

Reform roundup

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

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Administrative Review Council

Report on the scope of judicial review

On 19 May 2006, the Chief Justice of Australia and the Attorney-General of Australia launched the Council's *The Scope of Judicial Review* (Report No 47, 2006).

The purpose of the report is to respond to the lack of analysis of the scope of judicial review by considering the constitutional framework in which judicial review and its elements are located, the issues relevant to when legislative amendment to the scope of judicial review might be appropriate and in the public interest, and how this might best be achieved. A major issue dealt with in the report is the extent to which it is appropriate for Parliament either to cut back on the scope of a judicial review jurisdiction that it has earlier created, or to seek to minimise the ambit of judicial review practically available under s 75(v) of the Constitution.

Coercive information-gathering powers of government agencies

The Council is currently undertaking a project on the scope of government agency coercive information-gathering powers. This project reviews the powers of six government agencies to require the production of information or documents, and to require the provision of information by way of oral examination not requiring the issue of a warrant or other external authorisation. The release of a draft of the report for public comment is expected in the near future.

Entries to Reform roundup are welcome.

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

Report series relating to primary decision makers

The Council is considering collating a series of reports covering areas of administrative law that concern primary decision makers. This project would involve two steps: first, updating and revising the Council's existing publications on this topic; and, secondly, identifying areas that are not currently covered by existing publications and considering the addition of publications in those areas.

Existing publications that would be reviewed include *Internal Review of Agency Decision Making* (Report No 44, 2000) and *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions* (Report No 33, 1991).

Practical guide to procedural fairness

The first area in which the Council is working on a new publication for primary decisions makers relates to procedural fairness. This guideline publication is designed for decision makers with no legal background, providing a simple step-by-step guide to the questions they must ask themselves at each stage of the decision-making process. The guide will also illustrate the most common situations where bias or deficiencies in the hearing rule may arise.

Admin Review

The 57th edition of *Admin Review* is complete and will be released shortly.

Family Law Council

Relocation

The Council's major focus in the first half of 2006 has been on the operation of the child paramountcy principle in relocation cases. Council released a discussion paper on 13 February 2006 and sought submissions from interested individuals and organisations by 7 April 2006. Over 40 submissions were received. The Council is currently preparing a report to the Attorney-General on relocation, following consideration of the complex issues raised by the submissions.

Collaborative law

In January 2006, the Family Law Council, in consultation with the Family Law Section of the Law Council of Australia and the National Centre of Collaborative Law, was asked to advise how the Government, in partnership with the legal profession, can assist in promoting

collaborative law in Australia. A collaborative law working group has been set up and is presently developing best practice guidelines for comment from interest groups in June.

Immunity for family counsellors and family dispute resolution practitioners

In November 2005, the Family Law Council and the National Alternative Dispute Resolution Advisory Council jointly advised the Attorney-General that family counsellors and family dispute resolution practitioners should not be granted statutory immunity. This recommendation was incorporated in the Family Law Amendment (Shared Parental Responsibility) Bill 2006, which was passed on 10 May 2006.

Family violence

On 28 February 2006, the Council received a new reference on family violence and the *Family Law Act*. The Council was asked to consider measures that the Commonwealth may initiate on its own or with the cooperation of State and Territory Governments to:

- improve effective protection of persons who are or may be victims of family violence;
- examine the effectiveness of legal and law enforcement mechanisms and their costs;
- consider the degree to which Commonwealth, State and Territory agencies, individually or in cooperation, are able to deliver just and cost-effective outcomes;
- assess the effectiveness of initiatives in public education for prevention and rehabilitation; and
- examine the alleged incidence of false allegations of family violence.

Improving post-parenting order processes

The Council is presently preparing a report in response to terms of reference on improving post-parenting order processes.

Statistical snapshot 2003–05

The Council is drafting its next bi-annual statistical report on various aspects of the Australian family law system. The report will draw on data sourced from the Family Court of Australia, the Family Court of Western Australia, the Federal Magistrates Court and the Australian Bureau of Statistics.

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

Law Reform Commission of Western Australia

Aboriginal Customary Law

The Law Reform Commission has released its comprehensive Discussion Paper and Discussion Paper Overview on the Aboriginal Customary Laws reference. The project, which aims to canvass issues relating to the recognition of traditional Aboriginal laws and customs within the Western Australian legal system, has provided the Commission with the opportunity to revisit the work of the Australian Law Reform Commission in light of subsequent developments in law, research and policy as they relate to Western Australia.

The completion and distribution of the Discussion Paper was followed by a three month submissions period in which interested parties were invited to read and consider the contents and comment on the Commission's proposed recommendations. In order to facilitate the feedback process and to encourage submissions from Indigenous people, the Commission conducted several return visits to various regional and remote communities previously consulted. To date, the Commission has received positive feedback from the majority of people and organisations who have taken the time to respond to the issues raised.

The Commission is now working on final recommendations and hopes to publish the Final Report in early August 2006.

The Commission has also republished the 15 Background Papers previously released throughout 2004–2005 into a single Background Paper volume for ease of reference.

Problem-oriented Courts and Judicial Case Management

The Commission has met with unexpected delays in relation to its reference on Problem Oriented Courts. Nevertheless it anticipates releasing a paper in August 2006, with a Final Report to be released later in the year.

A Review of the Law of Homicide

On 26 April 2005, the Commission received a reference to review the law of homicide, with particular consideration to be given to the distinction between wilful murder and murder; the defences to homicide, including self-defence and provocation; and current penalty provisions.

At present, Western Australia is the only Australian jurisdiction that maintains a distinction between the offences of wilful murder and murder, requiring juries to weigh the issue of intent to kill, in the case of wilful murder, against the issue of intent to do grievous bodily harm, in the case of murder. Other jurisdictions have only one offence of murder, which in effect incorporates both intentions and thus reduces the complexity and confusion often faced by juries when deliberating on such cases.

The Commission released its Issues Paper, *The Review of the Law of Homicide*, in May 2006 and has called for submissions on the matters raised by 15 June 2006.

Following a thorough consultation process with members of the judiciary, prominent criminal practitioners, academics and other interested parties, the Commission will commence work on its recommendations and anticipates the release of its Final Report by early August 2006.

Compensation for Injurious Affection

On 29 November 2005, the Commission received a new reference on Compensation for Injurious Affection. The reference requires the Commission to inquire into and report upon whether the principles, practices and procedures pertaining to the issues of compensation for injurious affection to land in Western Australia require reform. Since receiving the reference, the Commission has gone out to tender for a writer to complete a Discussion Paper and Final Report. The Commission is in the process of evaluating the responses received and will engage a successful respondent in the near future. It is anticipated that a Discussion Paper will be available early in 2007 with a Final Report to follow shortly thereafter.

Commission Publications can be viewed at its website <www.lrc.justice.wa.gov.au>.

New South Wales Law Reform Commission

Uniform Succession Laws

On 14 March 2006, the Commission released a Research Report as part of its review into Uniform Succession Laws. Research Report 13, entitled, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries*, reveals the results of a survey

showing who people want to leave their property to when they write a will. The survey examined 650 deceased estates that were filed in the Supreme Court's Probate Registry in September 2004.

The principal finding was that 75% of those who have a spouse and children chose to leave the whole of their property to their surviving spouse. In only around 2% of cases people chose to share their property between spouse and children. The survey also found that only 43% of persons with a spouse and children from another relationship chose to give everything to the surviving spouse. 31% of people in these cases gave everything to their children.

Other findings included:

- 82% of those who were survived by children, but no spouse, gave everything to their children; and
- 33% of people who were survived by neither spouse nor children, gave their property to their siblings and 25% of them gave their property to their nieces and nephews.

This Research Report will feed into the Commission's final report on intestacy, which is expected to be released before the end of the year.

Uniform Evidence Laws

In February 2006, the Attorney-General released the Commission's Report 112 on *Uniform Evidence Law*. The Report was prepared jointly with the Australian Law Reform Commission (Report 102) and the Victorian Law Reform Commission (Final Report).

Other developments

The Commission completed a Report on surveillance in mid-2005, but the Report had not been released by the Attorney General by May 2006. The Commission has also completed a Report on the sentencing of young offenders, which it expects to be released in mid 2006. Also to be released in mid 2006 is a consultation paper examining whether juries should have a role in the sentencing process.

During 2006, the New South Wales Law Reform Commission will also publish reports on:

- relationships and the law;
- blind or deaf jurors;
- people who guarantee other people's debts; and

- Uniform Succession Laws: intestacy.

The Commission has also received a new reference to review NSW privacy legislation, primarily the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Protection Act 2002* (NSW). In addition, the Commission has been asked to consider whether a statutory tort of privacy should be introduced in NSW. The Commission will be liaising with the ALRC, which is currently reviewing the *Privacy Act 1988* (Cth).

Queensland Law Reform Commission

Review of Queensland's guardianship laws

The Queensland Law Reform Commission has a reference to review Queensland's guardianship legislation, which consists of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). The Commission has been asked to report in two stages, the first stage of which involves a review of the confidentiality provisions and 'General Principles' contained in the legislation.

The Commission plans to release a Discussion Paper on the confidentiality provisions in July 2006. This paper will address a range of issues, such as:

- openness in hearings conducted by the Guardianship and Administration Tribunal;
- confidentiality of material given before the Tribunal;
- confidentiality of Tribunal decisions and reasons;
- reporting of Tribunal proceedings; and
- confidentiality imposed on those involved in administering the guardianship regime.

Review of the *Peace and Good Behaviour Act 1982* (Qld)

In July 2004, the Commission received a reference to review the *Peace and Good Behaviour Act 1982* (Qld). The Commission has been asked to consider whether the Act provides an appropriate, easily accessible and effective mechanism for protecting individuals from breaches of the peace.

The factors to be taken into account by the Commission in its review include:

- the kind of conduct covered by the Act;
- the complexity of the process for obtaining an order;

- whether the existence of a filing fee deters people from making an application; and
- the enforcement of orders made under the Act.

The Commission released a Discussion Paper (WP 59) in March 2005 and expects to complete its final report in late 2006.

Uniform Succession Laws

The Commission continues to lead the Uniform Succession Laws Project, which was initiated by the Standing Committee of Attorneys General with a view to developing uniform succession laws for the Australian States and Territories.

The National Committee for Uniform Succession Laws is now working on its final Report, *The Administration of Estates of Deceased Persons*, which is expected to be completed in December 2006. The Report will address general issues of administration, including the recognition of foreign and interstate grants of probate and administration.

Queensland Legal, Constitutional and Administrative Review Committee

Voices and Votes

The committee is currently preparing a report on its *Voices and Votes* inquiry into young people engaging in democracy in Queensland. It is anticipated that the report will be tabled in the Parliament in mid-2006.

The committee has said that the aim of its inquiry is to recommend practical ways to increase young people's interest and meaningful engagement in democracy in Queensland. To ensure that it heard young people's views on relevant issues, the committee developed a consultation strategy that utilised various methods of engagement, some of them innovative.

The committee's consultation strategy included:

- involving people aged 12 to 25 whenever possible;
- publishing a discussion paper and response form—both available on-line and via a link from a multi-media CD Rom that featured committee members and a music track from a local band;
- an on-line poll;
- ten workshops with young people throughout Queensland, particularly in rural and regional areas; and

- a four-day 'youth jury' at Parliament House, Brisbane.

The most innovative consultation method, the youth jury, was held in February 2006.

The youth jury was a deliberative consultation mechanism used to determine the views that young people might hold if they were fully informed about the issue, 'How can democracy better serve young people in Queensland?'. Twelve randomly selected participants heard from people with expert knowledge on the issue. The jurors asked questions of those experts, deliberated as a group on the information they heard, and achieved consensus in formulating a series of recommendations about the issue.

The recommendations of youth jury will be considered by the committee and may form the basis of recommendations to the Parliament in the committee's report.

The Accessibility of Administrative Justice

In December 2005, the committee commenced an inquiry into the accessibility of freedom of information (FOI) and judicial review mechanisms in Queensland. In this inquiry, the committee aims to assess the effectiveness and accessibility of laws allowing the people of Queensland to:

- access government-held personal information and amend information that is inaccurate, out-of-date or misleading;
- access information about a government decision; and
- challenge the legality of government decisions.

The committee released a Discussion Paper that provided information about, and called for submissions on, the following key issues:

- FOI fees and charges;
- costs associated with proceedings under the *Judicial Review Act 1991* (Qld), and concerns relating to self-represented litigants;
- access to available information about government decisions and actions;
- whether a diversity of people can access administrative justice; and
- resolution of genuine grievances about government decisions in an effective and timely way.

An appendix to the Discussion Paper summarised Supreme Court (Trial Division)

judgments regarding proceedings under the *Judicial Review Act* from 1 February 1995 to 31 October 2005, and any costs orders made.

In April 2006, the committee convened a conference at which participants, who included members of the public, government decision-makers, lawyers, and representatives of community organisations and government-owned corporations, took part in one of three parallel discussions.

Each discussion group worked towards the formation of four recommendations for reform which were acceptable to all in that group. These recommendations are available on the committee's website and will be considered by the committee when it prepares its report on the inquiry.

The committee has also received 34 submissions to its inquiry. Submissions were invited to be made by 17 March 2006, and non-confidential submissions will be tabled in due course.

It is likely that the committee's report on the *Accessibility of Administrative Justice* inquiry will be tabled and published in August/September 2006.

Meetings with the Ombudsman and Information Commissioner

On 21 December 2005, report no. 52 of the committee, *Meeting with the Queensland Ombudsman; Meeting with the Queensland Information Commissioner ~ 29 November 2005*, was tabled in Parliament.

Under the *Ombudsman Act 2001* (Qld), the committee has responsibilities to monitor, review and report on the performance of the functions of the Queensland Ombudsman and the Queensland Information Commissioner. Since 2002, the committee has met biannually with the Ombudsman and then reported to Parliament on the performance of the Ombudsman's functions.

Following amendments to the *Freedom of Information Act* assented to in May 2005, the committee also has responsibilities to monitor, review and report on the performance of the Information Commissioner's functions. In November 2005, the committee met for the first time with the Information Commissioner by way of a biannual meeting process. Report no. 52 relates to that meeting also.

In May 2006, the committee again held biannual meetings with the Ombudsman and

the Information Commissioner. The committee's report following that meeting was tabled in June 2006.

Strategic Reviews of the Offices of the Ombudsman and Information Commissioner

The *Ombudsman Act* and the *Freedom of Information Act* respectively require, at least every five years, a strategic review of the functions of the Ombudsman and Information Commissioner and the performance of those functions.

Under the *Ombudsman Act* and the *Freedom of Information Act*, the reports for the 2005–06 strategic reviews have been referred to the committee. The committee's review of these reports will include:

- consideration of written submissions, invited by 31 July 2006; and
- questions of the strategic reviewer, Ombudsman and Information Commissioner at public hearings to be held on 25 August 2006.

The committee will report to the Parliament on its review of the strategic review reports later in 2006.

Review of some contemporary electoral matters

In March 2005, the committee resolved to conduct an inquiry into electronic voting in Queensland. This followed an e-petition to the Queensland Parliament requesting that the committee be asked to consider ways in which the people of Queensland might be able to vote electronically so as to improve access to democracy for rural and regional Queenslanders and people with disabilities.

The scope of this inquiry has been broadened to incorporate other electoral matters including the representativeness of those elected by way of the electoral system in Queensland.

It is likely that this inquiry will be launched in mid-2006.

Monitoring of *Hands on Parliament* recommendations

The *Hands on Parliament* inquiry of the committee of the 50th Parliament examined Aboriginal and Torres Strait Islander people's participation in Queensland's democratic processes.

In the Ministerial response to the *Hands on Parliament* report, the Queensland Premier

stated that he would request of the committee an interim evaluation of the implementation of recommendations after the first full electoral cycle. Accordingly, that evaluation will be undertaken by the committee of the 52nd Parliament early in that parliamentary term.

To assist the committee of the 52nd Parliament to carry out that function, the present committee has collated information about the implementation of *Hands on Parliament* recommendations.

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

Victorian Law Reform Commission

Family Violence

The VLRC recommended the introduction of a new Family Violence Act and a new approach from police and the courts in its final report on family violence laws, which was tabled in parliament on 1 March 2006.

The mix of civil and criminal responses to family violence is retained but the VLRC thinks police and court responses to family violence need to be stronger to ensure the civil intervention order system works better and punishment for criminal breaches of orders is commensurate with the seriousness of the crime.

Training for police, registrars and magistrates was also high on the list of 153 recommendations, especially regarding the dynamics of family violence, family violence myths and stereotypes and the problems experienced by Indigenous people, people from non-English speaking backgrounds and people with disabilities.

In specific recommendations targeting police, the VLRC called for the establishment of a specialist prosecution unit that would also provide support for victims, more intervention order breach prosecutions, more police emergency order applications after hours, and improved evidence gathering at incidents.

Courts were also urged to improve their accessibility for family violence victims, specifically, to establish a specialist list in the Magistrates' Court and to encourage the provision of legal advice and representation for both parties. The Commission recommended

the provision of legal advice to all victims at courts by funding community legal centres to provide advice and representation.

There were also recommendations about improving court safety and tailoring intervention orders to the particular situation of victims.

The Commission's Interim Report recommending extended police powers has been fully implemented through legislation, however, the government has yet to respond to the final report in detail.

Evidence

The VLRC's *Implementing the Uniform Evidence Act Report* and the joint ALRC, NSWLRC, VLRC *Uniform Evidence Law Final Report* were both tabled in Parliament on 8 February 2006.

While the joint report reviewed the current uniform *Evidence Act* operating in NSW and federal jurisdictions, the implementation report focused on the legislative changes that would be needed to implement the uniform Act in Victoria.

The Victorian Attorney-General has signalled a commitment to implementing the uniform Act but the government has not indicated when the Act is likely to be introduced.

VLRC staff are developing a quick summary of the uniform Act for the Victorian legal profession to introduce them to its key elements.

Residential Tenancy Databases

The *Residential Tenancy Databases Report* is the second community law reform report published by the VLRC, which has the power to instigate small law reform projects without a reference from the Attorney-General.

The state's tenants union contacted the VLRC with concerns about the transparency of databases operated by private companies that hold details of people's rental histories.

In response, the VLRC tabled a report in Parliament on 5 April 2006 that recommended only people who were the subject of orders from the Victorian Civil and Administrative Tribunal be listed on the databases.

Other recommendations included limiting database entries to three years, fines for operators or agents who listed people who were not the subject of VCAT orders and giving tenants more access to information about themselves held on databases.

Bail

More than 40 submissions have been received to the VLRC's *Review of the Bail Act Consultation Paper*, which was released on 23 November 2005.

The VLRC is now conducting in-depth consultations with key stakeholders about the issues raised in the consultation paper.

Once the round of consultations is completed work will begin on a final report, which the VLRC plans to hand to the government at the end of 2006.

ART and Adoption

The VLRC has begun work on the development of final recommendations to the government about its assisted reproductive technologies (ART) and adoption reference.

The third in a series of position papers that covered access to ART, parentage and surrogacy was released on 25 November 2005 and attracted close to 60 submissions. The first and second position papers received 350 and 351 submissions respectively.

Consultations about the interim recommendations in the position papers were held shortly after submissions were due.

The VLRC plans to hand its final report to the government by the end of 2006.

Surveillance in Public Places

Initial research has begun on the second stage of the privacy reference, which has already resulted in a report on workplace privacy.

This stage of the reference will focus on whether there is a need for legislation or other measures to control surveillance in public places and the publication of photos without the subject's consent.

Implementation

Since the last issue of *Reform*, two Bills have been introduced into the Victorian parliament based on VLRC reports.

The Disability Bill 2006 incorporates recommendations made in the VLRC's *People with Intellectual Disabilities at Risk Report*, which focused on decisions to detain people without their consent and restrictive care practices that affect the freedom of people with intellectual disability.

The Crimes (Sexual Offences) Bill 2006 picks up on many of the Sexual Offences Report's recommendations about children and people with a cognitive impairment and evidence. The government is considering the remaining recommendations from the Sexual Offences Report for introduction in legislation later in 2006.

Commission changes

In February this year the VLRC's foundation Chairperson, Professor Marcia Neave, was appointed to the bench of the Victorian Court of Appeal. Justice Neave's extensive academic track record and work in the law reform arena were cited as two reasons behind her appointment.

The Victorian Government is now searching for a replacement Chairperson, as well as a new full-time Commissioner to replace outgoing Commissioner Judith Peirce, who completed the well-received *Review of Family Violence Laws Report* in March. The new full-time Commissioner will concentrate on a civil law reform reference, which is yet to be officially handed to the VLRC.

Alberta Law Reform Institute

It is an interesting time in Edmonton as our hockey team heads into the Stanley Cup Semi-Finals. This is the team that captured the last playoff spot, but has already eliminated the team that finished first in the league. It's not uncommon to draw an analogy between sports and other endeavours. I have even been known to suggest that law reform is a contact sport—hopefully only incidental contact, but occasional contact nonetheless.

I am struck by one parallel, which I think is particularly appropriate for ALRI at the present time. In coaching, we often say: 'Think Process,' ie, think process as opposed to results. We want to get the athlete to think in terms of the simple elements, breaking the performance down into more simple controllable elements not the whole five-minute free program, but each element and the preparation for each element; not scoring a goal, but the process of taking the shot; not swimming the race, but the purity of the stroke that will result in an incredible time.

'Think Process' has a lot of parallels in a law reform agency, and it has two in particular, as we come to the end of a major project, and

as we attempt to put our normal program of projects back on track.

We are almost at the end of the Rules Project. We have a virtually finished draft of 90% of the rules; the remaining two elements will be added on 30 June and 30 November to complete the package. It would be tempting to look ahead to the end of the year and the end of the project, and possibly to hurry some of the elements that still have to be dealt with before the end of this calendar year. However, one of our comfort points throughout this project has been to stick to a reliable process that we have developed to ensure the comprehensiveness and thoroughness of both research and review. We could have saved time by not going back to working groups to resolve niggling policy points, or issues that only became issues once the drafts were developed; or just by saying it was too late when we received sensible suggestions for improvement that only became apparent late in the game.

Law reformers don't have the advantage of the software approach—put out the program, let the help desk deal with all the problems, and then put out a new version when all the glitches have been identified by users and fixed by the programmers. Not having that advantage, ALRI finds that drafting has taken longer than anticipated; we have incorporated more mid-course improvements; and further consultation and review have been necessary.

There may be a question of diminishing returns, but so far, the additional work and the additional time has certainly been represented in improvements in both the content and organization of proposed draft rules. Good process usually means good results. We are certainly finding that investing in creating a good process, and being sufficiently disciplined to follow it, is improving the eventual product which we will put forward.

The same principle applies as we attempt to put back on track our conventional law reform project inventory. The impact of our work on the Rules Project has meant that we have been able to maintain only a modified conventional project inventory, and as we wind down the Rules Project, we will find an unusually large number of projects at the beginning stage. Normally, we would like to have a good sample of projects at various stages of maturity. Again, it would be tempting to rush some potential topics through to the project stage, and to compromise the selection and filtering process that we have worked hard to develop.

The purpose of that process is to ensure that when we commence an approved project, it is one that clearly meets the criteria that we have established for law reform projects. Experience suggests that without that investment at the front end of the process, risks of project creep, unfocused consultation, and unlikely implementation are more likely.

Three examples of relying on the good process that we have developed are quite relevant.

In our preliminary assessment work on the question of valuation dates for matrimonial property action, we asked focus groups about the implications of selecting different valuation dates, ranging from date of separation to date of trial. The feedback caused us to realize that valuation date was being used as an awkward tool to remedy other problems, such as how to deal with ownership and changes in the value of the property in the time between separation and dissolution of a relationship. We will now recast the issues and go back to the preliminary assessment stage to see if we are now concentrating on the correct issues.

The topic of joint and several liability has been on our radar screen for some time, and it has even been suggested in Alberta that we have a project on this topic. It has long been a possible topic, but we have not done the preliminary work to determine the scope and direction of the project. For example, it is unlikely that we would carry out root and branch review of the doctrines of joint and several liability, but it is much more likely that we would examine sectoral areas in which it is alleged that the doctrines of joint and several liability causes undue hardship; or we could review areas in which it is argued that there is not sufficient concerted action to justify the imposition of joint and several liability.

Similarly, in the area of assisted reproduction, we have been encouraged to do work in this area, but our preliminary work so far has lead us to restrict our work to the question of definition of parent-child relationship when the reproduction is assisted by the donation or receipt of genetic material. This precludes us examining the regulation of, or availability of, assisted reproduction techniques which we think are broader policy issues than ought to be examined by a law reform agency.

As a result, even though our program may be slightly skewed in terms of the balance of projects, we will rely on the process that we have developed for project selection and

project planning, and good results are likely to follow good process.

Will the same hold true for the Oilers? Stay tuned.

Malawi Law Commission

Review of the *Education Act* (2003–...)

Work under this program commenced in September 2003. There is a draft Report which serves as a working document of the Commission. The remaining activities are Commission meetings, hosting of three regional workshops and a National Workshop. The Law Commission has since submitted a request to development partners for funding to complete the program.

Review of Land Related Laws (2003–2006)

The special Law Commission on the Review of Land-Related laws has examined twenty-two statutes relating to land matters under three themes, namely; customary land, private land and public land. To complement the review work, the Commission carried out three regional workshops, a workshop for Members of Parliament and then a National Consultative Workshop in order to solicit views on the viability of the tentative recommendations agreed by the Commission. The Commission has finalised its Report and draft Bills which are yet to be presented to the Ministry of Justice for laying in Parliament.

Review of Gender-Related Laws (2001–2006)

The special Law Commission on the Review of Gender-Related Laws finalised its work on the Review of Laws on Marriage and Divorce in December 2005. This exercise involved the review of the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act, the Affiliation Act and the Maintenance Orders (Enforcement) Act. The Report and draft Bills are yet to be presented to the Minister of Justice for laying in Parliament. The Report is expected to be laid before Parliament during the first quarter of 2006.

The special Law Commission will embark on the third and final phase of this program which is the development of a gender equality statute. A Discussion Paper has already been developed by one of the Program Officers and Commission meetings commenced in February,

2006. The third phase of the program is expected to be completed by September 2006.

Review of the *Traditional Courts Act* (2004–2006)

Work under the program commenced in 2004 and has been carried out by the Commission on Criminal Justice Reforms though the issues went beyond criminal justice. The reforms are aimed at reintroducing primary courts to dispense justice at the grassroots taking into account the limitations of magistrate courts in terms of accessibility and availability. The reforms have also recognised the requirements of the Constitution in terms of status and jurisdiction to ensure that no parallel legal system is created as was the position prior to 1994.

In particular, the reforms suggest that the courts should exist under a new name of "Local Courts" to avoid the stigma associated with Traditional Courts. The Local Courts will be presided over by lay persons with the assistance of assessors where necessary. Further, the jurisdiction of these courts shall be limited to the extent that, in civil matters, it should extend exclusively to civil cases at customary law and in criminal matters to minor statutory offences.

The reforms suggest excluding certain matters, though falling properly under the jurisdiction of these courts, for various reasons. Such matters include those involving inheritance, custody of children, witchcraft, land disputes and distribution of matrimonial property.

Spent Convictions (2004–...)

The special Law Commission on the introduction of legislation on Spent Convictions has not been empanelled yet. The program commenced as a remnant of the Criminal Justice Law Reform Program in the first quarter of 2005 with a literature review and the development of a Discussion Paper by the Program Officer.

It is envisaged that the special Law Commission shall be empanelled in the second quarter of 2006 subject to availability of funds.

Abortion (2004–...)

The program was created as a result of the recommendation of the special Law Commission on the *Review of the Penal Code* under the Criminal Justice Reform Commission. The recommendation was to the effect that a separate law must be developed to regulate

termination of pregnancies by creating exceptions to the prohibition under the Penal Code.

The empanelling of the special Law Commission under this program awaits funding. The development of a Discussion Paper is nearing completion and it is envisaged that the review of literature and development of the Discussion Paper shall be completed during February 2006.

Review of the Constitution of the Republic of Malawi (2004–...)

This program commenced in August 2004 with a call by the Law Commission to the general public for submissions.

During 2005, the Commission held consultative meetings with various stakeholders to solicit their views on some of the submissions that the Law Commission received. This exercise has also been used to subject submissions forwarded by representative groups, mainly non-governmental organisations (NGOs), to public critique to test their veracity as representing the views of the people.

Further, the Law Commission also consulted stakeholders on how best the review process may be designed and executed so that it is acceptable to all Malawians. The Law Commission consulted the following groups: chiefs, the Malawi Law Society, civil society, the academia, the youth, professional bodies, political parties in and outside Parliament, the judiciary, the civil service, constitutional bodies including the Reserve Bank of Malawi, Malawi Police Service and Malawi Defence Force. These meetings were held in all three regions of the country.

The Law Commission intends to hold the first National Constitutional Conference in March 2006. This Conference will be guided by an Issues Paper as well as a Consultative Paper developed by the Law Commission. Thereafter a special Law Commission will be empanelled and it will work for eight weeks, beginning in April 2006.

Judicial Service Commission Legislation (2004–...)

The program has stalled due to lack of funding and although potential Commissioners were already identified, the special Law Commission is yet to be empanelled.

It is, however, anticipated that the program may take off the ground in earnest in the second quarter of 2006.

Review of the laws relating to firearms and explosives (2004–...)

The Law Commission received a submission for review of laws relating to firearms and explosives from the Ministry of Home Affairs and Internal Security in October 2004.

The program has not yet commenced due to lack of funding. Currently, the Program Officer has developed an Issues Paper and a special Law Commission will be empanelled in consultation with the Judicial Service Commission in the course of 2006.

HIV and AIDS law reform (2005–...)

The Law Commission received a submission from the National Aids Commission (NAC) during the last quarter of 2005 to assist in formulating legislation on HIV and AIDS.

The program is expected to commence in the last quarter of 2006. Currently, the Program Officer is carrying out literature review and the special Law Commission will be empanelled in consultation with the Judicial Service Commission in the third quarter of 2006.

Development of a law regulating declaration of assets (2005–...)

The Malawi Constitution makes provision that the President, Cabinet, Ministers, Members of Parliament and senior public officers should declare their assets and business interests soon after their election, nomination or appointment. The constitutional provisions are, understandably, very general and an Act of Parliament needs to be developed to actualize them. Declaration of assets is one method of preventing corruption and curbing the abuse of public power for personal interests. The objective of the program is to develop an operative legislation on declaration of assets in Malawi.

The program commenced in the last quarter of 2005 with literature review and the development of a Concept Paper by the Program Officer. The special Law Commission will be empanelled in consultation with the Judicial Service Commission in the second quarter of 2006.

The Commission published a Research Paper in April 2005. The Paper has been developed as a preliminary assessment of human trafficking in Malawi. The Paper will also provide the strategy and direction for the development of an anti-human trafficking law.

Subject to availability of funding, it is envisaged that the Program will commence in earnest in August 2006. This will be an expedited program which will take six months. The Commission has nonetheless compiled working documents and one officer took part in a regional assessment of the existing legal and policy framework of human trafficking in the Southern Africa Development Community (SADC) region, organized by the International Organisation for Migration (IOM).

Scottish Law Commission

Criminal law

During consultation on the Scottish Law Commission's 7th programme of law reform it was suggested the law on sexual offences was in need of review. Following public, academic and professional concern about two widely-reported rape cases in Scotland in 2004, the Commission was asked by Scottish Ministers to review the law relating to rape and other sexual offences. The Commission's Discussion Paper on *Rape and Other Sexual Offences* was published in January for a period of public consultation ending in May 2006. The key issues covered in the paper were:

- the need to define consent;
- the redefinition of rape to cover a wider range of sexual acts and ensure protection for male and female victims; and
- enhancing the protection of persons vulnerable to sexual exploitation.

'Rape' is currently defined in Scotland as a man having sexual intercourse with a woman without her consent. However, 'consent' is not defined and juries are expected to apply what they consider to be the ordinary meaning of that word. The Discussion Paper proposed that the meaning of consent should be defined in statute and that a list of factual situations should be provided to indicate where consent is not present. The list, which would not be exhaustive, would include situations where the victim was subject to violence, including violence against a third party; and where the victim was unconscious or asleep or lacked capacity to consent as a result of drink or drugs.

The Discussion Paper also proposed a redefinition of the physical act constituting the crime of rape to include non-consensual penetration with a penis not only of the vagina but also the anus or mouth of the victim. Other

offences proposed included sexual assault by penetration, sexual assault by touching and new offence of compelling another person to engage in sexual activity.

The Commission also proposed that protection should be given to those who cannot consent to sexual activity (such as young children) and also to people with a limited capacity to consent. Such persons include older children, people with a mental disorder and people over whom others hold a position of trust or authority.

The Discussion Paper emphasised the need for gender equality and proposed that common law and statutory homosexual offences should be replaced by offences which were neutral as to gender and sexual orientation. It also considered arguments for and against the requirement in Scotland of corroborative evidence.

The Commission has received a large number of responses to the Discussion Paper and following analysis of those responses a final report will be prepared, including draft legislation, for submission to Scottish Ministers in 2007.

Insurance law

The Commission is assisting the Law Commission for England and Wales with this project.

Insurance law in the United Kingdom has been criticised as outdated and unduly harsh to policyholders.

It has been decided to look at non-disclosure of material facts and breach of warranty, two areas of insurance law which are thought to give rise to particular difficulties in both consumer and business insurances. An initial scoping study has also been carried out seeking views on whether there are other issues in this area of the law which should be considered. The scoping paper is available on the Commissions' websites. Responses to the paper are currently being analysed and the Commissions will announce further plans once the scope of this project has been determined.

Interest

The Commission was asked to examine the law on the application of interest to claims for payment arising from contractual and other obligations, and to make recommendations for reform of the law. While the current law is

reasonably certain in many respects, it lacks any coherent principle. In a Discussion Paper (No 127) published in January 2005, the Commission proposed the introduction of a statutory right to claim interest during the period when a claimant is deprived of the use of his money, whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The proposals received a generally favourable response at consultation. Some specific areas of concern with the present law were identified:

- A claim for damages may attract interest from the date when the right of action arose (for example, the date of an accident) but interest will run on a contractual debt only from the date when a court action is raised. This appears inconsistent and it is proposed that interest on both debts and damages should be due from the date a person lost the use of his or her money.
- Interest is not payable on a debt unless payment has been 'wrongfully withheld' or, in the case of contractual debt, until court proceedings are commenced. A statutory entitlement to interest from the date when payment is due is proposed, which would not apply where parties have made express contractual provision for interest nor where interest is due under another statute.
- At present, the courts in Scotland apply a fixed rate of 8% which does not necessarily bear any relation to a rate which would be available commercially. A fluctuating rate of 1% or 1.5% above the Bank of England base rate is proposed.

A final report including draft legislation is currently being prepared with a view to publication this year.

Limitation in personal injury actions and extinct claims

At the request of Scottish Ministers, the Commission is undertaking a review of the provisions of the *Prescription and Limitation (Scotland) Act 1973* concerning limitation in personal injury actions. In particular, the Commission is looking at the so-called "knowledge test" and the judicial discretion to override the limitation period. Concern has been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised whether the 1973 Act should be amended to specify factors to which the court should have regard in exercising its discretion.

Scottish Ministers have asked the Commission to also review the position of claims for damages in respect of personal injury, which had expired as a result of the law of prescription prior to September 1984, when a number of amendments to the 1973 Act came into force. One of those amendments was the removal of personal injury actions from the scope of prescription. This change in the law did not affect claims which had already been extinguished. The Commission was asked to review the position of such claims following concerns about the position of people, particularly those who claim to have suffered childhood abuse many years ago in various institutions in Scotland, whose claims were extinguished under the previous rules of prescription.

A Discussion Paper (No 132) was published in February 2006, inviting comments by 31 May 2006.

Property

A Discussion Paper (No 112) on *Conversion of Long Leases* was published in April 2001. It proposed that leases for more than 175 years should be converted into ownership. It also sought views on whether conversion should be available for leases of much shorter duration (50 years or more). A possible alternative for these leases would be to introduce some form of security of tenure. The Commission hopes to complete its report in the course of 2006.

The Commission is working on a review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A Discussion Paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second Discussion Paper, (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third Discussion Paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register.

The Commission is also engaged on a project concerning protection of purchasers buying property from insolvent sellers. A Discussion Paper (No 114) on *Sharp v Thomson* (1997

SC (HL) 66), which is the leading case in this area, was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. Some of the remaining proposals may be dealt with in the Bankruptcy and Diligence etc. (Scotland) Bill, currently before the Scottish Parliament. Other proposals may be taken forward in the land registration project. The Commission hopes to complete its report during 2006.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. In the Commission's view, the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. The project will concentrate on issues relating to intestacy and protection from disinheritance. As a first step, a public attitude survey has been commissioned and a report of the results "Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey" was published by the Scottish Executive in July 2005. A Discussion Paper will be published by the end of 2006.

Trusts and judicial factors

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

The second phase of the project will cover the constitution, variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It will also look at trustees' liability to third parties and enforcement of beneficiaries' rights. The Commission published Discussion Paper No 129 on *Variation and Termination of Trusts* in December 2005. A separate Discussion Paper (to be published in late 2006) will consider the dual patrimony theory, the possibility of conferring legal personality on trusts and

what juridical acts are required to constitute a trust as between the truster and the trustees/beneficiaries and as between the truster and third parties. It will deal also with latent trusts of heritable property.

The Commission's recommendations regarding the investment powers of trustees contained in the Report on *Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the Charities and Trustee Investment (Scotland) Act 2005. Trustees can now invest in any kind of property and also buy land for any purpose.

The Commission is also working on a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission believes that a radical overhaul of this area of law is necessary because judicial factor is a cumbersome procedure involving disproportionate expense. The initial stages of the project involve empirical research into the current use of judicial factor and consultation with practitioners experienced in this field. The Commission aims to publish a Discussion Paper by the end of 2006.

Further information about the Scottish Law Commission's work and its publications is available at <www.scotlawcom.gov.uk>.

South African Law Reform Commission

The South African Law Reform Commission has released its Discussion Paper No 111 on *Trafficking in Persons* for general information and comment. The Discussion Paper sets out the Commission's preliminary recommendations for law reform regarding trafficking in persons. The legislative proposals can be summarised as follows.

Offences: The proposed Bill criminalises the act of trafficking in persons. In addition to this, the proposed Bill criminalises the following acts: debt bondage; the destruction, confiscation, possession and concealment of documents; using the services of victims of trafficking; and conduct facilitating trafficking in persons.

Protection of victims of trafficking: The proposed Bill lists several guiding principles which must be considered when deciding the

question as to whether a person is a victim of trafficking. This will facilitate the identification of victims of trafficking. Apart from dealing with the trauma of being trafficked, victims of trafficking are faced with arrest and prosecution for offences committed as a direct result of their situation as victims of trafficking. In South Africa, victims of trafficking may be prosecuted for prostitution, even though they were forced into prostitution by their traffickers. Victims of trafficking may also be prosecuted for illegal entry in terms of the *Immigration Act* 13 of 2002. The proposed Bill therefore provides that the decision as to whether criminal proceedings should be instituted against a victim of trafficking for an offence committed as a direct result of his or her situation as a victim of trafficking should rest with the National Director of Public Prosecutions. Foreign victims of trafficking are provided with a non-renewable suspension of their deportation period. This will allow such victims to come to terms with what has happened to them and to make informed decisions as to whether they want to assist in the investigation of and the prosecution of their traffickers. The decision whether to grant such a period should rest with the Director-General of the Department of Home Affairs. If victims of trafficking decide to assist with the investigation of and prosecution of traffickers, they should be provided with a temporary residence permit. The Commission has taken cognisance of the fact that some victims of trafficking may never be able to return to their countries of origin or the countries from where they have been trafficked because they may be harmed, killed or trafficked again by their traffickers or the associates of their traffickers. In this regard the following options are proposed:

- **Option one:** In terms of this option section 3 of the *Refugees Act* should be amended to provide that a person qualifies for refugee status if that person is a victim of trafficking and proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked. Such victims would be able to apply for a permanent residence permit in terms of section 27(d) of the *Immigration Act* which states that the Director-General of the Department of Home Affairs may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the *Refugees Act*. Section 27 (c) of the *Refugees Act*.

Act provides that a refugee is entitled to apply for an immigration permit after five years continuous residence in the country from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

- **Option two:** In terms of this option a victim of trafficking should be entitled to apply for a permanent residence permit in terms of the *Immigration Act* 13 of 2002, after five years of continuous residence in the country, commencing on the date he or she was granted a temporary residence permit. This option should, however, be available on the condition that the victim of trafficking proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.
- **Option three:** Instead of providing victims of trafficking with some kind of permanent residency status, this option proposes that the Director-General of the Department of Home Affairs may, on humanitarian grounds, extend a temporary residence permit granted to a victim of trafficking. The Director-General's decision should further be guided by the likelihood that the person may be harmed, killed or trafficked again.

With regard to the provision of services to victims of trafficking, the following options are proposed:

- **Option one:** The Department of Social Development should have the responsibility to establish centres for adult victims of trafficking.
- **Option two:** The Director-General of the Department of Social Development should accredit organisations to provide accommodation to adult victims of trafficking.

A centre for adult victims of trafficking or an accredited organisation as proposed above must offer a programme suited for the needs of victims of trafficking. Such a programme should be aimed at the provision of counselling and rehabilitation services to victims as well as the reintegration of victims into their families and communities. It is further important that the safety of adult victims of trafficking should be ensured if they are at risk of retaliation by their traffickers.

With respect to the provision of compensation to victims of trafficking, the proposed Bill provides that a court may, in addition to any other punishment pursuant to the Bill, order a person convicted of such offence to pay appropriate compensation to any victim of the offence.

Foreign victims of trafficking are often deported. This is because they are not identified as victims, but labelled as illegal immigrants. Furthermore, victims of trafficking are being returned to their countries of origin without investigation into their circumstances in order to establish whether protective systems are in place in their countries so as to ensure that they are not returned to the same circumstances that made them vulnerable to being trafficked in the first instance. It is therefore proposed that the summary deportation of victims of trafficking be prohibited prior to an investigation into their circumstances. Victims of trafficking should be repatriated in terms of a process that takes cognisance of their safety not only during the repatriation process, but also in the countries to which they are to be returned as well as the possibility that they might be harmed, killed or trafficked again. With regard to child victims of trafficking, due consideration should be given to the availability and suitability of care arrangements in the countries to which they are to be returned.

Prevention of trafficking in persons: The proposed Bill provides that public awareness programmes or other measures should be established in order to:

- (a) inform and educate persons at risk of becoming victims of trafficking on issues relating to trafficking in persons;
- (b) inform and educate victims of trafficking on their rights as victims; legal or other measures in place to ensure their safety, recovery and repatriation; and organisations, institutions or law enforcement agencies that may be approached for assistance or information; and
- (c) discourage the demand that fosters the exploitation of victims of trafficking, especially women and children.

Furthermore, the proposed public awareness programmes or other measures must include appropriate measures aimed at reaching rural

communities and should be reviewed biennially in order to determine their effectiveness.

The Discussion Paper, and other publications of the South African Law Reform Commission are published on the Commission's website: <<http://www.doj.gov.za/salrc/index.htm>>.