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A. Australia

Review of Legal Professional Privilege and Commonwealth Investigatory Bodies
Inquiry
http://www.alrc.gov.au/inquiries/current/privilege/about.html

On 29 November 2006, the Australian Law Reform Commission (ALRC) received instructions from the Attorney General of Australia to inquire into the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies, including powers to compel the production of documents, the answering of questions and the entering of premises to inspect and copy documents or to search and seize records under warrant. Further, the ALRC is directed to consider whether it is desirable to:

- modify or abrogate the privilege in order to achieve a more effective performance of Commonwealth investigatory functions;
- clarify all existing federal provisions that modify or remove the privilege, with a view to harmonising them across the Commonwealth statute book; and
- introduce or clarify other statutory safeguards where the privilege has been modified or abrogated, with a view to harmonising them across the Commonwealth statute book.

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In *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC noted the significant inconsistencies in the availability of the privilege across regulatory statutes and recommended that a review be undertaken of federal investigative powers compelling disclosure of information and the operation of the privilege with a view to providing greater certainty and consistency. The ALRC also considered legal professional privilege, now more accurately referred to as client legal privilege, in its recent report, *Uniform Evidence Law* (ALRC 102).

As with other common law rights, client legal privilege can be modified or abrogated by statute where the legislature accords a competing public interest a higher priority. The ALRC's Inquiry will consider the circumstances, if any, in which it may be appropriate to give priority to other public interests over the public and private interests in maintaining the privilege.

Questions of privilege commonly arise in relation to the exercise of coercive information gathering powers by Commonwealth bodies. The Inquiry raises issues of considerable importance to the effective operation of Commonwealth agencies with investigative and associated powers. It also raises significant issues for individuals and organisations who may be subject to Commonwealth investigatory powers, in particular the targets of those inquiries, but also potential witnesses and the custodians of relevant information. One key issue for the ALRC will be to determine the use to which privileged information subsequently can be put, in the event that privilege is abrogated.

The ALRC will consult widely with stakeholders and encourages those with an interest in the Inquiry, including members of the judiciary, the legal profession, Commonwealth bodies, individuals and organisations who have been involved in Commonwealth investigations, and the victims of unlawful conduct the subject of Commonwealth investigation, to register an interest.

The ALRC intends to release an Issues Paper in April 2007. A more detailed Discussion Paper, which will contain preliminary proposals for reform, is planned for release in late August or early September 2007. The final report to the Attorney General, containing recommendations for reform, is due on 3rd December

2007 and will be publicly available after its tabling in federal Parliament.

Review of Privacy-Credit Reporting Provisions
Issues Paper 32, November 2006
http://www.austlii.edu.au/au/other/alrc/publications/issues/32/

The Attorney General of Australia asked the ALRC to conduct an Inquiry into the extent to which the Privacy Act 1988 (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia. The Privacy Amendment Act 1990 (Cth), which commenced operation in September 1991, extended the coverage of the Act to consumer credit reporting. Credit reporting for these purposes is the practice of providing information about consumer creditworthiness to banks, finance companies and other credit providers through credit reporting agencies that collect and disclose information about individuals. The credit reporting provisions of the Act are contained in Part IIIA and associated provisions (the credit reporting provisions) and are the subject of this Issues Paper. In 2000, amendments to the Privacy Act established a further set of privacy principles, known as the National Privacy Principles (NPPs), which apply to the private sector. As discussed in Chapter 3, credit reporting agencies and credit providers must comply with the NPPs as well as with the credit reporting provisions in Part IIIA. The relationship between the obligations set out in the credit reporting provisions and those in the NPPs is an important issue discussed in this Issues Paper.

The Terms of Reference are reproduced at the beginning of this Issues Paper. The ALRC is directed to focus on the extent to which the Privacy Act and related laws continue to provide an effective framework for protection of privacy in Australia. The Attorney General identified four factors as relevant to the decision to initiate the Inquiry: rapid advances in information, communication, storage, surveillance and other relevant technologies; possible changing community perceptions of privacy and the extent to which privacy should be protected by legislation; the expansion of state and territory legislative activity

in areas relevant to privacy; and emerging areas that may require privacy protection.

During the course of the Inquiry, the ALRC will consider: relevant existing and proposed Commonwealth, state and territory laws and practices; other recent reviews of the Privacy Act; current and emerging international law and obligations in the privacy area; privacy regimes, developments and trends in other jurisdictions; any relevant constitutional issue; the individual's need for privacy protection in an evolving technological environment; the desirability of minimising the regulatory burden on business in the privacy area; and any other related matter.

Two Issues Papers have been released during the course of this Inquiry. This Issues Paper (IP 32) deals with the credit reporting provisions. The other Issues Paper, Review of Privacy (IP 31), was released in October 2006, and deals with all other matters relevant to the Terms of Reference. An overview document, *Reviewing Australia's Privacy Laws: Is Privacy Passé?*, highlights, in a general manner, the key issues that the ALRC is exploring in this Inquiry. The two Issues Papers will be followed by the publication of a Discussion Paper in mid-2007 which will contain a more detailed treatment of the issues and will indicate the ALRC's current thinking in the form of specific reform proposals. The ALRC will then seek further submissions and undertake a further round of national consultations concerning these proposals. The final Report containing the final recommendations is due to be presented to the Attorney-General by 31 March 2008. The ALRC has not been asked to produce draft legislation in this Inquiry, but many of the recommendations in the final Report will doubtless indicate the precise nature of the desired legislative change.

B. England and Wales

Report: Inchoate Liability for Assisting and Encouraging Crime
LC300
July 2006
http://www.lawcom.gov.uk/docs/lc300.pdf

The Report describes the current law in the area as complex, unsatisfactory and arbitrary. The chief deficiency in the law is that, although those who *encourage* another to commit a crime are instantly guilty of inciting the crime, those who actively seek to *assist* a crime are only criminally liable if the offence actually takes place. The central recommendation of the Report is that those who commit acts capable of encouraging or assisting a crime are criminally liable regardless of whether the offence itself subsequently takes place. Moreover, the Report recommends that the individual be liable to the same maximum penalty as if they had actually committed the crime.

The two new inchoate offences recommended in the Report are:

1. encouraging or assisting the commission of an offence ("the principal offence") *intending* to encourage or assist its commission ("the clause 1 offence")
2. encouraging or assisting the commission of an offence ("the principal offence") *believing* that it will be committed ("the clause 2(1) offence").

The two new offences would replace the existing common law offence of incitement and remedy the present situation at common law where no criminal liability arises for assisting the commission of an offence unless and until the offence is actually committed or attempted. In the case of the new law, each offence may be committed whether or not the principal offence is committed.

The Report deals with sentencing (sentences, save in murder cases, are to be the same as in the case of the principal offense) and defences and exemptions. It is a defence to both new offences if the actor can show that, on the balance of probabilities, he acted in order to prevent the commission of an offence, or the occurrence of harm, and where he shows it was reasonable to so act in the circumstances.

Report: Trustee Exemption Clauses
LC301
July 2006

http://www.lawcom.gov.uk/docs/lc301.pdf

The Report deals with trustee exemption clauses and sets out the recommendations of the Law Commission resulting from a consultation process. A trustee exemption clause is a trust instrument which purports to exclude or restrict the trustee's liability for failure to carry out properly the duties imposed upon it by the trust instrument or by law. The Report should be read with reference to Trustee Exemption Clauses, Law Commission Consultation Paper 171. It arose as a result of the Trustee Act 2000, which adopted a permissive approach to modern trusteeship. The concern arose that the instrument did nothing to restrict the use of exemption clauses in trust instruments and raised the possibility that beneficiaries wouldn't be adequately protected. The Lord Chancellor accordingly referred the matter to the Law Commission to "examine the law governing clauses which restricts the liabilities of trustees either by excluding liability for breach of their duties or by limiting the duties to which the trustees are subject."

Following a comprehensive consultation process, it was found that there was strong support for the idea that trustee exemption clauses should not be included in a trust without the full knowledge and consent of the settlor. The current state of affairs, where the settlor is very often unaware of the existence or the effect of the clause, is unacceptable. Rejecting the option of a statutory requirement that trustees must disclose the clause to the settlor, the Report instead recommends a practice-based approach as the appropriate and proportionate one. It is recommended that it be a rule of practice that any trustee must take reasonable steps to ensure that the settlor is aware of the existence and the meaning of the clause. Breach of this rule would give rise to liability in damages and would not, according to the Report, suffer the defects of legislation.

Report: Post-Legislative Scrutiny
LC302
October 2006
http://www.lawcom.gov.uk/docs/lc302.pdf

This Report addresses the lack of a formal and systematic procedure for reviewing legislation after its enactment. In 2004, a House of Lords Select Committee on the Constitution, in a report entitled "Parliament and the Legislative Process," noted that proper scrutiny of legislation post enactment was distinctly lacking and that proper, formal procedures should be introduced. The Law Commission was asked to assess the matter and a consultation process began in September 2005.

With a number of useful contributions, the Report notes that the question was not whether formal procedures for post-legislative scrutiny were desirable (that was beyond dispute), but rather, what mechanism was appropriate and suitable. The Report recommends that a new joint Parliamentary Committee for post-legislative scrutiny should be established with the aim of enhancing the accountability of governments for the legislation they pass, and, ultimately, to facilitate better, more effective law.

The Commission acknowledges that post-legislative scrutiny does already take place, but that it is on an *ad hoc* and informal basis. The Report lists the benefits of post-legislative scrutiny as including:

- establishing whether legislation is working in practice as intended
- improving the focus on implementation and delivery of policy aims
- identifying and disseminating good practice so that lessons may be drawn from the successes and failures revealed.

The Commission also issued a cautionary note about the limitations of such an exercise. There is a risk of a straightforward replaying of the arguments advanced during the passage of the Bill. Accordingly, the reviewing body must exercise self-discipline in terms of focusing on the outcomes of the legislation. Similarly, the dependence on political will and political judgment was noted. The Report noted further that such a process would be futile in the absence of adequate resources; resources which, of course, would be in demand elsewhere.

Report: Termination of Tenancies for Tenant Default
LC303
October 2006
http://www.lawcom.gov.uk/docs/lc303.pdf

The Law Commission set out a provisional position that the law on forfeiture (which currently regulates how a landlord may terminate a tenancy as a result of a breach of a covenant or condition by the tenant) is complex, incoherent and can give rise to injustice. A consultation paper was released proposing (provisionally) that the law on forfeiture be replaced by a new statutory scheme. This position was overwhelmingly supported by the consultees. The Report, and the draft Landlord and Tenant (Termination of Tenancies) Bill which accompanies it, sets out the recommended scheme for the termination of tenancies by landlords following a breach of covenant or condition by the tenant.

The objectives of reform include the provision of a level playing field for both landlords and tenants. The Report noted that the present system operates to the prejudice of tenants, but that it also affords tenants the opportunity to manipulate the law to their advantage. The Report deems the current system to be unnecessarily complicated, excessively technical and lacking transparency.

The scheme introduces a new concept of tenant default to define the circumstances in which a landlord may terminate a tenancy before the end of its term. Written notice to the tenant of the details of the breach and the resultant impending action is required by the scheme. The chief purpose of this notice is that the tenant must comply with the obligations under the tenancy, but, failing this, the landlord may make a termination claim. The court can order as it sees reasonable and proportionate and can take into account the conduct of both parties and whether the deadline provided was reasonable. The court may issue a:

- termination order;
- remedial order (setting out what is required of the tenant to remedy the default);

- order for sale (which requires that the tenancy be sold and the proceeds distributed);
- transfer order (which can only be sought by qualifying interest holders);
- new tenancy order (which can only be sought by qualifying interest holders);
- joint tenancy adjustment order (where, in the case of joint tenancy, a reluctant party can be released).

The Report notes that, though the scheme is court based, it will not lead to increased litigation. Whereas under the present law forfeiture can take place without court engagement, in practice, the court comes into play in the case of a disputed forfeiture and in the case of a threatened – but not yet carried out – forfeiture. Moreover, the proposed new law facilitates the early exchange of information and encourages prior negotiation and compromise. Furthermore, there is a summary termination procedure which applies where the tenant has no reasonable prospect of defending his tenancy in court, or where the premises concerned have been abandoned.

Report: Murder, Manslaughter and Infanticide
LC304
November 2006
http://www.lawcom.gov.uk/docs/lc304.pdf

In July 2005, the Government announced a review of the law on murder which was to take account of the continued existence of the mandatory life sentence for murder and which was to provide clear and coherent offences which protect individuals and society and provide appropriate punishment. This Report by the Law Commission recommends a new Homicide Act for England and Wales to replace the Homicide Act 1957. The present law fails to provide clear, comprehensive definitions of the homicide offences and of the partial defences. Similarly, juries are very often confronted with a situation whereby they have too few options to choose from in terms of reflecting fairly the blameworthiness of the offender. Victims' families likewise

object to the unreasonable breadth of the manslaughter offence compared to the single offence of murder.

The Report recommends that the general law on homicide be rationalised by legislation for the first time, with offences and defences specific to murder taking their place within a readily comprehensible and fair legal structure. This structure must be set out with clarity to promote certainty, and in a manner that the non-lawyer can understand and accept. The proposals seek to remedy the flaws in the present law. Moreover, the Commission argues that the new Act should extend the full defence of duress to the offences of first and second degree murder and attempted murder, and should improve the procedure for dealing with infanticide cases.

The Commission recommends a new three-tier structure of homicide offences to replace the present structure based on murder and manslaughter. Murder would then be split into first and second degree; the latter a middle-tier offence between the former and manslaughter. Second degree murder would encompass some killings currently regarded as murder and some killings currently regarded as manslaughter.

It is recommended that second degree murder should attract a maximum sentence of life imprisonment, with guidelines issued on appropriate periods in custody for different kinds of killing falling within the second degree. The term "injury" should be used instead of "bodily harm."

In terms of the fault element, the Report recommends that the existing law governing the meaning of intention should be codified so that a person is taken to intend a result if he acts so as to bring it about. The jury may regard a result as intended if the accused thought the result was a virtually certain consequence of his action.

The Report recommended that a partial defence of "mercy" killing should be considered on its own merits only after a further and detailed consultation process concentrating exclusively on that issue. Following on from this Report, the Home Office will now set out on a consultation process in 2007 on broader issues of public policy, such as sentencing. The Commission decided against issuing a draft Act in view of this impending process.

C. Hong Kong

Report: Substitute Decision-making and Advance Directives in Relation to Medical Treatment
August 2006
http://www.hkreform.gov.hk/en/publications/rdecision.htm

The report addresses "substitute decision-making" *i.e.* the situation where decisions as to medical treatment are made on behalf of a patient by someone else, such as a doctor, when the patient is comatose or in a vegetative condition. It also addresses "advance directive" *i.e.* the situation where the patient himself, while competent, gives instructions as to the medical treatment he wishes if he later becomes incompetent.

Firstly, the Commission proposes that the definition of "mentally incapacitated persons" in the Mental Health Ordinance should be amended to make it clear that those parts of the Ordinance which deal with the giving of consent for medical treatment, guardianship and the management of a mentally incapacitated person's property and affairs should apply to persons who are comatose or in a vegetative state.

The Report notes that the lack of an agreed form of "advance directive" creates confusion and uncertainty for both patient and doctor. The Commission has rejected the proposal to provide a statutory form of advance directive because it believes it would be premature to legislate on advance directives when the concept is still new to the community and is one on which most people have little knowledge.

The Commission has instead tabled a model form of advance directive which could be used by those wishing to make decisions as to their future health care. The Commission believes that this option is prudent insofar as an individual can be reasonably assured that his wishes will be carried out. The model form will also assist medical practitioners in their consideration of consent to medical treatment and enable them to be confident as to the patient's prior wishes.

The Report proposes that the model form would require two witnesses, one of whom must be a medical practitioner and neither of whom would have an interest in the estate of the person

making the advance directive. The advance directive would come into play only where the individual is terminally ill, in a persistent vegetative state or in an irreversible coma. Moreover, the Report proposes that an advance directive can be revoked at any time by the person who has made it, while those wishing to revoke an advance directive should be encouraged to do so in writing (though it may also be revoked orally).

The Commission considers that the Government should play a role in promoting public awareness and understanding of the concept of advance directives, and should endeavour to enlist the support of relevant bodies to this end. The Commission also proposes that the Government should review the situation at a later stage once the community has become familiar with the concept of advance directives and consider whether legislation should be introduced.

D. Ireland

Multi-unit Developments
Consultation Paper (LRC CP 42-2006)
December 2006
http://www.lawreform.ie/CP%20Multi-Unit%20Developments%2019%20Dec%2006.pdf

In its Second Programme, published in December 2000, the Law Reform Commission included as an item for future consideration the law relating to "condominiums," an expression commonly used in certain parts of the world (e.g., North America) to describe multi-unit buildings. It has recently been estimated that more than 10% of the total population live in multi-unit developments in Ireland. Such developments have long been the subject of extensive statutory regulation in other jurisdictions, such as the condominiums legislation in North America and Europe and the Strata Titles legislation in Australia. This necessarily involves reviewing the law which, until now, was developed largely without consideration for the distinct company, property, planning and consumer issues which face multi-unit developments. The Commission drew further attention to this subject in its *Report on Land Law and Conveyancing Law: (7)*

Positive Covenants over Freehold Land and Other Proposals (LRC 70 – 2003). It was described there as a "very complex subject" which would be considered at a later stage (para. 1.14). In September 2003, the Commission established a Group to give preliminary views on the issues involved to the Commission.

In preparing this Consultation Paper, the Commission was conscious that it must address a wide range of connected areas of law. These include: national regulatory issues (including planning matters and the appropriate regulatory structure for those involved in multi-unit developments), the legal structures associated with multi-unit developments (in particular the role of management companies), consumer protection issues (including the protection of consumers at purchase and protecting their long-term investment in an apartment complex) and general land ownership and conveyancing issues. At the level of the developer and the purchaser, there has been considerable public debate on the role of management companies, and the Commission makes a number of recommendations in this area.

This Paper makes provisional recommendations on a broad range of issues which, the Commission believes, impact directly on multi-unit developments. Among other subjects, the status in company law of management companies, the introduction of further guidance and protection for consumers and the potential regulation of the sector are all analysed and provisional conclusions are reached. The object of the Paper is also to further the debate surrounding multi-unit developments and, in this context, the Commission has, at this stage, made no provisional recommendations, but rather welcomes submissions on some of the issues addressed.

Submissions on the provisional recommendations included and all issues in this paper are welcome. In order that the Commission's Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by email to the Commission by 30 April 2007.

Privity of Contract: Third Party Rights
Consultation Paper (LRC CP 40-2006)
November 2006

http://www.lawreform.ie/Consultation%20Paper%20Nov%2006.pdf

This is the first time the rights of third parties in relation to privity of contract have been examined in the State with a view to its reform. This Consultation Paper is concerned with identifying the role of privity of contract in the modern law of contract and analysing whether the needs of those affected by privity would be best served by its reform.

The Paper highlights the problems that have been encountered in practice as a result of privity. The Commission focuses on a number of key areas, such as construction contracts, shipping contracts, insurance contracts, consumer law and exemption clauses and provisionally recommends that the rule of privity be reformed to allow third parties to enforce rights under contracts made for their benefit. The Commission provisionally recommends that the development of third party contractual rights should take the form of legislation, which is most suited to address the injustices and inconveniences associated with the current privity of contract rule. The Commission discusses the test of enforceability; identification of the third party; the rights of the parties to vary the terms of the contract; and the separate and distinct rights of the parties involved in a contract.

The Commission welcomes submissions on this paper, by post or email, by March 31st 2007.

Legitimate Defence
Consultation Paper (LRC CP 40-2006)
November 2006
http://www.lawreform.ie/CP%20Legitimate%20Defence-%20Final%20Document.pdf

This Consultation Paper addresses the law relating to the criminal defence of legitimate defence in the context of homicide. Legitimate defence is the lawful killing of another person in response to a threat to "private" or "public" interests. "Private defence" covers the use of force for the protection of the person or of property. "Public defence" covers the use of force for the prevention of crime or to effect arrests. It is the fourth in a series

of papers intended to provide a comprehensive review of the law of homicide in this jurisdiction with the eventual aim of codification.

One of the values underpinning codification is the principle of legality. As noted in the *Report of the Expert Group on Codification*, the general principles of criminal liability need to be defined in a manner compatible with the principle of legality and "citizens are entitled to clear notice as to what the law expects of them and to be given a fair opportunity to act in conformity with its provisions." In particular, the justification defences, which permit the use of force (particularly lethal force), should be comprehensively defined since they seek to set out the limits of what a citizen may and may not lawfully do. The approach adopted in this paper is to carry out a comprehensive and systematic review of the law as it operates in Ireland and in other common law jurisdictions.

The essence of the legitimate defence can be summarised as a defender's response to a threat from an attacker. Thus, any assessment of the liability will involve a two-stage test, namely:

- Was the nature of the threat such as to permit a lethal defensive response?
- Was the response warranted?

Each stage of the test can be further divided into a series of sub-issues. Under the threat stage of test, three primary questions arise:

- Is the threatened interest of sufficient importance to warrant a lethal response? (The Threshold requirement)
- Is the threat imminent? (The Imminence requirement)
- Is the threat unlawful? (The Unlawfulness requirement)

Under the response stage of the test, two primary questions arise:

- Is the use of lethal force necessary to protect the threatened interest? (The Necessity Requirement)
- Is the use of lethal force proportionate to the level of harm threatened? (The Proportionality requirement)

The recommendations are as follows. The Commission recommends that a minimum threshold requirement should be imposed on the use of private lethal defensive force and that it may not be used in defence of personal property. However, it does not recommend that any upper limit be placed on the force that may be used to defend one's dwelling house. In relation to law enforcement, it is recommended that a prison guard should be entitled to assume that every escaping prisoner is dangerous and consequently resort to lethal force where all the other requirements for legitimate defence are met, unless they are aware that the escapee is not in fact dangerous. In effecting arrests and preventing crime, the power to use lethal defensive force should be restricted to law enforcement officers alone. Lethal force with regard to fleeing suspects should be prohibited except where the arrestee is suspected of an "arrestable offence" or it is necessary to protect a person from an imminent threat of death or serious injury.

Further, the Commission recommends that the imminence requirement should be retained. Also, unlawful arrests should be dealt with under the general rubric of self defence and not accorded special treatment. Therefore, a person should be entitled to resist an unlawful arrest which the person realises is unlawful or a lawful arrest which the arrestee believes and a reasonable person would believe due to a mistake is unlawful. The Commission recommends that the lack of capacity cases and the mistaken attacker cases be subject to the unlawfulness rule and is committed to conceptually reconciling these cases with the unlawfulness requirement, rather than providing for them in specific exceptions. The Commission invites submissions on how this may best be achieved.

It is recommended that innocent defenders may only resort to lethal defensive force in response to a threat where they are unable to retreat with complete safety from that threat. Public defenders should not be required to retreat from a threat in any instance and a defender should not be required to retreat from an attack in her dwelling home even if she could do so with complete safety. All occupants of dwelling houses should be entitled to the benefit of this doctrine. The Commission recommends that a person, who has provoked or initiated the

conflict which is threatening his safety, is only entitled to use lethal defensive force in the face of a disproportionate response from the original victim and where he is unable to retreat in complete safety.

The Commission recommends that proportionality should be clearly and concisely dealt with by legislation. The Commission recommends the adoption of the dual model of reform, which would comprise both separate justification and excuse-based defences. Finally, the Commission recommends that a mistaken defender who uses lethal force as a result of an honest but unreasonable mistake, whether of law or of fact, in respect of any of the elements of the test for legitimate defence, shall be guilty of manslaughter as opposed to murder.

Submissions on the provisional recommendations made in this paper are welcome by 30 April 2007.

Report: Charitable Trusts and Legal Structures for Charities
(LRC 80-2006)
October 2006
http://www.lawreform.ie/Charities%20Report%20Final%2016%20October%202006.pdf

The Commission's Second Programme of Law Reform 2000-2007 includes the law of trusts and charities. This Report follows two Consultation Papers – on Charitable Trust Law and on Legal Structures for Charities – published in 2005 by the Commission. There is currently no definition of a "charity" as such; they are identified and defined by reference to their "charitable purposes." The draft Charities Bill 2006 proposes to introduce a clear statutory definition of "charitable purposes" and "charity."

The recommendations made in this Report may be summarised as follows. The Commission recommends that a minimum of three trustees be required to act for a charitable trust or three officers in the case of an unincorporated association. The Commission recommends that, where a corporate trustee acts as sole trustee, there should be at least three directors on the board of directors. If the numbers fall below three and the person or persons having power to appoint new charity trustees are unable

or unwilling to do so, the Charities Regulator should have power to appoint additional trustees to bring the numbers back up to the statutory minimum.

In relation to legal structures for charities, the Commission recommends the introduction of a new form of legal structure for charities, to be called the Charitable Incorporated Organisation (CIO). The CIO should be governed by the new charity legislation, not by company law, and should be subject to regulation solely by the Charities Regulator. It should be incorporated in the forthcoming Charities Bill and should solely be confined to charities. The commencement of the relevant provisions dealing with CIOs could be postponed to allow the new Charities Regulator an opportunity to become established. The Commission goes on to recommend a legislative scheme for the CIO and states that existing charitable trusts, unincorporated associations or industrial and provident societies should be given the option of converting to the proposed CIO structure. The conversion should be capable of being achieved in a simple, cost-effective manner, consistent with the general purposes of the Charities Bill which will follow from the publication of the draft Charities Bill 2006. The structure should be an additional option for incorporated charities and other existing methods of incorporation should continue to be available.

Report: Prosecution Appeals and Pre-Trial Hearings
(LRC 81-2006)
November 2006
http://www.lawreform.ie/REPORT%20Prosecution%20Appeals%20FINAL%20VERSION%20-%2020.11.06.pdf

This Report examines two types of prosecution appeal: prosecution appeals in cases brought on indictment and prosecution appeals against unduly lenient sentences in the District Court. In the current system, in a case brought on indictment, the convicted person is the only party allowed to appeal the verdict with a view to having it overturned. Since the passing of the Criminal Procedure Act 1967, the prosecution may appeal against certain rulings made in a case that result in an

acquittal, but this appeal is "without prejudice" to the acquittal. Even if the appellate court rules that the trial court erred in law, the acquittal still stands. In the case of prosecutions in the District Court, the same general rule applies, subject to certain exceptions. There is also a more general right of appeal on points of law to the High Court using the "case stated" procedure.

Chapter 1 of this Report involves an examination of the underlying purpose of appeals in criminal cases. The Commission acknowledges that the public have an interest in ensuring fair outcomes from the criminal process, whether in terms of the verdict or the sentence imposed. However, the public interest also lies in the safeguarding of accuseds' rights and the right to a fair trial. The accused person's right to a fair trial is not in conflict with the community's interest in having criminal matters prosecuted. The community has no constitutional interest in a prosecution and trial that is not fair or is otherwise in breach of the Constitution. However, as the law currently stands, the prosecution's right of appeal are clearly more limited than those of the convicted person.

When the Commission published its Consultation Paper in 2002, its primary focus was the extension of the very limited form of "without prejudice" appeal, which was then available under the 1967 Act. In preparing this Report, the Commission has reiterated this as its key point of reference. As Chapter 2 of the Report notes, the Criminal Justice Act 2006 has now extended the range of "without prejudice" appeals along the lines contemplated in the 2002 Consultation Paper. In this Report, the Commission welcomes the enactment of these changes, which it considers will assist in achieving the aim of preventing future errors in trial rulings and consequently enhance the reliability of verdicts.

In light of the enactment of the Criminal Justice Act 2006, the Commission notes that the question of "without prejudice" appeals has largely been dealt with, so that the only remaining question is whether "with prejudice" appeals should be introduced, which would mandate a change to long-established criminal procedure. Furthermore, the Commission notes that serious questions arise as to whether a retrial after an acquittal by a jury that considered the case in full and on its merits would be consistent with the right to a fair trial in Article 38 of the

Constitution, though, as the Report makes clear, this point remains unresolved.

In Chapter 1, the Commission examines the principles underpinning its consideration of prosecution appeals. The Commission makes it clear that it is not recommending the introduction of "with prejudice" appeals, whether they are immediate or whether they take the form of "fresh evidence" prosecution appeals. The Commission considers that it is appropriate to allow the changes introduced by the Criminal Justice Act 2006 to "without prejudice" appeals by the prosecution to take effect and to examine how these work in practice. The Commission is aware that this complex policy matter will be addressed by the Balance in the Criminal Law Review Group established by the Minister for Justice, Equality and Law Reform in October 2006.

The Commission considers that any future debate on the desirability of "with prejudice" prosecution appeals should take account of the operation of the extended avenues of "without prejudice" prosecution appeals under the 2006 Act and the Commission's recommendations regarding a pre-trial questionnaire, in conjunction with any deliberations of the Balance in the Criminal Law Review Group.

In the context of summary prosecutions in the District Court, dealt with in Chapter 3, the Commission acknowledges that the issue of prosecution appeals in summary matters must be examined against a somewhat different constitutional and statutory background. Thus, it has been definitively decided that prosecution appeals on points of law against summary acquittal are not unconstitutional. The Commission agrees that, in principle, serious errors in sentence at District Court level should be subject to review, but has concluded that, given the absence of an evidence based problem and the lack of information on sentencing, it is not appropriate at present to confer a power on the prosecution to appeal District Court sentences. Nevertheless, the Commission considers that it is appropriate to consider the question of prosecution appeals in the wider context of possible procedural reforms, including, for example, the role of prosecuting counsel in assisting the trial court and the development of a sentencing information system.

In Chapter 4, the Commission examines the current pre-trial procedures in cases brought on indictment. These include cooperative case management arrangements, which have led to improved focus on central issues and the avoidance of unnecessary delays. Nonetheless, the Commission is conscious that there have been many recommendations to introduce mandatory pre-trial hearings which might prevent lengthy "trials-within-a-trial" in which the admissibility of evidence is discussed. The Commission examines these proposals and developments in other jurisdictions where mandatory pre-trial hearings have been introduced. The Commission recommends that consideration be given to further case management reforms, including a pre-trial questionnaire.

Report: Rights and Duties of Cohabitants
(LRC 82-2006)
December 2006
http://www.lawreform.ie/Cohabitants%20Report%20Dec%201st%202006.pdf

Cohabitation increased in this jurisdiction by 125% between 1996 and 2002 and is likely to continue to increase at some level. The Commission feels that the current legal framework does not reflect this social reality.

The outline of the report is as follows. Chapter 1 discusses the policy considerations that underlie its approach to the development of a legal framework concerning cohabitants. It examines the demographic pattern concerning cohabitation both in Ireland and in other jurisdictions. Against this background, the concept of family life as interpreted under the Irish Constitution and the European Convention on Human Rights is examined. In Ireland, recognition of cohabitation has been taking place in specific areas. However, the rationale for recognition is not always clear. The Commission discusses its underlying principles for reform and the varying models that can be relied on, such as the status model/registration, contract model/private arrangements and redress model/safety net systems. The Commission considers it appropriate to have a "tiered approach" in which each of these models can play a part. The Commission believes that the redress

model and contract model could form part of a wider reform process, which, rather than being mutually exclusive, would co-exist with, and yet would operate separately from, marriage and any form of registration introduced. The redress and contract models seek to address those couples who have not opted in for any form of public registration.

Chapter 2 defines a cohabitant, for the purposes of reform, as couples living together in an intimate relationship, whether same-sex or opposite-sex.

In the Consultation Paper, the Commission highlighted in general terms the need to separate issues, such as domestic violence and health care, from others, such as property-based entitlements. Chapter 2 suggests that, in framing a legislative scheme, it may not be possible to have a single eligibility criterion that would apply across all these diverse areas. For example, in terms of protection from physical harm, orders to prevent domestic violence should not depend on a minimum three-year cohabitation period. In essence, the existence of the relationship can be sufficient to attract legal protection. Others, like the granting of, for example, an application for a property adjustment order, should be contingent on certain requirements, such as a minimum cohabitation period and proof of economic dependency.

Chapter 2 also sets out the eligibility criteria to be established before an application will be heard under the redress model. The Commission suggests a "qualified cohabitant" is a cohabitant who has been living with his or her partner for three years, or two years where there is a child of the relationship. In conjunction with a number of factors, the concept of household and co-residence is discussed as a means of establishing cohabitation. In the Consultation Paper, the Commission stated an application could not be heard where one or both of the parties are still married to another person. On further analysis, the Commission believes the constitutional reasoning for debarring an application on this basis is not justified. Rather than creating a parallel institution to marriage, the redress model aims to act as a safety-net system for cohabitants who are in a vulnerable position on termination of the relationship. The existence of a marriage may affect an applicant in establishing the existence of

cohabitation and the marriage will be a factor taken into consideration by the court. However, the Commission considers that it should not preclude an application from being made.

Chapter 3 discusses the contract model and its role within the reform process. Under this model, the parties choose the terms of a contract directly, by cohabitation agreements, and indirectly, by making co-ownership agreements and wills. The contract model aims to recognise and respect people's right to arrange their financial affairs without court intervention. The enforceability of cohabitation agreements and the relevance of the decision in *Ennis v. Butterly* [1996] 1 I.R. 426 are discussed. The Commission believes safeguards are needed to ensure parties are fully informed and are aware of the consequences of entering cohabitation agreements. For this reason, specific formalities are required. Chapter 3 also examines the use of co-ownership agreements as a means of arranging couples' property affairs. The Commission believes the area of taxation indirectly relates to the making of agreements under the contract model and impacts on the difficulties that arise for cohabitants in the transfer of property. Save in a few contexts, the law treats cohabitants as strangers for the purposes of the taxation code. For this reason, the Commission discusses possible relief for some cohabitants under Capital Acquisitions Tax and Stamp Duty.

In recent years, general recognition has been extended to cohabitants. However, the use of the term "husband and wife" in legislation has limited its recognition to opposite-sex cohabitants. In addition, restrictive criteria exist (e.g., in domestic violence legislation) before a cohabitant will be granted protection. Moreover, its recognition is restricted to a few contexts. Chapter 4 examines areas where general recognition should be extended to cohabitants, such as in social welfare, tenancies, domestic violence and health care.

Chapter 5 examines the position of a cohabitant on death of a partner. Where inadequate or no provision is made by a will for a surviving cohabitant, or where there is no will, the redress model will operate as a safety net and extend a limited discretionary remedy to cohabitants. Chapter 6 examines the position of cohabitants on breakdown of the relationship before an application will be heard by the court. The Commission

proposes that a "cohabitant" or "qualified cohabitant" must prove the existence of "economic dependency" on making an application for an order of ancillary relief. Such orders include property adjustment orders, maintenance orders and pension adjustment or pension splitting orders.

Chapter 7 examines some practical and procedural issues relating to reform in this area. The issue of retrospectivity and its impact on legislative reform in this area is examined. Additionally, extension of the *in camera* rule to hearings involving cohabitants is discussed.

Report: Vulnerable Adults and the Law
(LRC 83 - 2006)
December 2006
http://www.lawreform.ie/Vulnerable%20Adults%20Report%20Final%20Dec%202006.pdf

The Second Programme includes the heading, 'Vulnerable Groups and the Law', under which two related topics are listed: first, the law as it affects older people; and second, the law affecting persons with physical, mental or learning disabilities. In June 2003, the Commission published a *Consultation Paper on Law and the Elderly* which made provisional recommendations concerning legal mechanisms for the protection of older people under a number of specific headings. It also set out the Commission's proposed framework for a new decision-making structure – Guardianship – to replace the current Wards of Court structure, which is based primarily on the Lunacy Regulation (Ireland) Act 1871. In May 2005, the Commission published its *Consultation Paper on Vulnerable Adults and the Law: Capacity*. This second Consultation Paper provisionally recommended the enactment of new capacity legislation in order to create clear rules on legal capacity which could apply to a wide range of decisions. The Commission also concluded that its proposed capacity legislation would be the appropriate context for establishing the new Guardianship system.

This Report brings together the related issues dealt with in these two Consultation Papers. In broad terms, the Report can be

divided into two parts: first, reform of the law on mental capacity, and second, the establishment of a new Guardianship structure. At this general level, the Report mirrors the approach in the two Consultation Papers, but the final detailed recommendations made in this Report diverge in a number of respects from those in the Consultation Papers, taking into account the many submissions received and further reflection by the Commission.

The Appendix to the Report contains draft legislation.

E. Manitoba

Report: Development Schemes
Report # 113
June 2006
http://www.gov.mb.ca/justice/mlrc/pubs/113.html

The Manitoba Law Reform Commission, in this report, considers amendments to The Real Property Act (the RPA) to make it easier to create and record a development scheme on title of land (traditionally called a common building scheme). A development scheme is established when agreements between a vendor and the respective purchasers of lots, which contain building restrictions, are recorded on title. The difficulties with this approach are that it is inconvenient for the vendor and also limits the effect of the scheme, potentially frustrating the reasonable expectations of purchasers. In Manitoba, section 76 of the RPA allows an owner of land to create party wall obligations, easements and rights-of-way unilaterally and the report considers whether the same privileges should be extended to development schemes.

It is the Commission's view that allowing owners of land to create and record a development scheme by unilateral declaration, as well by agreement, serves the dual purpose of facilitating economic activity involving land and protecting the reasonable expectations of purchasers. The Commission, therefore, recommends the addition to the RPA of a provision similar to section 76 and modelled on British Columbia's statutory building scheme provisions.

The Commission does not recommend a complete codification of the general law relating to development schemes in light of the complexity of the law. Instead, it suggests the incorporation of key elements into the legislation with modifications appropriate to modern circumstances. A development scheme must clearly identify all lands included or exempted from the restrictions and these lands must be reasonably proximate to each other. The restrictions in the scheme must be negative in effect, be set out in clear language and apply uniformly and consistently to the affected lands. Lastly, the instrument creating the scheme must state that the restrictions are intended to attach to and run with the land.

The Commission makes two broad recommendations for reform of the general law. First, that a developer should not be permitted to exempt unsold lots from the application of the scheme as doing so would defeat the reasonable expectation of purchasers. Second, that the common vendor rule, which no longer applies in England, should be expressly abrogated. This would allow continuation of a scheme despite a change of vendor and would allow a group of owners to create a scheme for their mutual benefit. The Commission, while noting the harshness of the existing law and the desirability of reform in this area, does not recommend any change to the rules relating to positive covenants as such reform requires extensive study and careful consideration.

The Commission also recommends certain formal prerequisites to recording of the scheme on title. A development scheme should meet such formal requirements as are determined by the district registrar and should be executed in accordance with section 72(1) of the RPA. In order to provide assistance to drafters, the district registrar should create a statutory form, similar to that used in British Columbia, but its use should not be made mandatory. A scheme must affect at least two separate parcels of land which are registered under the RPA and are clearly identified by their legal description. It must contain one or more restrictions which appear to be negative in effect and must also clearly state that the restrictions attach to and run with the land. Finally, all persons whose names appear on the register as

having a claim or interest before the date of the development scheme instrument must consent to its registration on title.

In respect of the termination or variation of a development scheme, the Commission recommends that this be executed in the same way that a building restriction may be: by unanimous agreement or by order of the Manitoba Municipal Board. Although it does not agree with the automatic expiry of such schemes after 50 years, for the sake of consistency, the Commission does not recommend a different rule for development schemes. Finally, the Commission recommends minor amendments to ensure that provisions affecting building restrictions or restrictive covenants also apply to development schemes, including survival following tax sale, mortgage sale or foreclosure proceedings, compatibility with municipal zoning by-laws and town planning schemes and exemptions from compliance for school boards.

The Report also contains draft legislation implementing the recommendations of the Commission.

F. New Zealand

Report: Access to Court Records
Report NZLC R 93
August 2006
http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=119

This Report of the New Zealand Law Reform Commission has found that the current rules pertaining to access to court records are drawn from a variety of different sources and are not clear, consistent or comprehensive. The recommendations in the report provide a framework of principle upon which the law can rest and set out to produce as much clarity and consistency as possible. In accordance with the principle of open justice, the report recommends that there should be as much access to information as possible, except when there is good reason for not permitting access. It views the Official Information Act 1982, which was applied in the case of access to information within the executive branch of government, as being consistent with this idea and, accordingly, recommends that it be the legislative

foundation for access to court records. The Report acknowledges, however, that the courts exhibit unique features that must be taken into account and respected. Personal information and individual privacy must be adequately protected.

The Report proposes a Court Information Act with a presumption of accessibility to court information, and exceptions only where conclusive reasons pertain. Conclusive reasons for withholding information would include situations where allowing access would be likely to prejudice the maintenance of the law or endanger the security of New Zealand. Good reason for withholding information would also pertain where access would disclose a trade secret, unreasonably prejudice a commercial decision or compromise the privacy of natural persons. In addition, good reasons for withholding would also operate where the case file relates to a proceeding under listed statutes relating to Family Court, Youth Court, mental health matters, defamation proceedings or a property dispute arising out of an agreement to marry.

The Report also notes that access to information might be particularly sensitive at particular times or stages of a proceeding. Accordingly, it divides a judicial proceeding into four stages for the purposes of facilitating the withholding or releasing of information at appropriate times. The Report reiterates, however, that, in some cases, access to information should be withheld in all periods, especially in cases involving sensitive material about children or people with disabilities.

The Commission also recommends that the Court Information Act would provide for an automatic right of appeal, as well as further appeals to a higher court by leave. Furthermore, the Court Information Act should provide for a manner of dealing with *bona fide* researchers who require access to court information for reasons connected with public policy.

G. Queensland

Report: Wills – The Anti-Lapse Rule
http://www.qlrc.qld.gov.au/reports/r61.pdf

The effect of the anti-lapse rule is to modify the circumstances in which the doctrine of lapse applies. At common law, if a person is a beneficiary under a will, but does not survive the testator, the gift fails. This is known as the doctrine of lapse. The doctrine is said to be "founded on the view that a testator intends those who are named as beneficiaries under the will to take their benefits personally, so that if they predecease the testator their benefits pass back to the testator's estate and are said to lapse."

In four Australian jurisdictions (the Australian Capital Territory, the Northern Territory, Queensland and Victoria), the survivorship requirement that forms the basis of the doctrine of lapse has been extended by statute. As a result, it is no longer sufficient that a beneficiary simply survive the testator. The beneficiary must survive the testator for a period of 30 days, failing which the disposition takes effect as if the beneficiary died before the testator.

The Uniform Succession Laws Project, which is an initiative of the Standing Committee of Attorneys General, is being undertaken by the National Committee for Uniform Succession Laws. At the outset of the project, the National Committee decided that the project would be divided into four stages: wills, family provision, administration of estates and intestacy.

In December 1997, the National Committee provided its final report on the law of wills to the Standing Committee of Attorneys General. That Report contained the National Committee's recommendations for uniform wills legislation for the Australian states and territories, together with model legislation that gave effect to the National Committee's recommendations.

Since completing its work on the law of wills, the National Committee has identified a problem with the drafting of the provision in the model wills legislation that deals with the anti-lapse rule.

The purpose of this Report is to explain the nature of the problem and to recommend a new model provision that can be implemented in the Australian states and territories. Chapter 2 briefly outlines the doctrine of lapse and the purpose of including

an anti-lapse provision in wills legislation. Chapter 3 explains the problem with the National Committee's original model anti-lapse provision and proposes a new provision to avoid this problem.

Public Justice, Private Lives
Companion Paper
July 2006
http://www.qlrc.qld.gov.au/wpapers/WP61.pdf

Queensland has two laws about guardianship: the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998. The guardianship laws apply to adults (people 18 years or older) with impaired capacity. The Attorney General has asked the Queensland Law Reform Commission to review the guardianship laws.

The Commission is currently undertaking stage one of its review on the issue of confidentiality. There are five main themes. The first four relate to the Guardianship and Administration Tribunal. The last one relates to a general duty of confidentiality imposed on people involved in the guardianship system.

1. Under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing?
2. Under what circumstances, if any, should the Tribunal be able to stop a person involved in the proceeding from seeing documents that the Tribunal is considering?
3. Under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in the proceeding?
4. To what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings?
5. Apart from the situations referred to in questions 1 to 4 (which deal with Tribunal proceedings), are there other circumstances in which information that is revealed within the guardianship system should be required to be kept confidential?

The Commission, which is independent of the Queensland Government, will report to the Attorney General in three stages. The Commission's final guardianship report is due in December 2008.