Commission and its mode of operation.

First, there will be changes to the composition of the Commission, although these cannot take effect until parliament passes the necessary amendments to the Law Reform Commission Act. The membership of the Commission will be expanded with an emphasis on appointing members with expertise appropriate to particular Commission projects.

Secondly, commencing early in 1998, there will be a significant alteration in the Commission's mode of operation. The work of research and writing discussion papers and reports will no longer be carried out by full-time research officers, but by consultants appointed for particular projects. All staff positions will be abolished and the Commission will employ only one full-time staff member, who will act in an administrative capacity.

The aim of the changes is to enable a larger Commission to be able to draw upon a larger pool of experience. Moreover, the Commission will be able to recruit the most appropriately qualified personnel for each project, thus enabling it to better accommodate changes in the nature and number of matters referred to it in the future.

By implementing the changes, it is expected that the Commission will no longer be required to maintain an expensive infrastructure and that resources will be applied more directly to particular projects. One important consequence of these changes is that early in 1998 the Commission will move to a new location in Westralia Square, the premises occupied by the Ministry of Justice. ❑

Administrative Review Council

Contracting out

In March this year, the Council published an issues paper, *The Contracting Out of Government Services*. The paper examines the legal position of members of the public where service delivery to them, or which affects them, is contracted out.

Where services are contracted out, administrative law rights and remedies, which were previously available to the public, will no longer be available, unless legislation specifically provides that such rights and remedies should continue. These are the rights and remedies that, for example, enable a member of the public to seek information about the service, to complain about defects in the way it was delivered and to have information protected from unauthorised disclosure.

The paper seeks comment on four options, which it suggests would provide additional remedies and redress for people affected by the actions of service providers. Combinations of the options can also be used.

- Service recipients might be given the ability to sue on the contract between the government and the provider, to the extent that the contract relates to the service to be provided to the particular recipient.
- New remedies might be established. For example, service recipients might be given a direct right of action against the Commonwealth to recover compensation for minor loss or damage suffered because of the action of a contractor. The government might also establish a complaint-handling body for recipients of contracted government services.
- Contractors might be required, by legislation or by contract, to establish their own complaint-handling mechanisms and to provide access to information about the service.
- Existing administrative law mechanisms, such as the Ombudsman and the Freedom of Information Act regime, might be extended to deal with complaints about services provided by private contractors.

The Council's final report is due to be completed in the next few months.

Appeals to the Federal Court

In May 1995, the Council published a discussion paper on whether the provision that governs appeals to the Federal Court from the Administrative Appeals Tribunal (AAT) (Section 44 of the *Administrative Appeals Tribunal Act 1975*) should be changed. The issues are:

- whether the grounds of appeal from the AAT to the Federal Court should be broadened;
- whether the Federal Court should be given a discretion to determine questions of fact where it finds on appeal that the AAT has made an error of law;
- whether the President of the AAT should be given a discretion to refer whole cases to the Federal Court for determination; and
- whether any change to AAT appeals or referrals should be general or be limited to particular AAT review jurisdictions.

The project was put on hold pending a High Court decision in a case that involved, in part, what constitutes a 'question of law' for the purposes of Section 44. A decision in *Collector of Customs v Agfa-Gavaert* (1996) 141 ALR 59 was handed down in December 1996, but the High Court shed no further light on the distinction between questions of law and of fact. Sydney barrister Mark Leeming has been engaged to help the Council complete the Section 44 project and a final report should be available soon. A related project report on patents decisions will be finalised after the Section 44 report has been completed.

Best practice for internal review

The Council's internal review project is part of its strategy to place more emphasis on ensuring that decisions made in the administration of Commonwealth government policies and programs are of consistently high quality.

This project aims to help agencies by developing a best practice guide for internal review. The focus will be on the achievement of the agencies' own objectives in establishing their systems of internal review. The Council would use its findings to develop guidelines for internal review. These would not necessarily be 'one size fits all', but would reflect the particular purposes sought to be achieved by internal review systems and would assist agencies to develop or adapt internal review systems to achieve particular purposes.

The Australian Customs Service and the departments of Social Security, Veterans' Affairs and Health and Family Services are participating in the first stage of the project, which is a pilot study to look at issues over a range of internal review systems. The Council is currently developing its methodology for the pilot. ❑

Law Commission of Canada

The government of Canada recently announced the creation of the Law Commission of Canada (LCC) as well as the first appointments to the Commission. The President, who holds a full time position is Roderick A. Macdonald, a Professor of Law from McGill University, where he was Dean of Law from 1984-1989. There are four part-time Commissioners: Gwen Boniface, Chief Superintendent Regional Commander for Western Ontario-Ontario Provincial Police; Alan G. Buchanan, former Attorney-General of Prince Edward Island and now General Manager, Corporate Development of Island Telephone Company Ltd of Prince Edward Island; Nathalie Des Rosiers, Professor of Law at the University of Western Ontario; and Stephen Owen, former Deputy Attorney-General of British Columbia and now Professor at the University of Victoria in the Faculty of Law and the Faculty of Human and Social Development. All these appointments took effect on July 1, 1997.

The former Law Reform Commission of Canada was abolished in 1992 and this was greeted with protest by several constituencies, such as public interest groups, the legal profession, academic community and the media. Two concerns were raised; the loss of an independent advisory body separate from the government; and the termination of an important source of public legal information, an important precondition for democratic decision making.

Several socio-economic and socio-demographic changes have occurred in Canada since the former Law Reform Commission was created in 1971. These include major developments in information technology, industrial structures and economic realities. Citizens are demanding more accountability and responsiveness from their public institutions. Law reform agencies are not exempt from these demands.

The LCC has been fashioned to promote an approach to law reform that recognises the importance of these socio-economic and socio-demographic conditions. Its constitutive legislation sets out several principles to guide its work. The Commission is to be open and inclusive, multidisciplinary, responsible and accountable, innovative and cost-effective. These principles are intended to apply to all aspects of the Commission's work.

Its mandate is to review Canada's law and its effects and to provide independent advice on improvements, modernisation and reforms that will ensure a just legal system that reflects the common law and civil law traditions, and that meets the changing needs of Canadian society. The Commission is supported by a small secretariat, a volunteer advisory council and diverse study panels for individual projects.

In pursuing its mandate, the LCC is to develop new approaches to and new concepts of law; to propose measures to make the legal system more efficient, economical and accessible; to forge productive networks; and to identify obsolete laws and anomalies in the law with a view to their elimination. Currently the LCC is in the process of developing its strategic agenda and long-term research program. ❑