

Reform

New South Wales Law Reform Commission

Complaints against lawyers

A better system for dealing with complaints against lawyers is the aim of a report released by the NSW LRC in September 2001.

In New South Wales, all complaints against lawyers are made to the Legal Services Commissioner (LSC), an independent statutory officer. The Office of the LSC currently receives about 3,000 complaints a year. The LSC may investigate a complaint, refer it to the Law Society or Bar Council, dismiss it for being vexatious, misconceived or frivolous or it may mediate a 'consumer dispute'.

Justice Michael Adams, Chair of the Law Reform Commission, said: 'The Report deals with concerns that some complaints are not being properly dealt with because of the way some investigations have been conducted and because of technicalities in the legislation. The community needs a fair, credible and effective complaints and disciplinary system for lawyers.'

The Commission has recommended:

- strengthening the Legal Services Commissioner's powers including giving the Legal Services Commissioner powers of entry, search and seizure without notice;
- increasing the accountability of the profession by creating a public register to record findings of mis-

conduct against lawyers and by requiring the reporting of any offences uncovered during the course of an investigation into a lawyer;

- changes to the composition of the Legal Services Division of the Administrative Decisions Tribunal (ADT) so that it is no longer lawyer-dominated;
- making hearings before the Tribunal open to the public, except in special circumstances; and
- streamlining the procedures for appealing decisions of the ADT and a greater role for the Supreme Court as the ultimate supervisor of the profession.

The Commission's report suggested there was merit in a further, more wide-ranging inquiry being undertaken. New South Wales Attorney-General, Bob Debus, said he agreed with the Commission that a broad examination of the disciplinary scheme for dealing with complaints against legal practitioners should be undertaken and initial work on this is being done by the Attorney-General's Department.

Young people who commit crimes

Issues Paper 19, released by the NSW LRC in September 2001, raises some challenging questions about the way in which the police and the courts, particularly the Children's Court, deal with young offenders (generally those under 18 years).

There is evidence that young offenders from particular ethnic backgrounds, including Aboriginal and Torres Strait Islander people and those from Pacific Island backgrounds, receive harsher penalties than young offenders from Anglo-Australian backgrounds.

Presently in New South Wales, 25 per cent of young offenders in detention are Aborigines or Torres Strait Islanders. The Commission is keen to find out why this is happening, and to look at ways to reduce the number of young people in these groups becoming young offenders.

“We are trying to find the best outcomes not only for young people, but also for the community,” said the Chair of the Commission, Justice Michael Adams.

The way that the justice system deals with young people who commit crimes has been changing in recent years, with a wider range of diversionary options now available. In 2000, the NSW government created the Youth Drug Court, and in 1997 the *Young Offenders Act* was introduced. Under the *Young Offenders Act*, young people who commit offences are given warnings or cautions or attend youth justice conferences with the victims of their crimes instead of going to court.

However, almost half of young offenders end up in court, and therefore the Commission is looking at several specific matters related to this, including:

- bail;
- the role of a specialised Children’s Court;
- naming young offenders in the media;
- mandatory sentencing;
- sentencing guideline judgments;
- the role of victims and families in sentencing;
- criminal records; and
- the effectiveness of the Youth Drug Court.

The Commission wants to hear in particular from Aboriginal and Torres Strait Islander people, Pacific Islander people, people from regional and rural New South Wales, people with intellectual disabilities, and wards of the State about their experiences as young offenders.

In the pipeline

Over the next six months, the Commission plans to publish the following reports and consultation papers.
Surveillance. An interim report on the review of the

Listening Devices Act 1984 (NSW) and the need to regulate the use of surveillance equipment in public places is expected to be tabled in Parliament in October 2001. The Commission expects this report to be the subject of considerable community debate.

Relationships and the law. The Commission is currently finalising a detailed discussion paper as part of its review of the *Property (Relationships) Act 1984* (NSW) (formerly the *De Facto Relationships Act 1984*). This paper will consider not only the current scope of the *Property (Relationships) Act*, but also the financial adjustment provisions in the Act.

The paper will also examine the complexities that arise in including superannuation as part of the property of the parties to a relationship, whether parties should have the right to seek maintenance, and the rights of children to relationships. This paper will be published before the end of 2001.

Contempt by publication. The Commission is in the final stages of its review of the law relating to contempt by publication. A report is currently being prepared following the publication of a comprehensive discussion paper in July 2000. The report will be released early in 2002.

Guaranteeing someone else’s debts. People who guarantee debts for family and friends may end up losing much more than they thought they were committing themselves for when they signed the guarantee document. If the borrower can’t or won’t repay the debt, the lender (usually a bank or financial institution) can demand that the guarantor pay the amount owing, in addition to any costs of recovery. Often, the guarantor may use their home as security for the debt, which may then have to be sold to cover the costs.

The Commission is currently participating in the conduct of empirical research which involves surveying consumers, lenders and lawyers to obtain an up-to-date picture of the current lending practices and expectations around guarantees. This research is in partnership with the University of Sydney Law School, with funding from the Australian Research Council’s Strategic Partnership with Industry for Research and Training (SPIRT) scheme. Results of the surveys are likely to be published early in 2002.

Sentencing of corporate offenders. The Commission will also be publishing an issues paper in November 2001 which covers problems that arise in the sentencing of corporate offenders, and the need to have a broad range of sentencing options available.

Administrative Review Council

Professional standards for tribunal members

The Administrative Review Council (ARC) has finalised this project with the launch of its *Guide to Standards of Conduct for Tribunal Members* in October 2001.

Development of the Guide is a logical progression from the issues of tribunal management, practice and procedure examined by the ARC in its 1995 *Better Decisions* report on Commonwealth merits review tribunals.

In December 2000, the ARC released an Exposure Draft, *Principles of Conduct for Members of Merits Review Tribunals*. Consultation forums were held in April and May 2001 in Melbourne, Canberra and Sydney, and involved heads of Commonwealth, state and territory tribunals and tribunal members, agencies and tribunal users.

As the ARC's statutory role under the *Administrative Appeals Tribunal Act 1975* (Cth) is to monitor the Commonwealth administrative review system, the Guide nominally focuses on standards of behaviour for members of Commonwealth tribunals. However, the project was not developed with any particular tribunal in mind and the Guide will be of use to other tribunals.

For tribunal members, the Guide is intended to inspire integrity rather than enforce compliance. It encourages members to make sound judgments and to recognise, consider and address potential problems before they become real ones. Accordingly, the Guide is drafted in general rather than specific terms, and each principle is supplemented by explanatory comments,

particularly on issues that members have expressed uncertainty or concern about.

The Guide recognises the leadership role of tribunal heads in developing and maintaining tribunal standards. The Guide will also provide a focus for continuing consideration of tribunal member standards of conduct.

The Council of Australian Tribunals

The ARC is working to facilitate the establishment of a Council of Australian Tribunals (the COAT), as recommended at different times by both the ARC and the Australian Law Reform Commission.¹

The COAT would provide a national forum for tribunal heads to develop policies, secure research and promote education on matters of common interest.

The ARC has consulted widely with state, territory and Commonwealth tribunals, and released a proposal for a COAT. Preliminary discussions indicate broad support for the proposal.

The scope of judicial review

In November 2000, the ARC approved a project to explore the legitimate scope of judicial review.

The outcome of the project will be a set of guidelines to assist agencies, legislators and commentators determine the circumstances in which the scope of judicial review might appropriately be limited.

Work is currently underway on developing an issues paper for the project. The ARC expects that this paper will be released in late 2001.

There appears to be scope (constitutionally at least) for the Commonwealth to restrict judicial review by limiting the opportunity for someone to obtain a remedy prohibiting or enforcing administrative action. However, having regard to fundamental concepts such as the rule of law, separation of powers and individual rights, the ARC has started from the position that,

unless there are compelling reasons for doing so, judicial review should not be excluded. (For example, 'in what circumstances should an executive decision maker be able to make decisions that are unlawful, exceed the statutory powers, are unreasonable, based on no evidence, are affected by bias, are founded on irrelevant considerations or are taken without having regard to relevant considerations, or are made without an opportunity to hear from the affected party?') It follows from this that policy considerations will be critical to the shape of the guidelines.

In seeking to identify these policy considerations, the ARC is focusing on a range of circumstances in which elements of judicial review might not be appropriate having regard to considerations such as:

- the character and subject matter of the decision;
- the alternative remedies that may or may not be available;
- the nature of the decision-maker; and
- the position of the decision in the review hierarchy.

The use of technology in government decision making

The ARC has recently commenced a project on the use of technology in decision making. This project will include an examination of the use of expert decision making computer systems (which seek to provide an automatic and logical process for identifying the relevant facts and law, collecting that information from applicants, and applying them to often complex legislation).

These systems are currently employed in a number of agencies (these include the Departments of Veterans' Affairs, Defence and FaCS, Comcare, Environment Australia, ATO and Centrelink). They offer at least the advantage of consistency, accuracy and uniformity of approach, no matter the diversity of personnel or location. However, their use also raises a number of issues, which the ARC intends to explore, such as:

- How are rules developed and tested to ensure they correspond with applicable legislation and accepted

policy? What are the opportunities for independent scrutiny of the rule-base? What are the implications for primary decision making, particularly de-skilling decision makers?

- Access and equity issues will be particularly important. While technology can enhance access, it can present barriers by reason of age, culture, income or disability.

Administrative Review Council 25th anniversary

The ARC celebrates its 25th anniversary this year. The ARC was established on commencement of the *Administrative Appeals Tribunal Act 1975* (Cth) and the first meeting of the ARC was held on 15 December 1976.

To mark this important milestone, the ARC will hold an anniversary function in Canberra on Thursday, 6 December 2001. This function will include a reception at Old Parliament House and dinner. The function will be open to all those who have had dealings with the ARC over the past 25 years.

Endnotes

1. In *Better Decisions*, the ARC proposed a 'Tribunals Executive', as part of formal arrangements for promoting and coordinating greater liaison between review tribunals, see paragraph 7.48, Recommendation 85; and *Managing Justice: A review of the federal civil justice system* (ALRC 89), para 2.230, Recommendation 10.

Copyright Law Review Committee

Copyright and contract

The Copyright Law Review Committee is an independent advisory body within the portfolio of the federal Attorney-General. It inquires into specific copyright issues referred to it from time to time. The Committee is comprised of seven members from various industry, legal and academic backgrounds. The current mem-

bers are Professor James Lahore (the chairman), Maureen Barron, Charles Britton, Tom Cochrane, Chris Creswell, Professor Michael Pendleton and Dr Warwick Rothnie.

In April 2001 the Attorney-General asked the Copyright Law Review Committee to examine the relationship between copyright and contract. The *Copyright Act 1968* (Cth) provides for certain exceptions to the exclusive rights of owners, in order to balance the rights of owners and users and promote the public interest. The Committee is investigating the extent to which online and offline agreements modify these exceptions. It is also examining the effect modification might have on the balance and whether any action should be taken to prevent contractual modification.

In June 2001 the Committee published an issues paper and called for submissions from members of the public. Thirty-one submissions were received from library, educational, industry, user and consumer groups, as well as from individuals. Generally, views submitted were quite polarised between user and owner interests. The Committee is consulting further with key interests.

The Committee has also been conducting its own research into the relevant academic literature and the strategies implemented by other countries to deal with similar issues, as well as its own survey of online licence agreements.

The Committee is due to report to the Attorney-General on 30 April 2002.

Family Law Council

Child and Family Services (CAFS) Committee

The discussion paper, *The Care, Support and Protection of Children: Interaction Between the Family Law*

Act and State and Territory Child and Family Services Legislation, was released on 14 March 2001. Submissions responding to the discussion paper have been received and will be analysed. They will assist in developing a final report, which will contain advice for legislative change, and will include suggested principles and standards for consideration by legislators and administrators.

Violence and the Family Law Act Committee

A discussion paper, *Violence and the Family Law Act: financial remedies*, was issued in August 1998. The work arising from this paper was incorporated into the Council's July 2000 submission in response to the Government's Discussion Paper, *Property and Family Law: Options for Change* (March 1999). The Council has recently finalised and sent a letter of advice to the Attorney-General on the issue. Following the completion of this aspect, further work on children, violence and the *Family Law Reform Act 1995* (Cth) will be considered.

Litigants in Person Committee

In August 2000, the Council provided a report to the Attorney-General in relation to litigants in person in family law proceedings. The Council's report, *Litigants in Person*, was publicly released in January this year.

Civil and Religious Divorce Committee

The Council completed its consideration of difficulties that may arise when one party, who under religious law is entitled to grant or refuse a religious divorce, refuses to do so in circumstances where a divorce is granted under civil law. It recently provided the Attorney-General with a report outlining its views on whether some change of law may be appropriate.

Northern Territory Law Reform Committee

Paramourncy

The Committee is examining the nature and application of the legal principle that the child's best interests must be regarded as the paramount consideration in family law litigation concerning children, and considering whether the *Family Law Act 1975* (Cth) should be amended in this respect. A report is being drafted.

The Northern Territory Law Reform Committee has been reviewing several pieces of legislation and recently submitted a number of completed reports to the new Northern Territory Attorney-General, the Hon Dr Peter Toyne MLA, for the consideration by the government. The President has met with the Attorney-General to discuss its function, progress and the issues that are currently under consideration. The Committee looks forward to continuing the positive working relationship that it enjoys with the government and is pleased to report that the Attorney-General has expressed his support for the Committee's work and the forthcoming 2002 ALRAC conference (*see article page 65*).

Coroners Act and the privilege against self- incrimination

The Committee has recently completed a review of the Coroners Act and the privilege against self-incrimination that the Act allows. Specifically, the Committee conducted an inquiry into whether the Territory should introduce legislation that would, among other things, compel a witness at a coronial inquest to answer a question subject to certain conditions. The Northern Territory is the only Australian jurisdiction that protects the unconditional privilege of refusal to answer a question at a coronial inquest on the grounds of self-incrimination, and this position was reviewed.

In assessing these issues, the Committee discussed a number of factors. The recommendation that the draft

Northern Territory Bill follow the existing Commonwealth and New South Wales legislation was supported. The Committee expressed reservation regarding the recommendation that the Coroner have the power to issue full indemnities.

The report was finalised in September 2001 and was submitted to the new Attorney-General in early October.

Disposal of uncollected goods

The Committee has also been reviewing the *Disposal of Uncollected Goods Act*. In relation to the dealing process of unclaimed monies and property, the procedure contained in both statute and common law was considered to be unclear and difficult to coordinate. Law reform in this area has been an issue for many years, and the Committee recently considered recommendations from a report compiled by the NT Attorney-General's Department. The Committee discussed the report and agreed that the *Disposal of Uncollected Goods Act* should be repealed and a new Act passed along the lines of the New South Wales legislation. In August 2001 the Committee was informed that the final report had been completed and was ready for submission to the new Attorney-General.

Other projects

In 1994, the Committee recommended that a *Suitors Cost Fund Act* be created. No such legislation was passed and in 2001 the President wrote to the then Attorney-General suggesting that the matter might be reconsidered. This was agreed and the Committee will suggest to the new Attorney-General that an updated revision of the proposed *Suitors Cost Fund Act* be implemented.

The Committee is also investigating research into illegal activities. In May 2001, the Acting Attorney-General asked the Committee to inquire into whether it is appropriate to guarantee confidentiality for approved research projects into illegal activities and if so, what would be the appropriate form of protection against illegal discovery for such information. The Committee expects to submit a report to the Attorney-General by

the end of 2001. The current proposal is that the NT legislation be modelled on the ACT *Epidemiological Research Act*. Investigations into the operations of that Act are underway and changes to the discussion paper are also being considered by the Committee.

The Committee is also reviewing the right to silence. Currently, the Committee is taking the view that the status quo should be preserved until other Australian jurisdictions develop an approach that is consistent, particularly in view of the unusual aspects of these provisions under Northern Territory law.

Queensland Legal, Constitutional and Administrative Review Committee

Review of the Freedom of Information Act 1992 (Qld)

The Committee is finalising a comprehensive review of Queensland's *Freedom of Information Act 1992* on the same terms of reference as the Parliament had referred to the former Committee, and utilising the material gathered by the former Committee through its extensive public consultation and other research.

The Committee is giving priority to finalisation of this review.

Members' oath of allegiance

The Committee is reviewing the oath or affirmation of allegiance taken by members of the Legislative Assembly. The Committee has sought expert advice on the constitutional and legal implications of amending the oath or affirmation and is expected to report to Parliament on this issue in the short term.

Other matters

The Committee is monitoring:

- developments regarding issues left open by the former Committee in its report on the prevention of electoral fraud in order to assess what action it might appropriately undertake; and
- implementation of recommendations made by the strategic management review of the offices of the Queensland Ombudsman and Information Commissioner.

Information on Committee inquiries and reports is available at

www.parliament.qld.gov.au/committees/legalrev.htm
or by contacting the Committee's secretariat on (07) 3406 7307.

Queensland Law Reform Commission

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).

In 1995, the Attorneys-General of the States and Territories, at the request of the Queensland Attorney-General, nominated representatives of their respective jurisdictions to participate in the project, and in September 1995, the National Committee for Uniform Succession Laws held its inaugural meeting.

To date, the project has made significant progress. In December 1997, the National Committee presented its final reports to SCAG on the first two stages of the project: *The Law of Wills and Family Provision*. The wills report contained model legislation to be used as the basis for reform by individual States and Territories. The *Wills Act* (NT), which came into effect on 1 March 2001, is based closely on the model legislation contained in that report.

Work is continuing on a discussion paper on *Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*. That paper will be released

in late 2001, and will examine proposals for a uniform procedure for the resealing of foreign grants, as well as proposals for the automatic recognition of certain Australian grants.

After the release of that discussion paper, the National Committee will turn its attention to the preparation of a final report on *The Administration of Estates of Deceased Persons*. A discussion paper on that topic was published in 1999, examining a wide range of issues including the appointment and removal of executors and administrators, the powers and liabilities of executors and administrators, the vesting of property, and the order of payment of debts in insolvent and solvent estates.

For further information contact Ms Claire Riethmuller on (07) 3247 5690.

Vicarious liability

The Commission is reviewing the principle of vicarious liability in the law of torts. It is anticipated that a report, which will include draft legislation implementing the Commission's recommendations, will be published in late 2001.

Issues being considered by the Commission include:

- the liability of a principal for a tort committed by an independent contractor;
- the liability of an employer for a tort committed by an employee who has been lent to a third party;
- the liability of an employer for a tort committed by an employee who is performing a duty conferred on the employee not by the employer but by law and who exercises an independent discretion in the performance of that duty;
- the rights of indemnity and contribution between an employer and an employee in circumstances where the employer is vicariously liable for the tort of the employee.

The Commission is also considering whether vicarious liability should be imposed in relationships such as parent/child, teacher/pupil and adult supervisor/child.

For further information, contact Associate Professor Peter MacFarlane on (07) 3247 4945.

Effect of remarriage or divorce on damages in a wrongful death claim

The Commission has been requested to review, in the light of the decision of Justice Atkinson in the Supreme Court of Queensland in *Row v Willtrac Pty Ltd* (unreported, Qld Sup Ct, Atkinson J, 6 December 1999), whether the damages recoverable by the spouse or child of a deceased person in a wrongful death claim should be affected by the remarriage or prospect of remarriage of the surviving spouse or the possibility that the relationship between the deceased and the surviving spouse might have ended in divorce.

The Commission intends to publish a discussion paper on this issue in 2002.

For further information, contact Associate Professor Peter MacFarlane on (07) 3247 4945.

Current publications may be accessed through the Commission's home page at <[www.qlrc.qld.gov.au](http://www qlrc.qld.gov.au)>.

Law Reform Commission of Western Australia

Aboriginal Customary Law

The Commission's current reference on Aboriginal customary laws aims to canvas issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian justice system. The reference resulted from the LRCWA's report, *Review of the Criminal and Civil Justice System 1999-2000*, where concerns were expressed in relation to the treatment received by Indigenous Australians in the current justice system. The Commission believed that these concerns would be best dealt with as a separate reference in its own right.

On 2 December 2000, the former state Attorney-General delivered the reference, prompting the LRCWA to immediately tender for project managers, writers, researchers and editors. The tender closed on 31 Jan-

uary 2001 and the Commission has since been involved in the process of evaluating the responses received. To achieve that end, the Commission formed a Reference Group, facilitated by Dr Mick Dodson, with representatives from the Aboriginal Affairs Department, the Aboriginal Justice Council, the Kimberley Aboriginal Law and Culture Centre and ATSIC. The Reference Group recently presented its recommendations to the Commission. Taking into account those recommendations, the Commission expects to appoint a project team soon, with research to commence in earnest shortly thereafter.

The LRCWA envisages the reference will be run in the same manner as the review of the criminal and civil justice system, with numerous public meetings, extensive culturally appropriate consultations with Aboriginal peoples and visits to all parts of the State.

Although the Commission has not been given a deadline to complete the reference, it anticipates that by the end of 2002 an issues paper and an initial report will be published.

Writs and warrants

The LRCWA's final report on *Writs and Warrants* has been tabled in state Parliament. The Commission is presently making the necessary arrangements to distribute hard copies of the report and to load the electronic version on its web site.

Contempt

The LRCWA is also undertaking a reference on the law of contempt. The Commission engaged three writers to produce discussion papers on the three topics that form the terms of reference. The first discussion paper on *Contempt in the Face of the Court* has been published and distributed to the judiciary for their comments and submissions. The Commission expects to deliver discussion papers on the other two topics by the end of this year, with a final report to be compiled once all comments and submissions are received.

Past reports

The other subsidiary project the Commission is currently working on is the conversion of all previous

reports and discussion papers into an electronic format, to be republished on a CD-ROM. The LRCWA recently sent hardcopies of all its publications to be republished on microfiche. These projects complement each other and will help to increase accessibility and protect the integrity of the publications for historic purposes.

Publications of the Law Reform Commission of Western Australia are available on the Commission's website at <www.wa.gov.au/lrc>.

Victorian Law Reform Commission

The Victorian Law Reform Commission was officially launched by the Attorney-General, Hon Rob Hulls MP in April 2001. At the launch, the Attorney-General announced three references for the Commission dealing with disputes between co-owners, sexual offences and privacy law reform.

Disputes between co-owners

The Commission is required to review Part IV of the *Property Law Act 1958* (Vic), with a view to introducing simpler and cheaper processes for:

- the resolution of disputes between co-owners; and
- the sale or physical division of co-owned land.

The terms of reference also require consideration of whether similar processes should be introduced to deal with co-ownership of other forms of property, for example chattels.

The Commission published a discussion paper, *Disputes Between Co-owners*, in June 2001. The paper was distributed widely and made available on the VLRC website, along with a summary of the paper.

The discussion paper addresses three main issues. First, it examines the rules that determine the type of co-ownership that is created in a given situation (ten-

ancy in common or joint tenancy). Second, the paper focuses on the rules for severing a joint tenancy. Third, it looks at the rules that allow co-owners to end co-ownership by selling or dividing the co-owned property, and making any necessary financial adjustments.

The major reforms canvassed include requiring the type of co-owned interest to be specified upon registration of the interest, enabling severance by registering a declaration of severance, and allowing the Victorian Civil and Administrative Tribunal — instead of the Supreme Court — to hear disputes that may arise.

Following the release of the discussion paper, the Commission has consulted with stakeholders and established an Advisory Committee and expects to release the final report by the end of 2001.

Sexual offences

The Commission has been asked to review current legislative provisions relating to sexual offences, to determine whether changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases.

The Commission undertook initial consultation with stakeholders and established an Advisory Group to assist its work. Based on the consultations and advice, the Commission has decided to undertake the review in two stages.

The first stage will deal mainly with substantive law and evidence and procedural issues. The second will deal with strategies for ensuring that substantive changes are reflected in administrative practices for example in the area of community education, police practices and judicial education.

The Commission has also decided to focus on problems experienced by complainants from Indigenous and non-English speaking backgrounds, and people in rural and regional areas. Earlier research has identified these as groups about whom relatively little is known in relation to sexual offences. It has been suggested that these groups may face particular difficulties in reporting sexual offences to the police, and that conviction rates for sexual offences, particularly against chil-

dren, are particularly low in some rural areas.

A discussion paper on the substantive law and evidence and procedural issues will be released in early November 2001. The Commission has also begun work on its second stage and is in the process of establishing reference groups of women from Indigenous backgrounds and those with English as a second language to advise and direct its consultations with Aboriginal, immigrant and refugee communities.

Privacy

Rather than provide the Commission with formal terms of reference, the Attorney-General asked the Commission to report on priorities for privacy reform. The Commission published an information paper on 13 July 2001 and held a seminar and consultation session with privacy advocates and experts on 19 July 2001.

The Commission also consulted extensively with the newly appointed Victorian Privacy Commissioner. Following this process, the Commission advised the Attorney-General that the priorities for privacy reform in Victoria were:

- surveillance in public places;
- workplace privacy; and
- public records.

The Commission is currently waiting for formal terms of reference from the Attorney-General on one of the areas identified.

Partial excuses and defences to homicide

In September 2001, the Commission received terms of reference in relation to the law of homicide. It has been asked to consider whether:

- it would be appropriate to reform, narrow or extend defences or partial excuses to homicide, including self-defence, provocation and diminished responsibility;
- any related procedural reform is necessary or appropriate to ensure that a fair trial is accorded to persons accused of murder or manslaughter, where such a defence or partial excuse may be applicable; and

- plea and sentencing practices are sufficiently flexible and fair to accommodate differences in culpability between offenders who are found guilty of, or plead guilty to, murder or manslaughter.

Minor law reform

Under the *Victorian Law Reform Commission Act 2000* (Vic), the Commission can undertake minor law reform without a reference from the Attorney-General, if the matter is one of community concern and undertaking work on it does not require deployment of major resources.

The Commission has received several suggestions from the community for minor law reform. It has established a process to deal with suggestions and, following initial investigations, to decide whether the suggestion falls within the Commission's guidelines for minor law reform. Based on this process, the Commission is investigating two community-generated suggestions for reform. They are:

- failure to answer bail (brought to the Commission's attention by the Victorian Aboriginal Legal Service); and
- changes to interim intervention orders under the *Crimes (Family Violence) Act 1987*, to ensure that a victim's location cannot be easily determined by defendants (brought to the Commission's attention by a regional women's refuge).

Appointment of part-time Commissioners

In early October, the state Attorney-General appointed four part-time Commissioners to the Victorian Law Reform Commission. They are:

- Judge Jennifer Coate, President of the Children's Court;
- Felicity Hampel, SC, Adjunct Professor of Law at Monash University;
- Justice David Harper, Supreme Court of Victoria; and
- Professor Sam Ricketson, Professor of Law, University of Melbourne.

Please visit the Victorian Law Reform Commission's website for progress on references and for other developments: <www.lawreform.vic.gov.au>.

Law Reform Commission of Nova Scotia

Since its inception in 1991, the Law Reform Commission of Nova Scotia has been funded jointly by the Department of Justice (NS) and the provincial Law Foundation. Government funding, which represented the larger portion, was withdrawn, effective early 2001. This significant loss of funding would ordinarily have meant the Commission's closure. Fortunately, a three-year grant of full funding from the Law Foundation, a fund derived from the interest on lawyers' trust accounts, will enable the Commission to continue its law reform work.

Although questions about the Commission's future have recently required a great amount of time and energy, progress has also been made on a number of projects. In January 2001, a final report was issued on the topic of interim payment of damages, namely whether, and in what circumstances, plaintiffs should be entitled to receive interim payment from defendants in the period before trial. The Commission is proceeding with its review of Nova Scotia mental health legislation and expects to publish a final report late in 2001. The Commission also expects to decide soon which additional projects will be undertaken in the next year.

In addition to the question of long-term funding, in future months the Commission will be examining such topics as its mission, governance, staffing arrangements, and operations. The Commission hopes this will lead to the development of a new law reform model, which is both effective and financially sustainable. The Commission is grateful to those other Commonwealth law reform agencies that have recently shared details about their mandates, nature, and work, thereby providing the Commission with models for comparative analysis.

Continued on next page

New York State Law Revision Commission

Commissioners and staff

The Commission was established by the Legislature in 1934. The five-member Commission includes Chairman Robert M Pitler, Professor of Law at Brooklyn Law School; Sanford Dranoff, Attorney; Michael Hutter, Professor of Law at Albany Law School; Stephen G Nordquist, Attorney; and John Ryan, Attorney. *Ex officio* members include New York Senators James Lack, Chair, Senate Judiciary Committee; Dale M Volker, Chair, Senate Codes Committee; and Assembly Members Joseph Lentol, Chair, Assembly Codes Committee; and Helene Weinstein, Chair, Assembly Judiciary Committee. The Commission is primarily staffed by Rose Mary Bailly, Executive Director and Julie Keegan, Associate Attorney.

Uniform Commercial Code

New York's adoption of revised Article 9 of the Uniform Commercial Code was a major focus of the Commission for much of the year. The model uniform article was developed by the National Conference of Commissioners on Uniform State Law. The Commission was charged with studying the effect of the revised article on existing New York law, identifying inconsistencies, and recommending various amendments to the Legislature. After substantial examination and debate among the Commissioners, an amended version of the Uniform Revised Article 9 was passed by the Legislature and signed by Governor Pataki in June 2001.

Guardianship of incapacitated persons

In 1993, the Commission was instrumental in New York's adoption of Article 81 of the Mental Hygiene Law. Article 81 created a new judicial proceeding to determine if an alleged incapacitated person is, in fact, in need of a guardian of the person or property and, if so, to what extent. The law provides significant due process protection, and requires that guardianship

orders be specifically tailored to the actual needs of the incapacitated persons.

Since its enactment, several practice and procedural issues have arisen, which the Commission is currently studying. These include: the applicability of Article 81 to minors and developmentally disabled adults; compensation of attorneys, court evaluators and guardians; judicial recognition of foreign guardianships and several other technical procedural issues.

Insurance

New York courts have recently called on the Legislature to review a certain provision of the New York insurance law, prompting intensive study by the Commission. The provision permits insurers to exclude, without notice to the insured, liability coverage for spouses where one spouse's injuries are caused by the negligence of the other spouse. Based on an extensive study of other States' approaches to this issue, the Commission is considering several reforms.

Employment

The Commission is considering a revival of its study of 'whistleblower' statutes in the public and private sector. Under current New York law, employees who disclose or report unlawful activities committed by an employer in the course of the employer's business receive minimal protection from retaliatory actions taken by the employer. The Commission's study proposes considering reforms that would strike an effective balance between protecting employees (and, thus, the public at large) while preserving an employer's autonomy and privacy.

Financial abuse of older and incapacitated adults

Financial exploitation of the elderly and incapacitated is a growing problem in New York as well as the United States generally. Often, durable powers of attorney are the weapon of choice of the abusers. The Commission will undertake a study of the extent of this significantly under-reported crime and the role of durable powers of attorney. Resolution of the issue

may prove difficult as many legal practitioners laud the durable power of attorney, emphasising the ease of execution, its minimal expense and simplicity as an estate planning tool. Critics, however, point to the lack of any formal accounting procedure and, hence, the difficulty in identifying abuse.

Rules of evidence

Certain evidentiary reforms are being studied by the Commission including: the creation of a parent-child testimonial privilege; the establishment of a testimonial privilege protecting statements in mediation proceedings; an exception to the hearsay rule in relation to domestic violence cases; and changes to an existing rule which, under certain circumstances, prohibits testimony regarding the statements of a deceased person.

The Commission is currently in the process of developing a website, which is expected to be operational in the (northern) winter of 2001-2002.

Scottish Law Commission

Obligations

As part of its work on obligations, the Commission is examining the statutory protection provided against the penal enforcement of leases. A discussion paper (No 117), *Irritancy in Leases of Land*, was published in October 2001, inviting comments by 28 February 2002.

Work is continuing, jointly with the Law Commission for England and Wales, on a review of the law of partnership. A consultation paper (No 111) was published in October 2000 seeking views on proposals for reform of the law on ordinary partnerships. It examines, in particular, the issues of separate legal personality and continuity of partnership and suggests a new mechanism for solvent dissolution. A second consultation paper is to be issued in the (northern) autumn of 2001 dealing with the law on limited partnerships. The aim is to report on both aspects of the law in the second half of 2002.

Another joint project with the Law Commission for England and Wales considers the desirability and feasibility of replacing the *Unfair Contract Terms Act 1977* and the Unfair Terms in Consumer Contracts Regulations 1999 with a unified regime that would be consistent with European legislation and would also extend the scope of the 1999 Regulations to protect businesses, as well as consumers. The aim is to publish a joint consultation paper in the early part of 2002.

Persons

The Scottish Ministers have asked the Commission to consider the question of who should be entitled to claim damages for non-patrimonial loss on the death of an individual. *The Damages (Scotland) Act 1976* currently confers the right on the deceased's spouse, heterosexual cohabitant, children and parents. A discussion paper (No 116) was issued in October 2001 and the Commission aims to submit its final report by March 2002.

The Scottish Ministers have also asked the Commission to examine the law relating to psychiatric injury caused by another person. The project will cover, among other things, the question of liability in damages for a recognised psychiatric illness resulting from stress caused by another person. The aim is to issue a discussion paper in the early part of 2002.

Property

A discussion paper (No 112) *Conversion of Long Leases* was published in April 2001. It proposes that ultra-long leases, that is, leases for more than 175 years, should be converted into ownership. It also seeks views on whether conversion should be available for leases of much shorter duration (50 years or more). A possible alternative for these leases would be to introduce some form of security of tenure. The Commission aims to produce a final report in 2002.

The Commission hopes to start work on a review of the *Land Registration (Scotland) Act 1979* in the early part of 2002. This project will look at the difficulties that have arisen in practice with the 1979 Act and will consider the need for a conceptual framework to under-

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

Another property project concerns review of the law of the foreshore and seabed. It concentrates on the technical issues involved in this area with a view to advising the Scottish Executive on a range of options for reform to improve clarity and consistency in the law. The topics covered include Crown interest and public rights of access. A discussion paper (No 113) was published in April 2001 and the Commission aims to submit its final report in the early part of 2002.

Criminal Law

A discussion paper on *The Age of Criminal Responsibility* (No 115) was published in July 2001. It examines the legal issues involved in rules fixing the age (currently eight) below which children cannot be guilty of any crime. The Commission's provisional proposals are that the existing rule setting the age limit at eight should be abolished and that criminal prosecution of children under 16 should continue to be possible only in exceptional cases where the Lord Advocate considers prosecution to be in the public interest. The Commission intends to submit its final report by the end of 2001.

Trusts

Preliminary work is underway on a wide-ranging review of the law on express trusts. Among other issues, this review will examine the powers and duties of trustees, current restrictions on the accumulation of income and the question of whether there should be separate regimes for private and public trusts.

Recent reports

In October 2000 the Commission submitted its reports on *Real Burdens* (Scot Law Com No 181) and, jointly with the Law Commission for England and Wales, on

Damages under the Human Rights Act 1998 (Scot Law Com No 180).

The Commission's substantial report *Diligence* (Scot Law Com No 183) was completed in April 2001. This deals with diligence against land as well as attachment orders and money attachment. A report on the *Third Parties (Rights against Insurers) Act 1930* (Scot Law Com No 184) was published jointly with the Law Commission for England and Wales in July 2001.

Implementation

Since the advent of devolution in July 1999, three of the Commission's reports have been implemented by the new Scottish Parliament: *Abolition of the Feudal System* (Scot Law Com No 168); *Leasehold Casualties* (Scot Law Com No 165); and *Incapable Adults* (Scot Law Com No 151).

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

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