# Reform roundup

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

Entries to Reform roundup are welcome.

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

## Contents



## Administrative Review Council

### 30th anniversary

The Administrative Review Council is finalising a special issue of its annual administrative law bulletin, *Admin Review*, to mark the occasion of the Council's 30th anniversary.

The bulletin will include presentations made at a special 30th anniversary seminar in September 2006 by the former Chief Justice of the High Court, Sir Anthony Mason AC KBE; the Secretary of the Attorney-General's Department, Robert Cornall AO; the Chief Executive of the Business Council of Australia, Katie Lahey; CEO of the Australian Consumers' Association, Peter Kell; and the Chairman of the UK Council on Tribunals, Lord Newton of Braintree OBE DL.

The bulletin will also include an article by Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, on 'Future Challenges for Administrative Review'; an article on 'Judicial Review in Western Australia' by the Chief Justice of the Supreme Court of Western Australia, the Hon Wayne Martin; and a brief history of the origins of the Council by its Executive Director.

Please contact the Council Secretariat if you would like a copy of the bulletin when it becomes available.

### Government agency coercive information-gathering powers

As noted in the last issue of *Reform*, the ARC has been working on a report on the exercise of coercive information-gathering powers by government agencies. A draft of the report was released for stakeholder comment in December 2006. The draft report is available at: www.ag.gov.au/arc.

Submissions in response to the draft report are presently being considered by the Council. The Council hopes to be able to report to the Attorney-General on this project by mid-2007.

### Best practice guides

The Council is working on a series of best practice publications for administrative decision makers. The subject matter of each publication in the series will reflect a key stage in the decision-making process. The guides will provide practical guidance to government decision makers on lawful and procedurally fair decision making, statements of reasons, accountability and fact finding.

The Department of Immigration and Citizenship is working with the Council to annotate the guides specifically for that Department. It is hoped that other departments, in consultation with the Council, will also express an interest in adding agency-specific materials to the guides.

The guides are to be launched at Parliament House in Canberra on 10 August 2007. Please contact the Council Secretariat for further information.

### Complex business regulation

The Council is conducting a review of administrative decisions in areas of complex and specific business regulation. This project will consider the special features of business regulation that may impact on the most effective and efficient way in which administrative law rules and principles can be applied.

The Council is seeking input from those interested in the complex business regulation project. Please contact the Council's Secretariat if you would like to make a contribution to this report. The terms of reference for the project are available on the Council's website.

**The Administrative Review Council's publications are available online at <www.ag.gov.au/arc>.**
**For further information on the work of the Council, please contact the Secretariat on (02) 6250 5800 or email: arc.can@ag.gov.au.**

## Family Law Council

### Collaborative law

The Family Law Council completed work on its report *Collaborative Practice in Family Law* in December 2006. The report was prepared in consultation with the Family Law Section of the Law Council of Australia and the National Centre of Collaborative Law. The report received a very warm reception when it was released earlier this year and may be obtained either on request to the Council's Secretariat or from the Council's website.

### Statistical snapshot 2003–05

The Council has completed and will shortly be distributing its next bi-annual statistical report on various aspects of the Australian family law system. The report draws 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. In the coming months the Council will be beginning work on the next edition of the snapshot, for the period 2005–07. This report will also be available on the Council's website.

### Arbitration of family law property and financial matters

The Council has completed a discussion paper in response to terms of reference on arbitration of family law property and financial matters. The paper is entitled *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters*. The paper discusses the potential advantages and disadvantages of arbitration and methods by which use of arbitration for appropriate property and financial matters could be encouraged. The Council welcomes comments on the questions raised in the discussion paper. Submissions should be returned to the Council by 13 August 2007. Details about how to make a submission are included in the paper and on the Council's website. Following the consultation period, the Council will be preparing a final report on arbitration in the latter half of this year.

### Family violence

The Council is continuing its research on family violence in response to terms of reference on 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.

### Consultation

In the past quarter the Council has consulted with the Government on draft legislation to introduce provisions into the *Family Law Act 1975* governing financial adjustments between parties to de facto relationships following the breakdown of the relationship. The Council has also provided a letter to the Australian Law Reform Commission's Privacy Inquiry, raising some issues surrounding privacy in the family law system.

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

## Law Reform Commission of Western Australia

### Homicide

Work on the Commission's review of the law of homicide continues. The Commission released an issues paper in 2006 and has in past months been busy consulting with interested parties, receiving submissions and hosting focus group discussions.

### Compensation for injurious affection

The reference on compensation for injurious affection 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. The Commission is in the process of compiling a detailed discussion paper on the area, which is expected to be released shortly. The discussion paper's release will be followed by a three month submissions period and a final report. Those readers who have an interest in this specialised subject area are encouraged to contact the Commission to be included on our discussion paper distribution list. Submissions from jurisdictions other than Western Australia are welcome. The Commission will be hosting public forums to maximise feedback on the proposals for reform.

### Problem-oriented courts

The Commission has encountered challenges on its problem-orientated courts reference, not least of which has been the rapid expansion and development of this area of law. This has resulted in the Commission reassessing its project methodology and undertaking a more thorough investigative process across jurisdictions. Work continues on this reference.

### New website

The Commission launched its new website in May 2007. The website is user-friendly, informative and has an improved search function. All publications of the Commission are now available for free download from the website immediately upon release. The new website also features an e-news subscription service, which will inform subscribers when reports and papers are released, as well as keeping subscribers up-to-date with the Commission's activities. The Commission invites *Reform* readers to subscribe to this service. Subscription is free and you can unsubscribe at any time—just follow the prompts on the website: <www.lrc.justice.wa.gov.au>.

## NSW Law Reform Commission

### Role of juries in sentencing

In February 2005, the Commission was asked by the Attorney General to investigate whether current sentencing procedures would be improved by involving juries in sentencing decisions. The Commission was asked to investigate the merits of allowing the presiding judge in a criminal trial to canvass the views of the jury when sentencing an offender. In addition, the Commission was asked to take into account whether allowing jury input in sentencing would enhance the public confidence in the administration of justice. The suggestion for this inquiry was made by the Chief Justice of New South Wales, the Hon James Spigelman AC.

The Commission published Issues Paper 27 in July 2006. The Issues Paper analyses the advantages and disadvantages of jury involvement in sentencing decisions, with particular reference to maintaining public confidence in the criminal justice system. A report was completed in June 2007.

### Jury directions in criminal trials

In February 2007, the Attorney General requested that the Commission inquire into the directions and warnings given by a judge to a jury in a criminal trial. The Commission is required to have regard to:

- the increasing number and complexity of the directions, warnings and comments

required to be given by a judge to a jury;

- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge;
- whether other assistance should be provided to jurors to supplement the oral summing up; and
- any other related matter.

The Commission is currently inviting preliminary submissions.

### Consent of minors to medical treatment

In June 2004, the Commission published Issues Paper 24, *Minors' Consent to Medical Treatment*, as part of a review that is considering when young people, below the age of 18, should be able to make decisions about their medical care by themselves. The issues paper examines who should be able to make medical decisions for minors on their behalf, and what the legal liability of medical practitioners should be who treat minors without valid legal consent.

The Commission conducted consultations in the second half of 2006, and a full-day seminar in November 2006, jointly organised with the Law School at Macquarie University.

The Commission is planning to publish a final report by mid-2007.

### Jury service

Issues Paper 28 *Jury Service* was published in November 2006 in response to a request from the Attorney General in August 2006 to review aspects of the system for selecting jurors in New South Wales. *The Jury Act 1977* (NSW) specifies the current qualifications for jury service, as well as specifying persons who are ineligible to serve as jurors or who may claim exemption.

The Commission has received submissions on Issues Paper 28, many of which have questioned the ongoing justification for the long list of exceptions and exemptions.

The Commission plans to report on this inquiry in 2007.

### Privacy

The Commission's review of New South Wales' privacy legislation continues. A Consultation Paper was published in May 2007. It considers whether a new cause of action based on privacy should be developed.

### People with cognitive or mental health impairments

The Commission has commenced two projects under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system. The first is reviewing s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). This provision gives a magistrate very broad powers (including diversion from the criminal justice system) when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chapter 3 of the *Mental Health Act*). The second project is a review of the principles of sentencing offenders with cognitive or mental health impairments.

The projects are important as there are a significant number of offenders with cognitive and mental health impairments coming into contact with the criminal justice system and being sentenced to periods of imprisonment.

The Commission is planning to report on these projects by the end of 2007.

### Completed reports

Six reports have been completed, and are awaiting tabling in Parliament at the time of print:

- *Surveillance: Final Report* (Report 108);
- *Young Offenders* (Report 104);
- *Guaranteeing Someone Else's Debts* (Report 107);
- *Relationships* (Report 113);
- *Company Title Home Units* (Report 115); and
- *Uniform Succession Laws: Intestacy* (Report 116).

Report 114, *Blind or Deaf Jurors*, was tabled in the New South Wales Parliament in May 2007. The article 'Jury Research in New South Wales', earlier in this edition of *Reform*, has further information.

## Tasmania Law Reform Institute

### Criminal liability of organisations

In April 2007, the Institute released Final Report No 9 that makes recommendations concerning the attribution of criminal responsibility to organisations. It was the view of the Institute that the current criminal law does not provide a means to adequately hold organisations criminally liable in the rare case where the organisation itself (rather than the individuals involved) has real culpability for traditional crimes. To address this inadequacy, the Institute recommended introducing specialised principles of criminal responsibility for organisations to address the very serious cases where the conduct of an organisation has been so reprehensible that it should be punished using the criminal law. These reforms are based on the Model Criminal Code position.

The report also makes recommendations concerning the sentencing of organisations. Currently, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment, such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This report makes recommendations to provide a greater range of sentencing options relevant to corporations such as adverse publicity orders and orders disqualifying an organisation from undertaking specific commercial activities.

### A Charter of Rights for Tasmania?

The Tasmanian Government has asked the Tasmanian Law Reform Institute to investigate how human rights are currently protected in Tasmania and whether the protection of human rights can be enhanced in any way. The Institute released an issues paper in August 2006 aimed to stimulate thinking and discussion about the protection of human rights and to encourage as many Tasmanians as possible to participate in the consultation process. Widespread community consultation has been undertaken with presentations being made to 70 groups within Tasmania. Almost 400 responses have been received to the issues paper. The final report is currently being prepared, with a view to release in mid-2007.

**For more information on the Tasmania Law Reform Institute visit the website: <http://www.law.utas.edu.au/reform/> or email <law.reform@utas.edu.au>.**

## Victorian Scrutiny of Acts Committee

The Victorian Parliament's Scrutiny of Acts and Regulations Committee is currently reviewing certain Victorian Acts referred to it by the Parliament with the view of making recommendations on whether the referred Acts are unclear or redundant and, if they are, whether they should be amended or repealed.

Following the Victorian Parliament's referral of the corporations powers in 2001 to the Commonwealth Parliament, the Committee now invites written submissions concerning whether certain Victorian corporations and related laws may be repealed. The Acts referred to the Committee are the:

- *Companies Act 1961* (Vic);
- *Companies Act 1975* (Vic);
- *Companies (Application of Laws) Act 1981* (Vic);
- *Securities Industry Act 1975* (Vic);
- *Securities Industry (Application of Laws) Act 1981* (Vic);
- *Marketable Securities Act 1970* (Vic); and
- *Collusive Practices Act 1965* (Vic).

**The Committee's senior Legal Adviser, Andrew Homer, is available to provide further information about the inquiry process on (03) 9651 3612.**

## Alberta Law Reform Institute

### Rules of Court Project

The Alberta Law Reform Institute has released two more consultation memoranda as part of its Rules of Court Project.

Consultation Memorandum 12.20 (CM 12.20) addresses the topic of *Criminal Jury Trials: Challenge for Cause Procedures*. Accused people have both statutory and constitutional rights to jury trials. Both the Crown and the accused are entitled to present their cases before fair and impartial jury members. To secure this, the Canadian Criminal Code has established a number of procedures, including challenges for cause on the ground that a prospective juror is not indifferent between the accused and the Queen. To say that a prospective juror is 'not indifferent' is to say that the individual is 'partial'. In Canada, prospective jurors are presumed to be

impartial. This presumption may be rebutted on the balance of probabilities by the party alleging partiality, through the challenge for cause procedure.

The challenge for cause procedure has two stages. First, the party must satisfy the trial judge that there is a realistic possibility that prospective jurors are partial and that they cannot set aside their partiality. The party may establish partiality on the basis of evidence (including expert evidence), judicial notice, or both. The trial judge has the discretion to set the questions to be asked in the challenge for cause and otherwise to manage the challenge process. Second, if the judge finds that there is a realistic possibility of partiality, each prospective juror is questioned before two 'triers'—two prospective jurors or two jurors who have already been sworn. The triers decide, on the balance of probabilities, whether the challenged juror is partial or impartial.

The Criminal Code provides very little guidance for challenge for cause procedures. CM 12.20 offers two main proposals. First, a standard notice of intention to challenge for cause should be developed. This document would be filed and served along with supporting documentation. Second, the notice should be filed and served at least 60 days before the date set for jury selection. CM 12.20 also makes proposals regarding procedures before the judge and before the triers; courtroom bookings; and the establishment of special jury panels if there is challenge for cause.

Consultation Memorandum 12.21 (CM 12.21) addresses the topic of *Civil Appeals*. When Alberta's current rules of court were enacted, appellate powers were exercised by a division of the Supreme Court of Alberta. Although a separate Court of Appeal came into being in 1979, the rules of court have not been revised to reflect the new structure and role of a separate appellate court. Thus, in many areas, current practices lag behind the needs of the court and litigants.

CM 12.21 reviews the progress of an appeal from the date of the trial decision through to the hearing of the appeal and decision. The proposals put forward for consultation reflect the following working principles.

1. An individual who has grounds for dissatisfaction with the outcome of his or her case should generally be able to have the case looked at by a higher court so that it can consider whether there appears to have been an injustice.
2. There is a private and a public purpose of appeals in civil cases. The private purpose is to correct an error, unfairness or wrong exercise of discretion that has led to an unjust result. The public purpose is to ensure public confidence in the administration of justice and, in appropriate cases, to:
   a) clarify and develop the law, practice and procedure; and
   b) help maintain the standards of first instance courts and tribunals.
3. An appeal should not be seen as an automatic further stage in a case. The presumption should be that the trial court got it right.
4. Appeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute.
5. An appeal process should ensure that, so far as is practical, delay, cost, and uncertainty of process are reduced to a minimum.

These principles are based on the set of principles stated in Sir Jeffery Bowman's *Review of the Court of Appeal* (1997).

CM 12.21 proposes revisions to the main steps of an appeal. Having identified several causes of delay at the outset of an appeal, CM 12.21 includes proposals to reduce both the number of steps in an appeal and the need for court intervention to get or keep an appeal moving:

- The time to appeal should run from the date of the decision rather than the later date of entry of the trial judgment.
- The appellant will be responsible for filing the main documents in the appeal book. The respondent will have the option to file an additional appeal book if required.
- There should be a deadline for the appellant to order the appeal book to ensure that it will be ready for filing.
- There should be a single deadline for filing the appellant's appeal book, factum and authorities rather than the series of deadlines that currently apply; and there should also be a single deadline for filing the respondent's materials.

CM 12.21 also reviews issues relevant to case management and the use of judicial dispute

resolution on appeal. Other topics covered include: applications to the court, leave to appeal, expedited appeals, and court powers.

**Both consultation memoranda are available on the Institute's website: <www.law.ualberta.ca/alri>.**

## British Columbia Law Institute

### Privacy Act

In the past two decades, privacy has become a prominent issue in society. As advances in technology have vastly increased the ways in which privacy can be violated, there has been a corresponding growth in the concern over its preservation. The British Columbia Law Institute has commenced a project on one aspect of the vast subject of privacy—civil liability for violation of privacy rights.

British Columbia enacted the *Privacy Act* in 1968, as a response to a controversy over electronic eavesdropping. The legislation was the first of its kind in the Commonwealth. The *Privacy Act* was intended to remedy a deficiency in the common law, which did not recognise a right to privacy. The Act creates a tort, actionable without proof of damage, for violation of the privacy of an individual. This statutory right to privacy is not absolute; it is subject to the limitations and qualifications set out in the Act. The Act has not been amended in the 39 years since its enactment and, as a result, has failed to keep pace with changing social attitudes and the challenges of new technology.

The Law Institute's project will involve a thorough review of the *Privacy Act*. In particular, improvements introduced in other provinces, such as greater specificity of remedies and the inclusion of stalking as a civil wrong, will be considered. The project will include consultations with the public. The final report is expected to be published in July 2007.

### Ageing with challenges

The Law Institute's internal division, the Canadian Centre for Elder Law Studies, is nearing completion of a major project based on the theme of ageing with challenges. The goal of the project is to challenge the notion that people age in a homogeneous fashion. The Centre has consulted extensively with the public with the aim of creating a working definition of 'ageing with challenges' and to identify specific legal issues that call for detailed legal analysis and research.

As part of this project, a study paper entitled *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario* was published in October 2006. The completed project will include the following elements:

- a best practices guide directed to the legal, medical, and care giving professions;
- a seminar for an audience of medical and nursing students, law students, care facility employees, caregivers, support organisations, and other key stakeholders;
- a final report, including outcomes and recommendations; and
- a brochure distilled from the final report.

### Society Act

The *Society Act* provides for the incorporation, organisation, governance, and dissolution of not-for-profit bodies. It has been 30 years since the last major revision of this legislation. In that time, British Columbia has enacted a new *Business Corporations Act*, other jurisdictions have begun to reform their not-for-profit incorporation laws, and the not-for-profit sector has expanded and developed in ways unforeseen in 1977.

The Law Institute is in the midst of a project to improve and modernise the *Society Act*. Work is being carried out by a volunteer project committee, made up of lawyers and consultants who are prominent in the not-for-profit field. A consultation paper will be published this year. A final report, with draft legislation, is anticipated in July 2008.

### Canadian conference on elder law

The third annual Canadian Conference on Elder Law will be held on 9–10 November 2007. This international conference, held annually in Vancouver, welcomes participants from around the world.

The theme of the conference will be 'Moving Forward, Moving Beyond'. The Right Hon Beverley McLachlin, Chief Justice of the Supreme Court of Canada, will deliver the Conference's keynote address. This year's streamed program will focus on elder justice, including the issues of elder abuse, neglect, self-neglect, and criminal justice.

A number of events will take place in conjunction with the conference. These events include the annual meeting of the World Study Group on Elder Law (8 November 2007), the Simon Fraser University Ting Forum on Social Justice (9–10 November 2007), and the first

Federal/Provincial/Territorial Working Group on Seniors' Issues Forum (8 November 2007). (Attendance at this forum is by invitation only.)

### Personnel changes

Jim Emmerton was appointed Executive Director of the Law Institute, effective 1 April 2007. Mr Emmerton has an extensive background in corporate law, having served as a senior executive and corporate counsel with several national and international corporations. He has a broad spectrum of knowledge in the fields of law, finance and corporate development.

The Law Institute wishes to acknowledge the contribution of its retiring Executive Director, Arthur L Close, QC. As a founding member of the Law Institute, and before that as Chair of the Law Reform Commission of British Columbia, Mr Close has been the visible face of law reform in British Columbia for 35 years. Mr Close will continue to be involved with the Law Institute, as a member and director.

## Manitoba Law Reform Commission

### Private title insurance

On 5 April 2007, the Manitoba Law Reform Commission released its Report *Private Title Insurance* (Report 114, December 2006). The project was the result of a reference from the Minister of Justice and Attorney General, and represents a collaboration between the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan. The report is a joint report by the two Commissions.

The report considers the effects of title insurance within the context of residential real property conveyancing and contains 15 recommendations aimed at protecting the interests of residential property owners and purchasers and protecting the public land registration system, while ensuring freedom of choice for consumers.

A title insurance policy insures a purchaser or lender against certain losses relating to an interest in land; generally these are matters that affect the title or the right to use and enjoy the property. It may include coverage for problems that existed at the date the policy was issued but were undiscovered, as well as for future risks related to fraud, forgery and encroachment. Critics of title insurance argue that it is of limited value in a land titles system, as it duplicates the coverage provided through the statutory compensation scheme and 'insures over' survey defects and zoning non-compliance, making it less likely that problems will be corrected. Proponents of title insurance assert that it complements the statutory coverage, insuring for additional off-title matters, for example, and facilitates the early release of mortgage and sale proceeds on closing.

The Commissions reported that, in their view, a ban on the sale of title insurance would be a disproportionate response to the possible harm caused. Instead, the Commissions made several recommendations to address the underlying weaknesses of the real property system to which title insurance has been a response and to close many of the gaps in protection. As well, a more proactive approach by the provinces to the protection of the survey fabric is required. The Commissions also make several consumer protection recommendations, to ensure that information relevant to a consumer's ability to make an informed choice in relation to title insurance is disclosed and to better protect consumers' interests.

### Franchise law

The Manitoba Law Reform Commission is engaged in a project on the review of franchise law. Franchise legislation has been enacted or introduced in four other provinces. The Commission is finalising a consultation paper for release in mid-2007. Copies of the paper may be obtained from the Commission's website upon release.

### Potential projects

The Commission is reviewing all potential law reform projects that had been deferred in previous years as well as a number of suggestions for new projects. Priorities for upcoming projects will be set during the (northern) spring of 2007.

**Information on the Manitoba Law Reform Commission, including the Commission's publications, can be found at <www.gov.mb.ca/justice/mlrc>.**

## National Conference of Commissioners on Uniform State Laws (United States)

The mission of the National Conference of Commissioners on Uniform State Laws is to promote uniformity of law among the various states and territories of the United States. Now in its 116th year, the Conference comprises more than 350 lawyers, judges and law professors appointed by the states as well as the District of Columbia, Puerto Rico and the US Virgin Islands. These commissioners draft proposals and work toward the enactment in state legislatures of uniform and model laws on subjects where uniformity is practical and desirable. Since its inception in 1892, the Conference has drafted hundreds of uniform laws on numerous subjects and in various fields of law, many of which have been universally or nearly universally enacted by the states.

The Conference is a national organisation since its work extends to all US state and territorial jurisdictions. It is also regional and international, since there is a cooperative relationship with sister organisations in Canada and Mexico. Our work also influences several institutes and law reform organisations in countries such as Australia and Japan. The Conference maintains a Special Committee on International Legal Developments to further its collaboration with international organisations and to promote international harmonisation and comity in a wide variety of fields, including, among other areas, commercial law, dispute resolution and trans-border enforcement of family law orders.

The Conference has a number of current projects dealing with international law. First, the Conference has recently embarked on three projects with its North American counterparts in an effort to harmonise the laws of the United States, Canada and Mexico. The Conference, along with the Uniform Law Conference of Canada and the Mexican Center for Uniform Laws, is working on a joint project to create a 'Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America'. This project should result in three 'national drafts'—one each for the US, Canada, and Mexico—that will contain a common set of basic principles that each country can incorporate into their statutory frameworks concerning unincorporated nonprofit associations.

A Joint Committee to Harmonize North American Law on the Assignment of Receivables in International Trade, with members from the Conference, Canada and Mexico, has been established. This joint committee, instead of working together to draft an Act that will then be enacted in each participating country, is assisting the US State Department in drafting an Act that would implement the United Nations Convention on the Assignment of Receivables in International Trade. The Convention, which came from the United Nations Commission on International Trade Law (UNCITRAL) and was adopted by the United Nations General Assembly in 2001, seeks to eliminate the prevailing uncertainties in the legal effectiveness of international receivables financing transactions through the establishment of a set of uniform rules.

The third project, a Joint Drafting Committee for Implementation of the UN Convention on Independent Guarantees and Standby Letters of Credit, with members from the Conference, the American Law Institute, Canada and Mexico, is working to draft language to implement the UN Convention, and to assist Canada and Mexico in developing letter of credit law consistent with UCC Article 5.

At the request of the US State Department, the Conference's Committee on the Uniform Interstate Family Support Act (UIFSA) is monitoring developments at the Hague Conference on International Private Law with respect to a draft convention in the international recovery of child support and other forms of family maintenance. The Committee will examine whether becoming a party to the Convention is in the best interests of the United States and is expected, if appropriate, to draft amendments to UIFSA, and possibly to draft implementing statutory language that would comply with the new Hague Convention.

The Conference is registered as a non-governmental organisation member of the United Nations Economic and Social Council (ECOSOC). ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to member states and the United Nations system. It is responsible for promoting higher standards of living, full employment, and economic and social progress; and identifying solutions to international economic, social and health problems. It has the power to make or initiate studies and reports on these issues.

The Conference is also a registered civil society organisation with the Organization of American States (OAS). The OAS brings together the nations of the Western Hemisphere to strengthen cooperation on democratic values, defend common interests and debate the major issues facing the region and the world. The OAS is the region's principal multilateral forum for strengthening democracy, promoting human rights, and confronting shared problems such as poverty, terrorism, illegal drugs and corruption.

Lastly, the Conference has recently formed a new Joint Editorial Board (JEB) for International Law. The JEB will consist of members appointed from the Conference and from the American Bar Association Section on International Law. The primary purpose of the JEB is to facilitate the promulgation of uniform state laws consistent with US laws and international obligations dealing with international and transnational legal matters.

The Conference strives to reduce the need for individuals and businesses to be faced with different national laws as they move and conduct business internationally. As the Conference's international program unfolds, it will undoubtedly involve a closer working relationship with the State Department, our counterparts in Canada and Mexico, and such international organisations as UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, and the OAS. Developing these relationships outside the United States and undertaking drafting and implementation of international projects are a logical and necessary extension of the Conference's historical mission.

## Scottish Law Commission

### Criminal law

During consultation on the Scottish Law Commission's Seventh Programme of Law Reform it was suggested that 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, *Rape and Other Sexual Offences*, was published in January, and was followed by a period of public consultation which ended in May 2006.

The issues covered in the paper included 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 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 a new offence of compelling another person to engage in sexual activity.

The Commission also proposed altering the current statutory provisions and common law principles to ensure that protection is given to those who cannot consent to sexual activity (such as young children) and 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 that are neutral as to gender and sexual orientation. It also considered arguments for and against the requirement that all the essential facts be proved by corroborated evidence.

The Commission has received a large number of helpful responses to the discussion paper. These have now been analysed and policy is being developed in light of them. A final report, including draft legislation, will be submitted to Scottish Ministers in the (northern) autumn of 2007.

Once the report on rape and other sexual offences has been submitted, we intend to commence a review of the criminal law defences of provocation, self-defence, coercion and necessity. The current law in each of these areas is uncertain and relatively undeveloped, and a review has been motivated by a recent court decision which accepted that reform was desirable and that legislation was the best mechanism for this. The difficulties apply particularly to the defence of provocation where, for example, it is not clear whether a successful defence will result in acquittal or mitigation of sentence. Equally, it is unclear whether a prolonged course of conduct, such as domestic violence, can amount to provocation.

### Insurance law

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

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

A joint scoping paper was published in January 2006 to seek views on areas of insurance contract law that should be included within the scope of this project. As a result of the comments submitted in response to that paper, the project will include topics such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay.

To assist in the development of our thinking, the joint team is producing a series of issues papers. These do not represent the policy of either Commission but are intended as a vehicle for sharing initial thinking with interested parties. Issues papers on *Misrepresentation and Non-Disclosure, Warranties and Intermediaries and Pre-contract Information* are available on the Commission's website.

We intend to publish two joint consultation papers, the first of which will be in the (northern) summer of 2007.

### 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 also asked the Commission to 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 removed personal injury actions from the scope of prescription. This change in the law did not affect claims that had already been extinguished by prescription. 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. The Commission received a number of responses and is now working on a report and draft Bill, which will be published later in 2007.

### Damages for wrongful death

We received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

The Commission is currently working on a discussion paper, which will be published later in 2007.

### Property

The Commission's report (No 204) on *Conversion of Long Leases* was published in December 2006. It recommends that tenants of ultra-long leases should be entitled to have their rights converted into ownership. An ultra-long lease is a lease that is granted for more than 175 years and which still has more than 100 years to run. The draft Bill included in the report sets out a scheme for the automatic conversion of such leases into ownership.

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 now working on the report.

The Commission is also engaged in 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. Section 17 of the *Bankruptcy and Diligence etc (Scotland) Act 2007* has now implemented another of our proposals designed to increase the protection given to bona fide purchasers. Following these developments the Commission hopes to complete its report in 2007.

### 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 its 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 in the latter half of 2007.

### 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 final Phase One discussion paper, *The Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered 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 dealt also with latent trusts of heritable property.

The second phase of the project will cover the 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 a report, *Variation and Termination of Trusts*, in March 2007 following a discussion paper in December 2005. The report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

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 factory is a cumbersome procedure involving disproportionate expense. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. Other work permitting, the Commission aims to publish a discussion paper by the end of 2007.

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