Reform ROUNDUP

Administrative Review Council

Council of Australian Tribunals

The Administrative Review Council (the Council) is working to facilitate the establishment of a Council of Australian Tribunals (the COAT), which will provide a national forum for tribunal heads to develop policies, secure research and promote education on matters of common interest.

The Council's proposal to establish the COAT was supported at a meeting of tribunal heads in NSW Parliament House on 3 October 2001. A Steering Group of tribunal heads has progressed the COAT proposal.

The inaugural meeting of the COAT will be held on Thursday 6 June 2002 in Melbourne (the meeting coincides with the 5th Annual AIJA Tribunals Conference, which will continue on Friday 7 June 2002). The meeting will involve consideration and adoption of the COAT's constitution and objects, election of office holders, and a series of working groups on issues such as the priorities for the COAT, training and education for members, benchmarking, knowledge sharing between tribunals and tribunal independence.

Any queries in relation to the COAT and how tribunals and members can participate should be directed to Matt Minogue on (02) 6250 5800 or email: <matt.minogue@ag.gov.au>.

The scope of judicial review

The Council is currently engaged in a project relating to the scope of judicial review.

The outcome of the project will be a set of guidelines to assist agencies, legislators and commentators to determine the circumstances in which judicial review should be available and when it might appropriately be limited. The Council hopes that its final publication will be a useful complement to its 1999 booklet, *What Decisions Should Be Subject to Merits Review?*

Production of the guidelines is to be preceded by the circulation of a Discussion Paper. To encourage stakeholder views, the paper will canvass the relevance to the judicial review of administrative decisions of a range of factors including:

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

The Discussion Paper will also take account of current exclusions from judicial review, including those provided for under the *Administrative Decisions (Judicial Review) Act 1977.*

The Council anticipates that the Discussion Paper will be available before the middle of this year.

The use of expert systems in administrative decision making

The Council is conducting an inquiry into the use of expert systems in administrative decision making. The Macquarie Dictionary defines an expert system as a computing system which, when provided with certain

basic information and general rules instructing it how to reason and draw conclusions, can then mimic the thought processes of a human expert in a specialised field.[1]

Expert systems (and particularly rule-based systems, which are a type of expert system) are used in administrative decision making in a number of Commonwealth government departments and some state government departments.

The Council is currently preparing an Issues Paper on the subject. Among other matters, the Issues Paper will consider:

- the implications of the use of such systems for primary decision making, particularly the potential deskilling of decision makers;
- how administrative review is undertaken of decisions made using expert systems; and
- the access and equity issues associated with the use of such systems.

In the course of the project, the Council will conduct a stocktake of the current and proposed use of expert systems in administrative decision making within Commonwealth agencies.

Endnotes

1. Third Edition (1998), p 743.

Family Law Council

At its November 2001 meeting several new Committees were established, existing Committees reconstituted, and Convenors appointed – details are available on the Council's website: <www.law.gov.au/flc>.

Child and Family Services (CAFS) Committee

This reference remains a priority for the Council. Follow-up work is continuing on the submissions received in response to 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* (Discussion Paper No 2), released on 14 March 2001. The Committee met in January and February. It is anticipated a report will be drafted for consideration by the Council later in the year.

Child Representatives Committee

The Committee is revisiting the findings and recommendations of the Council's Child Representation Committee's report, *Involving and Representing Children in Family Law* (August 1996). The review will be conducted in light of the Australian Law Reform Commission/Human Rights and Equal Opportunity Commission's report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84), and the significant social trends, and legislative and judicial developments that have emerged since its publication. It will involve examining the roles for, and the responsibilities of, child representatives. The Committee convened a telephone conference in November to outline issues and plan possible approaches.

Violence and the Family Law Act Committee

The Council sent a letter of advice to the Attorney-General in August 2001 concerning Part VIII of the *Family Law Act 1975* (Cth) and whether violence should be taken into account when making property distribution under that Part. Further discussions and research on violence and the *Family Law Reform Act 1995* (Cth) is now proceeding.

Paramountcy Committee

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. Research on the application of the principle in other countries is being undertaken. A paper relating to the various applications and expressions of the paramountcy principle throughout Commonwealth countries and its application is currently being drafted.

Cultural-community Divorce Committee

The Council's final report was sent to the Attorney in August 2001. The report and Discussion Paper are now available on the Family Law Council's website at <www.law.gov.au/flc/>.

Copyright Law Review Committee

Copyright and contract

The Copyright Law Review Committee is an independent advisory body within the Attorney-General's portfolio, which inquires into specific copyright issues referred to it from time to time. The Committee is presently inquiring into the relationship between copyright and contract.

The *Copyright Act* strikes a balance between the need to provide incentives for creators of copyright material and the need to encourage public access to information. It does so by creating a number of exceptions to the exclusive rights of copyright owners, which it establishes. The Committee is examining whether private agreements are being used to exclude or modify these exceptions so as to undermine the copyright balance and if so, whether corrective measures are needed. In particular, the Committee is considering how trade in electronic copyright materials is being conducted in the digital environment and whether this differs from trade in traditional copyright materials. As well as examining the situation in Australia, the Committee is assessing approaches to these issues adopted in Europe and the United States.

The Committee received 34 submissions in response to an Issues Paper published in June 2001. Submissions were generally polarised along the lines of copyright owners and users interests. The Committee also convened a consultative forum with key interests in October 2001 and has conducted its own research into licensing practices.

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

New South Wales Law Reform Commission

Guaranteeing someone else's debt

People who are asked to guarantee the debts of someone they love are sometimes subject to intense emotional pressure, and it is often solicitors who must advise them before they commit themselves to a serious financial obligation. Relationship debt, or 'sexually transmitted debt', is a growing concern, but detailed information about who becomes a guarantor and why is scarce. As part of its review into third party guarantees, the Commission, together with the University of Sydney Faculty of Law, released a survey in March 2002 asking lawyers about their experiences in advising people who are asked to guarantee the debts of others.

The survey is designed to gather information from solicitors about their day-to-day operations, both when they give advice before guarantees are signed, and also when loans are called in. The experiences of solicitors are key to understanding the process of entering a guarantee because prudent lenders will require potential guarantors to seek legal advice before signing any undertakings.

The information provided by the survey will help the Commission to assess problems with the law and to make appropriate recommendations for reform.

Relationships and the law

The release of the Commission's Discussion Paper on *Relationships and the Law* is expected in April 2002. The paper raises issues concerning the appropriateness of the *Property (Relationships) Act 1984* (NSW) to recognise heterosexual and same sex de facto and other close personal relationships. The primary focus of the review is on ensuring that the provisions of the Act are adequate to achieve a just and equitable redistribution of financial resources and other assets when relationships break down.

The Commission will be conducting consultations on the Discussion Paper in mid-2002, and is hosting a

seminar to discuss relevant issues during Law Week. Further information concerning the consultations and the review may be obtained from the Commission.

Other developments

The Commission's Interim Report on *Surveillance* (Report 98) was tabled in Parliament in December 2001. At the request of the New South Wales Attorney-General, the Commission will be undertaking further consultation on the recommendations contained in the report, particularly those concerning the media. The Commission plans to deliver a final report detailing the results of those consultations towards the end of 2002.

In January 2002, an Issues Paper setting out sentencing options for corporate offenders was released. Copies of *Sentencing: Corporate Offenders* (IP 20) are available from the Commission.

The Commission is finalising its report on *Contempt by Publication*, which is expected to be released in June 2002.

After the release of its Issues Paper *Sentencing: Young Offenders* (IP 19) late last year, the Commission is conducting further community consultations and preparing a final report.

As part of the continuing review of uniform succession laws being undertaken with the Queensland Law Reform Commission, the Commission will release a Discussion Paper in April 2002 on *Recognition of Interstate and Foreign Grants of Probate and Letters of Administration.*

New references

In March 2002, the Commission received three new references:

• whether people who are profoundly deaf or have a significant hearing or sight impairment should be able to serve on juries;

• a review of Part 15A of the *Crimes Act 1900* (NSW), which deals with Apprehended Violence Orders (AVOs); and

• whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine a complainant, or whether the court should have the power to appoint a person to conduct a cross-examination.

The Commission is also undertaking a project on mandatory sentencing, and will be publishing a consultation paper in June 2002.

Victorian Law Reform Commission

Disputes between co-owners

In January 2002 the Commission completed its reference on disputes between co-owners and forwarded its first report to the Victorian Attorney-General. The Commission was 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 physical sale and division of co-owned property.

The Commission's recommendations can be summarised as follows:

• To assist in preventing later disputes about the nature of co-owners' interest, documents transferring interest in land should specify whether transferees are to take the interest as joint tenants or tenants in common.

• The process of severing a joint tenancy (converting it into a tenancy in common and defeating the right of survivorship) should be simplified. A joint tenancy of land could be severed by lodging an instrument of severance at the Land Registry. Under the present law, divorce revokes dispositions in a will to a former spouse. The report recommends that joint tenancies held by married couples should automatically be severed by divorce, unless the couple agrees otherwise.

• It is recommended that the Victorian Civil and Administrative Tribunal should be given jurisdiction to order sale or physical division of co-owned land and goods. This will make the process of terminating a joint tenancy simpler and cheaper.

The report includes a draft Bill reflecting the Commission's recommendations, which was prepared by the Office of Parliamentary Counsel.

Liability of the Crown for industrial manslaughter

In December 2001 the Attorney-General asked the Commission to report on the criminal liability of the public sector for the death or serious injury of its workers. The Victorian Government introduced the Crimes (Workplace Deaths and Serious Injuries) Bill with the purpose of creating new criminal offences of corporate manslaughter and negligently causing serious injury by a body corporate in certain circumstances and to impose criminal liability on senior officers of a body corporate in certain circumstances. The Government indicated that it intended to bind the public and private sector but there was some concern about the Bill's coverage over the public sector. The Attorney-General provided the reference with a view to resolving inconsistencies in the legislation and giving effect to the Government's intention of binding the public sector. The Commission forwarded its report to the Attorney-General on 1 March 2002.

Sexual offences

A Discussion Paper on the substantive law and evidence and procedural issues was released in November 2001. The Discussion Paper canvassed the major issues in relation to the current law and compared Victorian law with the Model Criminal Code. The paper also included the findings of an empirical study on the outcomes of rape prosecutions. The study indicated that despite substantive reforms to sexual offences law and to evidentiary and procedural rules over the past decade, conviction rates have dropped.

The Commission has now begun its second phase of the reference, which focuses on implementation of the law and involves widespread community consultation. The central focus of the reference is on the responsiveness of the criminal justice system to the needs of complainants in sexual offence cases. An integral part of the Commission's approach is consultation with complainants and key stakeholders in sexual offence cases. A variety of consultation strategies are being employed to ensure effective input from a wide range of individuals and groups. Particular attention is being paid to the needs of complainants from Indigenous and non-English speaking backgrounds and from rural and regional areas. The Commission is also undertaking further empirical work on the characteristics of rape cases and on sexual assault of children.

Privacy

On 5 March 2002, the Attorney-General launched a major reference on workplace privacy and surveillance. The terms of reference for the inquiry require the Commission to investigate whether legislative or other reforms are needed to ensure that workers' privacy, including that of employees, independent contractors, outworkers and volunteers, is appropriately protected in Victoria. The terms of reference are broad and enable the Commission to look at all aspects of worker's privacy including the surveillance and monitoring of employee's communications, and physical and psychological testing of workers, including drug and alcohol testing, medical testing and honesty testing.

The Commission is to report on workers' privacy and then go on to examine surveillance more generally. The Commission has been asked to consider whether any regulatory models proposed by the Commission in relation to surveillance of workers could be applied in other surveillance contexts, such as surveillance in places of public resort, to provide for a uniform approach to the regulation of surveillance.

Compulsory care and treatment of intellectually disabled people

In December 2001, the Attorney-General gave the Commission a reference to examine existing legislative models for the compulsory treatment and care of persons with an intellectual disability who are a risk to themselves and the community and to make recommendations on the development of an appropriate legislative framework for that compulsory treatment and care.

The Commission is undertaking preliminary research and will release a Discussion Paper in May 2002.

Defences to homicide

Following preliminary research, the Commission will release an Issues Paper setting out the parameters of the reference in April 2002.

Community Law Reform: failure to appear in court in response to bail

In January 2002 the Commission released its first publication in its community law program. The issue was brought to the Commission's attention by the Victorian Aboriginal Legal Service (VALS). Section 4(2)(c) of the *Bail Act 1977* (Vic) states that a person who fails to answer bail must be remanded in custody unless they satisfy the court that the failure was due to causes beyond their control. VALS pointed out that in the Aboriginal community there could be a range of environmental and cultural reasons for failure to answer bail. Because the section does not permit these factors to be taken into account, people charged with minor offences can be remanded in custody even if they are unlikely to receive a sentence of imprisonment if found guilty of the offence for which they have been charged.

The Commission conducted research on this matter and has published a Draft Recommendation Paper that proposes the repeal of the section. The Commission has received submissions on the paper that are overwhelmingly supportive of the Commission's proposal. A final report will be forwarded to the Attorney-General for tabling in the current Parliamentary session.

Please visit the Victorian Law Reform Commission's website for copies of terms of reference, progress on references and publications: <www.lawreform.vic.gov.au>.

Victorian Parliamentary Scrutiny of Acts and Regulations Committee

Electronic democracy inquiry

A reference has been given to the Scrutiny of Acts of Regulations Committee by the Governor in Council to inquire into Electronic Democracy. The Committee is to report to the Victorian Parliament by 31 December 2002.

The inquiry is to consider how new technology can open Parliament and government to the community. It will investigate policy discussion forums online, getting people involved through 'virtual communities' and electronic voting.

Specifically, the Committee is to report on the opportunities available through the use of new technologies to improve public access to, and participation in, the processes of Parliament and government, including:

- netcasting of parliamentary proceedings;
- online interactive and collaborative approaches to policy discussion, including citizen email and online forums; and
- other technology solutions to promote access and participation.

The Committee will consider the core issues of the:

- potential impact of new and emerging technologies on the democratic processes of government;
- options available to improve democratic processes through the use of such technologies (for example, through electronically enabled voting);
- costs and benefits of new technologies that promote e-democracy;
- equitable access of all citizens to e-democracy;
- legal and regulatory factors; and
- educational or social barriers to the implementation of e-democracy.

In undertaking this inquiry, the Committee will also have regard to experiences in other jurisdictions and a number of projects in Victoria, including the 'Have Your Say' page on the Victorian government website at <www.vic.gov.au>; legislation and hansard online; and the Parliamentary website at <www.parliament.vic.gov.au>.

The above matters are to be addressed with a focus on public participation in democratic and parliamentary processes. It is not intended to examine issues relating to service delivery and government online processes, except as they may impact directly on issues of e-democracy.

In announcing the inquiry, the Minister for Information and Communication Technology, the Hon Marsha

Thomson, emphasised improving access for rural and regional Victorians through the Internet. She also highlighted the appeal of new technologies to attract young people into policy discussions. They have much to contribute and even more long-term reasons to be involved.

The Internet has linked people who share their interests and concerns about community issues, from the local scale to state-wide matters. Geographic limitations no longer apply. Groups are no longer restricted to being communities of location, but can be communities of interest.

These virtual communities offer potential to revitalise input into the political process by a broad range of people. They also combat the isolation, even alienation, which can affect some members of society.

Mary Gillett MLA, Chair of the Scrutiny of Acts and Regulations Committee, said the inquiry would consult widely with individuals, community groups, organisations, businesses and other interests. The perspective of institutions like Parliament and government will also be considered.

Ms Gillett identified three common themes for all these sectors: how they obtain information; how they interact; and how they make decisions. Technology affects all these areas.

During the inquiry, the Committee intends to release a Discussion Paper, call for submissions and conduct public hearings around Victoria. Details are available online at <www.parliament.vic.gov.au/sarc>.

Anzac Day inquiry

The Committee was recently given a reference by the Victorian Parliament to review the *Anzac Day Act 1958* (Vic) and any other relevant legislation with a view to making recommendations on ways to further enhance the significance of Anzac Day as a national day of commemoration.

During the inquiry the Committee will call for submissions and hold public hearings in Melbourne and regional Victoria. The Committee expects to table a report by the end of October 2002. Any person or organisation wishing to make a submission or give evidence should contact the Committee's Senior Legal Adviser, Andrew Homer on (03) 9651 3612 or by email at <andrew.homer@parliament.vic.gov.au>.

The Victorian Parliament Law Reform Committee

Powers of entry, search, seizure and questioning by authorised officers

This inquiry is nearing completion and a report will be tabled in June 2002. The inquiry looks at a number of powers of inspectors, focusing on their purpose, effectiveness and fairness, and the need to match the powers granted with the risk and gravity of the possible offence. Over 100 Victorian Acts have been identified as relevant to the inquiry. A further focus is on considering the degree of consistency between Acts and the desirability of promoting consistency.

Forensic sampling and DNA databases

The Committee has undertaken preliminary investigations in relation to this inquiry. The inquiry is to consider the use and effectiveness of forensic sampling and DNA databases in criminal investigations. The focus is on identifying areas and procedures that could more effectively utilise forensic sampling and improve the detection of crime.

Oaths and affidavits and the multicultural community

This inquiry will look at the system of oaths and oath taking in Victorian Courts, as well as the making of statutory declarations and affidavits, and consider how appropriate and accessible these processes are for members of the multicultural community. The Committee has undertaken preliminary investigations in relation to this inquiry.

Administration and Probate Act 1958

This inquiry has yet to begin. It will consider the possibility of legislative change in relation to the resolution

of disputes that involve small estates. It will also consider whether the Magistrates Court and the County Court should be given jurisdiction to deal with grants of probate and administration, and disputes relating to wills. The charges and commissions of solicitors who act as executors will also be investigated.

Industry codes

This inquiry, which has also yet to begin, will consider whether mandatory codes should be introduced to protect consumers in some industry sectors, in particular hairdressing, removalists, carpet cleaners and white-good retailers.

Government responses

A response to the Committee's report on the *Theatres Act 1958* (Vic) was received in November 2001. The Victorian Government supported all but one of the report recommendations. Implementation of those recommendations supported by the Government will see the repeal of the *Theatres Act 1958* (Vic).

A recommendation relating to the *Anzac Day Act 1958* (Vic) will be considered in the light of a subsequent reference on that Act to the Scrutiny of Acts and Regulations Committee.

Further information on the Victorian Parliament Law Reform Committee and our current and past references can be found on our website <www.parliament.vic.gov.au/lawreform>

Law Reform Commission of Western Australia

Aboriginal Customary Law

The Commission's current reference on Aboriginal customary law aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian justice system. The reference resulted from the LRCWA's review of the criminal and civil justice system 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.

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 the Aboriginal and Torres Strait Islander Commission, considered the various tender responses received by the Commission and recommended the appointment of Ms Cheri Yavu Kama Harathunian, from the Crime Research Centre of the University of Western Australia, as project manager. The Commission expects to appoint the balance of the project team in the next month with research to commence 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 is hoped that by the end of 2002 an Issues Paper and an initial Discussion Paper will be available. (Editor's note: For further information on the LRCWA inquiry, see the article 'Aboriginal customary law in Western Australia' on page 11.)

Contempt

The LRCWA is 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, *Contempt in the Face of the Court*, has been published and distributed to the Chief Justice of the High Court and every judge and magistrate in Western Australia for their comments and submissions. The second Discussion Paper on *Contempt by Publication* is due for release shortly and the third Discussion Paper on *Contempt by Disobedience* will be published some time after that. The final report will be published once all comments and submissions are received and considered by the Commission.

Judicial Review of Administrative Decisions

In September 2001, the Commission received a reference from the state Attorney-General to inquire into the inadequacies and deficiencies of the current law and procedures pertaining to the judicial review of

administrative decisions and to make recommendations for reform. A thorough research exercise was completed late last year and the Commission is now in the process of drafting its findings. It is envisaged that a draft paper will be available for consideration by the end of March 2002.

The 30th Anniversary report

In the May 2001 edition of the Law Society of Western Australia's *Brief* magazine, the Attorney-General, Jim McGinty, advised that as the year 2002 marked the Law Reform Commission's 30th Anniversary he proposed to take the opportunity to legislate to implement the vast bulk of the Law Reform Commission's previous reports. As a result, the Law Reform Commission has carried out an audit of its previous reports to identify those that are still outstanding and which require legislative change. The report setting out the necessary findings was presented to the Attorney-General for his consideration at the end of 2001. It is anticipated that the published version of the report will be available in the very near future as part of the Commission's 30th Anniversary celebrations.

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. This project is drawing to a close and it is envisaged that a CD-ROM containing all the Commission's past reports will be produced by the end of May 2002.

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

Queensland Law Reform Commission

Appointments

The Queensland Attorney-General, the Hon Rod Welford MP, has announced a number of new part-time appointments to the Queensland Law Reform Commission. Justice Roslyn Atkinson has been appointed to chair the Commission for a period of three years commencing 1 January 2002. The other appointments took effect on 21 December 2001 for a period of three years. The new appointees are:

Chair: The Honourable Justice Roslyn Atkinson, Judge of the Supreme Court of Queensland. Justice Atkinson holds the degrees of Bachelor of Arts (Hons), Bachelor of Educational Studies, and Bachelor of Laws (Hons) from the University of Queensland.

Her Honour was admitted to the Bar in 1987 and had a broad general public and private litigation practice in courts and tribunals including constitutional, administrative, corporate and industrial cases.

While in practice at the Bar, she was also the first member and then the first President of the Queensland Anti-Discrimination Tribunal, member of and then Deputy Chair of the Queensland Law Reform Commission, Hearing Commissioner for the Human Rights and Equal Opportunity Commission and member of the Social Security Appeals Tribunal.

Her Honour was appointed a Judge of the Supreme Court of Queensland in September 1998. She is also President of the International Commission of Jurists (Qld branch) and member of the Queensland University of Technology Faculty Advisory Committee for Law Courses.

Part-time member: Peter Applegarth SC. Mr Applegarth graduated from the University of Queensland with degrees in Arts and Law. In 1983 he was admitted as a solicitor. He was awarded the degree of Bachelor of Civil Law from the University of Oxford in 1985, has practised at the Queensland Bar since 1986 and was appointed a Senior Counsel in 2000.

Mr Applegarth lectures at the Queensland University of Technology, Griffith University and the Bar Practice Centre on defamation law and Federal Court practice. Between 1998 and 2001 Mr Applegarth was a member of the Board of Legal Aid Queensland. He is an Executive Member of the Queensland Council for Civil Liberties.

Part-time member: Ms Alison Colvin. Ms Colvin holds the degrees of Bachelor of Arts and Bachelor of Laws

(Hons) from the University of Queensland. She is enrolled in the degree of Master of Laws at Queensland University of Technology, focusing on administrative law and alternative dispute resolution.

Ms Colvin is admitted as a solicitor of the Supreme Court of Queensland and of the Supreme Court of Victoria.

Ms Colvin is a part-time Conference Registrar of the Administrative Appeals Tribunal and a part-time member of the Mental Health Review Tribunal. She has previously been a case manager at the National Native Title Tribunal, and a solicitor at Queensland Advocacy Incorporated and at the Aboriginal and Torres Strait Islander Legal Service.

Part-time member: Ms Heather Douglas. Ms Douglas has Bachelors' degrees in Arts and Law from Monash University and, in 1998, graduated with a Master of Laws from QUT. Ms Douglas was admitted as a barrister and solicitor in 1990 and practised criminal law in Melbourne and then, from 1992, at the Aboriginal Legal Service in Alice Springs.

Since 1996 Ms Douglas has worked at Griffith University Law School, where she is a lecturer. Her teaching areas currently include technology and the law and criminal law. For five years she coordinated a pre-law program for Aboriginal students. She is the author of a number of articles and publications.

Ms Douglas has been a member of the management committees at Fitzroy Legal Service, Women's Legal Resource Centre (Melbourne), Domestic Violence Legal Help (Alice Springs) and Caxton Legal Service.

Part-time member: Mr Gary O'Grady. Mr O'Grady holds the degrees of Bachelor of Science, Bachelor of Laws (Hons) and Master of Laws from the University of Queensland. He is admitted as a barrister of the Supreme Court of Queensland, and is an approved mediator of Dispute Resolution Services of the Bar Association of Queensland.

Mr O'Grady was a lecturer in law at the University of Queensland for several years prior to commencing full-time practice at the Bar. He continued as a part-time law lecturer at that university until 1992. His legal interests include personal injury law, company law, taxation, bankruptcy and commercial law, including trade practices. Mr O'Grady also lectures at the Bar Practice Course.

Full-time member. The position of full-time member is currently vacant, following the resignation of Associate Professor Peter MacFarlane in December.

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).

The project has already made significant progress. The National Committee has presented 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.

A Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (WP 55), dealing with the recognition in one jurisdiction of a grant made in another jurisdiction, has recently been published.

The Discussion Paper proposes a uniform procedure for the resealing of grants made in other Australian jurisdictions or overseas. It also proposes a scheme under which it would not be necessary for certain Australian grants to be resealed to be effective in another Australian jurisdiction.

The Commission seeks submissions on the proposals made and on the issues raised in the Discussion Paper.

The Discussion Paper will be available on the Commission's homepage at <www.qlrc.qld.gov.au> or may be obtained free of charge by contacting the Commission. The closing date for submissions is 3 May 2002.

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 released in early 2002.

Issues considered by the Commission in the report 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 Penny Cooper on (07) 3247 4550.

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*, 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 in this reference in 2002.

For further information, contact Penny Cooper on (07) 3247 4550.

Current publications may be accessed through the Queensland Law Reform Commission's homepage at <www.qlrc.qld.gov.au>.

Queensland Legal, Constitutional and Administrative Review Committee

Review of the *Freedom of Information Act 1992* (Qld)

On 20 December 2001, the Committee handed down its report *Freedom of Information in Queensland*. In its report the Committee recommended a range of significant reforms and technical amendments to Queensland's *Freedom of Information Act 1992*. The major recommended reforms include:

- the establishment of an independent entity (a Queensland FOI monitor) with the general responsibility of: (a) monitoring compliance with, and administration of, Queensland's FOI regime; and (b) promoting community awareness and understanding of the FOI regime, and providing advice and assistance to agencies and members of the public about the regime;
- the development of a whole-of-government strategy to promote the greater disclosure of government-held information outside the FOI Act;
- legislative provisions to facilitate a flexible and consultative approach to processing FOI applications; and

• amendment to the Cabinet exemption to limit it to documents created for the purpose of being submitted to Cabinet.

The Committee also reported that it would conduct a review of Queensland's recently amended FOI fees and charges regime in a year to assess whether that regime is operating fairly and efficiently.

The Electoral (Fraudulent Actions) Amendment Bill 2001

On 28 November 2001, the Queensland Parliament referred the Electoral (Fraudulent Actions) Amendment Bill, a private member's Bill, to the Committee for consideration and report back to the Parliament before 31 March 2002. The Bill seeks to amend Queensland's *Electoral Act 1992* by inserting a new 'catch-all' provision which makes it an offence to fraudulently do any act with intent to influence the outcome of an election. The Bill raises a number of issues including constitutional validity and mandatory minimum sentences.

The Committee called for public submissions on the Bill and has reported to Parliament.

Constitutional reform

The Committee has resolved to conduct a review of certain issues of constitutional reform including recommendations made by the Queensland Constitutional Review Commission in its February 2000 *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.*

Issues which the Committee will consider as part of its review include: constitutional amendment, entrenchment and review; initiation of legislative amendments; parliamentary reform; incorporation of Westminster conventions in the Constitution; a new preamble for the Constitution; protection of the judiciary and statutory office holders; and participation of Aborigines and Torres Strait Islanders in the democratic process.

The Committee is conducting its review in a number of stages.

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.

Tasmanian Law Reform Institute

The Tasmanian Law Reform Institute was established on 23 July 2001. The Institute is unique in Australia in that it was established by written agreement between the Tasmanian government, the University of Tasmania and the Law Society of Tasmania.

The establishment of the Institute follows an extensive history of law reform in this State. Tasmania established its Law Reform Commission in 1974. The Commission received references from the Attorney-General and its reports were presented to the Parliament. The Commission was chaired for the majority of its existence by Mr Bruce Piggott, a nationally and internationally renowned figure who made an impressive contribution to law reform in Tasmania. The Commission also comprised representatives of the government, Law Society, Bar Association and the Faculty of Law. In addition there were two community members. The Commission produced approximately 50 major reports, most of which resulted in the introduction of legislation, on a wide range of topics such as workers compensation, de facto relationships, motor vehicle accident compensation and rape law reform.

In 1989, for financial and political reasons, the multi-member Law Reform Commission was replaced by a single Law Reform Commissioner. Mr Henry Cosgrove QC, formerly Justice of the Supreme Court, and Professor Don Chalmers of the University of Tasmania held the office of Law Reform Commissioner consecutively until 1997. Some 20 reports were produced during this period, covering topics such as occupiers' liability, child witnesses, and insanity, intoxication and automatism. The government did not extend the sunset clause in the legislation and the office lapsed in mid-1997. The functions of the Commissioner were given to the Director of the Legal Aid Commission.

Following informal suggestions from the Law Faculty, in early 2000 the new Labor government approached the University Law School to collaborate in the establishment of a Law Reform Institute. This invitation recognised the extensive contribution by generations of Law School staff to law reform. The Law School had provided a member to the Board of the Law Reform Commission and the last Law Reform Commissioner was a member of the Law School staff. More significantly, substantial numbers of the discussion papers, working papers and reports were prepared by academics from the University of Tasmania Law School.

During the discussions with the Attorney-General, the Law School proposed the establishment of a Law Reform Institute modelled on the Law Reform Institute in the Canadian Province of Alberta. The Alberta Law Reform Institute (ALRI) was established by collaboration between the Province's university, government and law profession. The Alberta Law Reform Institute has operated successfully for nearly 30 years and offered a first-class model for the long-term development of law reform in Tasmania. The ALRI model proved to be legally and financially attractive to the government and an in-principle decision was taken to establish a Tasmania Law Reform Institute.

Functions and Structure

The Institute's Director is responsible for the administration of the Institute. The Director must be a member of the University's academic staff. Professor Kate Warner of the University's Law Faculty is the inaugural Director of the Institute.

The Institute receives advice and recommendations from its Board, which will meet at least four times a year. The Board is made up of the Director (Chair), the Dean of the Law Faculty, and members appointed by the Attorney-General, the Chief Justice, the Law Society and the Council of the University.

The Institute will consider any written law reform project proposed to it, whether by the Attorney-General, a member of the Board, a member of the public or interest group, or the Institute itself. The Institute decides whether to undertake a law reform project and, if so, what form that project will take – such as its extent and whether a research paper, issues paper or final report will be published.

Another function of the Institute is to work with the law reform agencies in other states and territories on proposals for reform of the laws in any jurisdiction or within the Commonwealth.

Location

The Institute is based at the Sandy Bay (Hobart) campus of the University of Tasmania within the Law Faculty. By basing the Institute within the Law Faculty the Institute has been given easy access to legal expertise and resources, as well as providing valuable research opportunities for staff and students.

Acknowledgements

The establishment of a Law Reform Institute in Tasmania is the first occasion that such an initiative has been undertaken in Australia. Tasmania is indebted to the Alberta Law Reform Institute for providing the model and much support for the establishment of our Institute. This Institute also greatly benefited from a visit in February from the ALRI's Director, Mr Peter Lown QC.

The Tasmania Law Reform Institute provides a unique, good quality, cost effective and collaborative model for providing independent, high quality law reform advice. This model is particularly attractive to smaller states and territories and South Australia and the Northern Territory have already shown interest in the example set by Tasmania.

Current projects

The Institute's current primary focus is a law reform project on sentencing, referred to it by the Attorney-General. This project looks at sentencing trends, sentencing options, and the role of victims and the community in the sentencing process. It is anticipated that an Issues Paper will be released in May.

A brief Issues Paper was released (early April) looking at criminal detention and police bail under the *Criminal Law (Detention and Interrogation) Act 1995* (Tas).

The Board of the Institute is considering projects on the *Commissions of Inquiry Act 1995* (Tas), and on the physical punishment of children.

For more information, to view a copy of the Institute's founding agreement, or to view current projects and reports visit the Institute's

webpage at <www.law.utas.edu.au/tlri> or contact us via email on <law.reform@utas.edu.au>.

Law Commission of Canada

Beyond conjugality

In January 2002, the Law Commission of Canada released its report entitled *Beyond Conjugality – Recognizing and Supporting Close Personal Adult Relationships*. The report followed two years of research and consultations with Canadians to determine how well Canadian laws were responding to the realities of adults in close personal relationships.

The Law Commission listened to the voices of many Canadians and discovered that they enjoy a wide variety of relationships – some marry or live with conjugal partners, while others have close relationships with siblings, caregivers, or best friends. While Canadian law supports and regulates adult relationships, most often it uses marriage or marriage-like relationships when developing laws, policies and programs. Statutes can be either under-inclusive or over-inclusive, that is, they may not cover all relevant relationships or they may apply to too many.

In keeping with its mandate to consider measures that will make the legal system more efficient, economical, accessible and just, the Law Commission's report recommends that governments pursue a more comprehensive and principled approach to the legal recognition and support of close personal relationships among adults. The Law Commission recommends a four-step methodology that invites governments first to clarify the objectives of the legislation or policy, second, to determine whether in fact relationships are relevant to the accomplishment of the objective, third, to allow, if possible, citizens to designate themselves the relationships that are most important to them and fourth, to target relationships on the basis of their function, such as economic interdependence, rather than their status. The methodology is applied to a number of federal statutes, such as the *Evidence Act*, the *Income Tax Act*, the *Immigration Act* and the *Canada Labour Code*, to illustrate how laws could better respond to close personal adult relationships in a way that respects two important values, equality and autonomy.

The state must also provide adequate legal structures to support the relationships that citizens develop. Therefore, *Beyond Conjugality* proposes a registration system for adults in conjugal and non-conjugal relationships, through which they can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations appropriate for their relationship. Furthermore, the report indicates that if the state continues its involvement in the legal institution of marriage, it cannot do so in a discriminatory way. In a pluralistic society where the legal regulation of marriage is essentially contractual in nature, the report recommends that governments move toward removing restrictions on same-sex couples.

Public police and private security

The Law Commission of Canada has embarked on a major research project to examine the emerging relationship between public police and private security. While the state remains a significant player in the delivery and regulation of policing, it is no longer the only institution involved in offering guarantees of security to citizens. There is now a range of private policing organisations that include, for example, private security firms, insurance companies, forensic accountants and private in-house corporate security. These private policing agencies have moved beyond simply protecting private property. They are actively engaged in maintaining order, investigating crimes and making arrests in public spaces. They are performing many activities that were once exclusively performed by the public police.

The coexistence and, at times, competition between publicly funded police forces and private security firms is not unique to the security field. However, the public-private divide in the world of security presents particular challenges to the values of a democratic society: will the private sector police act in a way that is compatible with our values of equality and human dignity? How can we be sure? Is the current division of labour between private and public the optimal one to support policing in our society? All of these ques-

tions must be asked at a time when we are, and continue to be more, concerned about security.

In the early (northern) spring of 2002 the Commission will be releasing a Discussion Paper on the topic. In February 2003, the Commission will host *Securing the Future: An International Conference on the Governance of Security*. The conference will take place in Montreal.

Electoral reform

As part of its research on governance relationships, the Commission has undertaken an examination of Canada's electoral system. The capacity of citizens to participate meaningfully in their democratic processes poses challenges for the design of public institutions. Increasingly, Canadians are disengaging from these institutions, and, in the process, becoming more sceptical about the government's capacity to respond to legitimate expectations.

The Commission intends to encourage public dialogue on alternatives to the current voting system, and will actively promote this process by creating opportunities for citizens to voice their opinions about the values they want to see represented in their electoral system. Is the current electoral system adequate or does it require modification? Is the design of our current system best suited to political realities in Canada? Does it facilitate participation in public life or impede it? What are citizens' expectations of a voting system? Will changing the voting system alleviate the growing public discontent with government institutions?

In the (northern) spring of 2002, the Commission will be hosting a forum on *Renewing Democracy: Citizen Engagement in Voting System Reform*. This event will bring together a diverse group of experienced and recognised leaders and experts from a wide variety of organisations and constituencies to examine methods for engaging Canadians on issues associated with the current electoral system and its reform. In addition, the Commission has contracted a researcher to examine the values and conditions that are associated with Canada's electoral system, as well as the model(s) that best accommodate these preferences.

For copies of documents and more information on these topics and others, please consult the Law Commission of Canada's website at <www.lcc.gc.ca>.

Alberta Law Reform Institute

The Alberta Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and Court of Appeal. The Rules Project is a three-year project, undertaking a major review of the Rules with a view to producing recommendations for a new set of Rules by 2004. The Project is under the management of the Alberta Law Reform Institute (ALRI).

The Alberta Rules have not been comprehensively revised since 1968, although they have been frequently amended and supplemented by practice directions. One Alberta lawyer describes the Rules as 'outdated and antiquated' and adds:

> *"My global concern about the Rules of Court is simply their immensity and complexity. Layered overtop of the Rules are numerous practice directions, which I have not even had time to read, but which undoubtedly have an effect on something."*

Primary among the project objectives is the rewriting of the Rules to maximise their clarity and useabilty, by simplifying complex language, revising unclear language, consolidating and shortening provisions, and reorganising and restructuring so that it is easier to locate relevant provisions on any given topic. ALRI has pointed to the recently revised Queensland *Uniform Civil Procedure Rules* to demonstrate to the Alberta Bar the great strides that can be made towards these ends.

But the objectives go beyond rewriting. The Alberta Rules Project takes place against the background of a number of major civil justice reform initiatives. The best known are the Woolf reports,[1] but there were also two major Canadian reviews in 1995 and 1996,[2] as well as more recent Australian studies.[3] All of these projects have focused on concerns about delay, cost and complexity associated with civil proceedings, and the

attendant issues of inaccessibility and mistrust of civil justice systems. These concerns are, not surprisingly, evident in Alberta,[4] and result in a Project objective that calls for pragmatic reforms to advance a fair, accessible, timely and cost-effective civil justice system.

The Canadian reform projects of the 1990s, like the Woolf reforms, advised the employment of different 'tracks' for litigation, case management and measures to circumscribe and expedite the discovery process. These recommendations have already had an impact in Alberta, in amendments to the Rules and practice notes adopted over the past few years. A 'Streamlined Procedure' has been designed for cases valued at $75,000 or less, case management conferences are provided for selected actions, and new time limits and other restrictions have been placed on documentary and oral discovery.

These changes have launched the Alberta legal community on what is effectively the early implementation phase of reform at the same time that it is undertaking its first systematic review of the issues. We thus have an opportunity to assess and evaluate reforms already in place. The consultation process is providing interesting insights into the frustrations experienced by some lawyers as a result of the recent changes:

> *"Do not use the rules to handcuff lawyers. . . There needs to be flexibility . . . Many amendments seem to be knee-jerk reactions to problems which aren't really problems. . . an example is the recent document discovery rules."*

In a time of transition in civil justice, it is clear that there is a need to change not only Rules, but the legal culture as well. If we are to seek such change from both judges and lawyers, we should also heed the call by many of them for a more broadly consultative rules-making process.

Recognising the importance of a collaborative approach, ALRI has involved members of the judiciary and other court personnel, lawyers in private and government practice and legal academics, from various areas of the province, on working committees that come together in videoconference meetings. A total of 14 such committees are planned for the full term of the project.

The quotations in this article are excerpted from a topically-organised database of comments provided to the Rules Project by Alberta lawyers. This growing resource is the result of active and broad consultations. An Issues Paper for the Legal Community has been distributed in booklet form and electronically. ALRI counsel and committee members have met with local Bar associations throughout the province and have attended sessions of the Canadian Bar Association and other legal associations that bring together lawyers who practice in areas such as civil litigation, insurance law, foreclosure and creditors' rights. The most successful consultation initiative to date has involved having ALRI counsel attend at law firms, meeting with litigation departments and other interested lawyers and paralegal staff. The ALRI counsel provide information about the Rules Project, facilitate a discussion about what works and what doesn't work under the current Rules, and collect concerns, insights and suggestions.

Another aspect of the consultation process seeks information and comments from the general public. A Public Consultation Paper and questionnaire describes civil actions in the Court of Queen's Bench and the Court of Appeal and asks questions about experience with civil proceedings, level of satisfaction, concerns and recommendations for change. The questionnaire has been made available at courthouse counters and Law Society and Legal Aid offices, and has been sent to members of the Alberta Legislature, advocacy groups and organisations with interests that relate to the civil justice system. The questionnaire may also be completed online on the ALRI website <www.law.ualberta.ca/alri>.

Endnotes

1. Lord Woolf, Access to Justice: Interim Report (1995) Lord Chancellor's Dept, London; Lord Woolf, Access to Justice: Final Report, (1996) Lord Chancellor's Dept, London.

2. Canadian Bar Association, Report of the Task Force on Systems of Civil Justice (1996) CBA, Ontario; Canadian Bar Association, Civil Justice Review: First Report (1995), CBA, Ontario; and Canadian Bar Association, Supplemental and Final Report (1996) CBA, Ontario.

3. Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System (1999)

LRCWA, Perth; Australian Law Reform Commission, Managing Justice: A review of the federal civil justice system ALRC 89 (2000), ALRC, Sydney.

4. Alberta Summit on Justice: Final Report (1999) Alberta Justice, Edmonton.

Manitoba Law Reform Commission

Recent publications

Since the last issue of *Reform*, the Manitoba Law Reform Commission has published one report, *Good Faith and The Individual Contract of Employment* (Report 107, December 2001).

In this report, the Commission reviews the case law following the 1997 decision of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.* The Commission is concerned that the *Wallace* decision may have resulted in uncertainty and unfairness in the law of employment and it has made 10 recommendations that, if implemented, will extend and clarify the obligation to act in good faith and create appropriate remedies for a breach of the obligation. The Executive Summary can be found at the Commission's website at <http://www.gov.mb.ca/justice/mlrc>.

Current projects

The Commission's three works in progress include:

• a comprehensive review of various aspects of Manitoba's succession legislation including *The Wills Act*, *The Law of Property Act*, *The Intestate Succession Act*, *The Marital Property Act*, and *The Dependants Relief Act*;

• a review of the law and medical-legal literature relating to the withholding of life-sustaining treatment ('do-not-resuscitate' orders). The Commission will circulate a Discussion Paper to obtain the input of health care providers, patient advocate organisations and other interested individuals or groups;

• a review of the law and practice relating to consent for medical treatment for incompetent and incapacitated patients who have not made an advance directive or designated a proxy under *The Health Care Directives Act*.

Staff

Since our near demise in 1997, we have operated without any in-house legal research staff and have had to hire outside consultants to undertake projects on our behalf. With the increase of our grant from the Manitoba Law Foundation, the Commission was able to hire a full-time researcher in August 2001. We are pleased to announce that Sandra Phillips joined the Commission as Legal Counsel and has been assigned two projects: 'do-not-resuscitate' orders and consent to medical treatment. She, of course, assists the Commission on all of its projects in finalising its reports prior to publication.

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) on *Irritancy in Leases of Land* was published in October 2001. Work is progressing on finalising policy in light of the consultation response.

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 (No 118) was issued in November 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, which 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 during 2002.

Persons

The Scottish Ministers have asked the Commission to examine the law relating to psychiatric injury caused by another person. The project covers, 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 by early in the (northern) summer of 2002.

Property

A Discussion Paper (No 112) on *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 is currently working up its final recommendations for reform in light of the consultation response.

The Commission hopes to start work shortly on a review of the *Land Registration (Scotland) Act 1979*. 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 underpin its provisions. As a preliminary step it is currently canvassing the legal profession for views on the operation of the Act. 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. The project is likely to be completed after the Discussion Paper on the *Land Registration (Scotland) Act 1979* has been published.

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, including an analysis of the Scottish Executive's proposal to create a statutory right of access over land. (This proposal is currently before the Scottish Parliament.) A Discussion Paper (No 113) was published in April 2001 and the Commission aims to submit its final report by the end of 2002.

Criminal Law

The Commission has recently started work on a review of the defences of insanity and diminished responsibility. A seminar was held in April with a view to identifying the specific issues involved in reform of this area. It focused on weaknesses in the existing Scots law and on recent changes in the law of insanity in other jurisdictions. Speakers from New Zealand, the United States, Ireland and England took part. The Commission aims to publish a Discussion Paper by the end of 2002.

Trusts

Work is underway on a wide-ranging review of the law of express trusts. The first part of the project will concentrate on the powers, duties and liabilities of trustees and the aim is to produce a Discussion Paper on this topic by early 2003.

Recent reports

The Commission's report on *Age of Criminal Responsibility* (Scot Law Com No 185) was submitted at the end of November 2001. Its main recommendations are to abolish the rule whereby a child under the age of eight cannot be guilty of an offence and to allow criminal prosecution of children aged between 12 and 16 (rather than referral to a children's hearing) only in exceptional circumstances.

More recently the Commission has completed its report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187). This makes a number of recommendations concerning the list of those entitled to claim non-patrimonial damages on the death of an individual, including conferring title to sue on brothers and sisters of the deceased.

Implementation

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

South African Law Commission

Domestic Partnerships (Issue Paper 17)

The South African Law Commission is involved in an investigation dealing with the question of the legal recognition and regulation of domestic partnerships – that is, established relationships between people of the same or opposite sex. As a first step in this process the Commission released an Issue Paper dealing with domestic partnerships, in the form of a questionnaire, for comment and discussion.

Marriage is currently the only legally recognised form of intimate partnership. Domestic partnerships, on the other hand, are virtually unrecognised and partners are excluded from the rights and obligations, which attach automatically to marriage. The number of people living in non-marriage relationships has, however, increased worldwide and also in South Africa. More and more legal problems associated with domestic partners and their families are coming to the attention of the courts and of lawyers generally.

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

- whether domestic partnerships should be legally recognised and regulated;
- whether marital rights and obligations should be further extended to domestic partnerships;
- whether a scheme of registered partnerships should be introduced;
- which marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;
- whether legislation should provide for same-sex marriage; and
- whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

Incapable Adults (Issue Paper 18)

Issue Paper 18 deals with the need for measures to protect the interests of adults whose capacity to act in the legal sense and to litigate has for some reason been diminished.

The legal principles governing mental incapacity are the same, irrespective of how the incapacity was caused. Any mental incapacity that affects a person's intellect and judgment will, in terms of South African private law, affect his or her capacity to act in the legal sense (eg to enter into a contract) and to litigate (ie to appear in court as a party to a suit).

At present the legal solution to the problem of persons who cannot manage their own affairs takes the form of curatorships. The existing system of curatorships has been criticised on the ground that it suffers from a number of serious and frustrating difficulties. Recently comprehensive legislative schemes to deal with the problems faced by incapable adults, their families and caregivers have been introduced through law reform in other systems.

Sexual Offences (Discussion Paper 102)

As part of an incremental approach, the Commission has released the Discussion Paper on process and procedure relating to sexual offences, this being the second of a four part series, for general information and comment. The first Discussion Paper dealt with the substantive law relating to sexual offences, while the third and fourth papers will address the controversial issues of adult prostitution and pornography. Although the Discussion Paper concentrates on aspects of the procedural law in relation to sexual offences, the Bill which accompanies the Discussion Paper includes revised substantive law provisions:

- A revised statutory definition of the offence of rape.
- Non-disclosure by a person that he or she is infected with a sexually transmissible disease prior to sexual relations with another (consenting) person would amount to sexual relations by false pretences and would therefore constitute rape.
- Child prostitution now constitutes what was previ-

ously referred to as Commercial Sexual Exploitation of Children.

• Provision has been made for the prohibition of the organisation or promotion of child sex tours.

Some of the areas of the process and procedural law relating to sexual offences that have received attention are as follows:

• The Commission holds the opinion that it is the responsibility of the state to provide the financial means to cover the cost of prescribed medication for victims of rape, as well as costs for treatment and counselling as a result of the rape.

• Criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction.

• The system of criminal procedure that should govern the conduct of trials in relation to sexual offences.

Some of the issues that have received attention in relation to sentencing and the post-trial phase of the criminal procedure process in relation to sexual offences are:

• drug and alcohol rehabilitation orders;

• sex offender orders, which will prohibit a person convicted of a sexual offence from acting in a way that may cause harm to others, from frequenting specified locations and from contacting specified persons;

• the possibility of providing compensation to the victims of sexual offences who suffered physical, psychological or other injury, loss of income or support; and

• the placement of dangerous sexual offenders under long-term supervision upon their release from imprisonment or release on parole.

Review of the Child Care Act (Discussion Paper 103)

Given the broad scope of the investigation, Discussion Paper 103, *Review of the Child Care Act*, covers a wide range of issues:

• Formal measures for the protection of children from abuse (including sexual exploitation) and neglect are the central focus of the Discussion Paper.

• The difficult issue of when childhood begins and when it ends. It further addresses the question of the best interests of the child, children's rights and responsibilities, and the principles underpinning the new children's statute.

• Aspects such as legitimacy of children, artificial insemination and surrogate motherhood.

• The diversity of family forms in South Africa, the shift from parental power to parental responsibility, and the acquisition of parental responsibility by persons other than biological parents and the termination of parental responsibility.

• The Discussion Paper recognises prevention and early intervention services as vitally important components of a future children's statute.

• It examines the issues of legislative support for early childhood development services and temporary care of children by persons other than their parents or ordinary caregivers.

• It deals with forms of substitute care: foster care, adoption, and residential care.

• It considers the issues of religious laws and customary laws affecting children. It further addresses international issues affecting children.

• It proposes a new court structure with extensive powers, and addresses the issues of grants and social security for children, and a monitoring system to ensure the effective implementation of the new children's statute.

Simplification of Criminal Procedure: Out-of-Court Settlements in Criminal Cases (Discussion Paper 100)

The aim of the Discussion Paper is to determine whether there is a need in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court and, if so, the best way in which this can be achieved.

In the Discussion Paper an out-of-court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the

parties, in exchange for the prosecutor discontinuing the particular prosecution.

The Commission concludes that there is a definite need for legislation which will formalise out-of-court settlements in criminal cases in South Africa and recommends that legislation provide for certain principles in this regard.

Islamic Marriages and Related Matters (Discussion Paper 101)

The proposed draft Bill contained and explained in this Discussion Paper draws a clear distinction between an Islamic marriage and a civil marriage. It is only Islamic marriages that would fall within the ambit of the Bill. Provision is *inter alia* made for the regulation of proprietary consequences, changes to matrimonial property systems (with due regard to existing and vested rights) and the regulation of polygamous marriages. In terms of the draft Bill all existing Islamic marriages would be recognised as valid marriages, for all purposes, upon commencement of the proposed legislation. This would cover both monogamous and polygamous Islamic marriages, which, if applicable, may exist alongside a civil marriage (ie a marriage registered under the Marriage Act).

The Commission's proposed draft Bill also addresses the registration of Islamic marriages, the dissolution of such marriages through the pronouncement of a *Talaq* (which, in terms of the proposals, must be confirmed by a court), custody of and access to minor children and maintenance.

Articles in *Reform Roundup* are written by the law reform agencies concerned.

Contributions to *Reform Roundup* and *Clearinghouse* are welcome and should be sent to reform@alrc.gov.au