

RECENT PUBLICATIONS BY LAW REFORM BODIES WORLDWIDE

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A. Australia

Review of Australian Privacy Law

Discussion Paper (DP 72)

September 2007

<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>

On 12 September 2007, the Australian Law Reform Commission (ALRC) released Discussion Paper 72, *Review of Australian Privacy Law*. This Paper advances a blueprint for the consolidation of Australia's privacy laws and practices which, at present, consist of a complex amalgam of principles and guidelines. Private organisations and government agencies allude to different principles under the federal Privacy Act, 1988 and each state and territory has its own privacy laws or guidelines. In addition, some states and territories have separate legislation on privacy in the context of health. This Paper makes a total of 301 proposals for reform of the law in this area.

The Commission proposes a single set of privacy principles for information-handling across all sectors, and all levels of government. It is contended that a single set of privacy principles will simplify the system, making it easier for individuals to identify and understand their rights, and also make it less financially burdensome for organisations to comply with the system. The Commission proposes that government agencies or companies who transfer personal information overseas without consent should remain responsible for any breach of privacy that occurs as a consequence of the transfer. The Commission also proposes a new system of data breach notification: where there is

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a “real risk of serious harm” to an individual arising from unauthorised access to his information, the Commission proposes that the individual be notified of such a risk.

The Commission calls for the removal of the exemption for political parties from the Privacy Act, the introduction of a new statutory cause of action where an individual’s reasonable expectation of privacy has been breached and the abolition of the fee for “silent” telephone numbers. Other proposals for reform include the expansion of the enforcement powers of the Privacy Commissioner, the imposition of civil penalties for serious breaches of the Act and the introduction of a more comprehensive system of credit reporting. The ALRC is currently seeking community feedback on these proposals. It is intended to complete a final report and recommendations by March 2008. Submissions close on 7 December 2007.

B. British Columbia

Report on the Parental Support Obligation in Section 90 of the Family Relations Act

BCLI Report No. 48

March 2007

http://www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf

This Report recommends repeal of Section 90 of the Family Relations Act – a provision that requires adult children to support their dependent parents in their old age – which, in the view of the Commission, has outlived its usefulness. While such repeal may not be of great urgency at present, demographic trends would suggest that Section 90 will be availed of more regularly – with all of the concerns that that may entail – in the near future. Section 90 has its origins in government policy in the 1920s and 30s where the State wished to reduce the burden of social assistance. It is contended that the present legislation simply leads to frustration on the part of dependant parents in their old age, on their families and on the court system.

Among the chief arguments against Section 90 is that parental support laws are less efficient than direct state support of

the poor and that they disrupt family relations. Moreover, Section 90 does not sit easily with contemporary society.

C. England and Wales

Cohabitation: The Financial Consequences of Relationship Breakdown

LC 307

July 2007

<http://www.lawcom.gov.uk/docs/lc307.pdf>

The Report makes recommendations to Parliament on the law relating to cohabitants, the most significant of which is that cohabitants should not be given the same rights as married couples or civil partners in the event of relationship breakdown. After reviewing the state of the present law – and noting the common misperceptions thereof – the Commission concludes that, while some cohabiting couples exhibit the same levels of commitment and interdependence as married couples, there is too broad a range to grant cohabiting couples the same rights. Moreover, cohabiting couples have not made the same levels of legal and public commitments that marriage necessarily entails.

Instead, the Report provides a scheme entirely distinct from that which applies between spouses on divorce, which would account for the rights and financial well-being of the individual cohabitants and their children. Unlike in cases of divorce, cohabitants would not be expected to meet each other's future financial needs by means of maintenance payments and there would not be a requirement that assets be shared equally. The scheme would have important eligibility requirements and would not undermine the institution of marriage.

D. Hong Kong

Enduring Powers of Attorney

Consultation Paper

April 2007

<http://www.hkreform.gov.hk/en/publications/epa.htm>

The Law Reform Commission published a consultation paper seeking the public's views on proposals to simplify the requirements for executing an enduring power of attorney. A power of attorney is a legal instrument that is used to delegate legal authority to another. A conventional power of attorney can only be made by a person who is mentally competent, and any such power of attorney will lapse if the donor subsequently becomes mentally incompetent. The consultation paper presents two options for change of the present law. First, it proposes to remove the requirement for a medical witness. Secondly, it proposes to retain the requirement, but to allow a doctor and a solicitor to sign the Enduring Powers of Attorney (EPA) at different times. Furthermore, the consultation paper seeks views as to whether consideration should be given to extending the possible scope of an EPA to include decisions about the donor's personal care, and whether the existing statutory form of EPA should be simplified. The consultation paper contains a suggested draft of a simplified form.

Report: Conditional Fees

July 2007

<http://www.hkreform.gov.hk/en/publications/rconditional.htm>

Conditional fees are a form of “no-win, no fee” arrangement. If the case is unsuccessful, the lawyer will charge no fees. If successful in the proceedings, the lawyer charges his normal fees plus a percentage “uplift” on the normal fees. At present, conditional fees, like other forms of “no win, no fee” arrangements, are unlawful. The restriction has its origins in the ancient common law crime and tort of champerty and maintenance.

The Law Reform Commission report recognises that conditional fees can enhance access to justice to a significant proportion of the community who are currently neither eligible for legal aid nor able to fund litigation themselves. However, a successful conditional fees regime requires that insurance to cover the opponent's legal costs, should the legal action fail, would be affordable and available on a long-term basis. Given that this is not sustainable in Hong Kong the report ultimately

concludes that conditions are not appropriate at present for the introduction of conditional fees.

Given the widespread support on consultation for the expansion of the Supplementary Legal Aid Scheme, the report recommends that the Government should increase the financial eligibility limits of the Supplementary Legal Aid Scheme, as well as expanding the types of cases covered by the scheme.

The report further recommends the setting up of a Conditional Legal Aid Fund to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful.

E. Ireland

Consolidation and Reform of the Courts Acts

Consultation Paper (LRC CP 46-2007)

July 2007

<http://www.lawreform.ie/Courts%20Acts%20CP%20Final%20Printers.pdf>

In 2005, the Law Reform Commission, the Courts Service and the Department for Justice, Equality and Law Reform began a joint project to consolidate, with reforms, the jurisdiction of the courts in a single Courts Act. The overarching objective of this project is the development of a new, codified Courts Act. The Commission sets out the contextual background for the Paper, providing an overview of previous proposals for reform of the jurisdiction of the courts. The history of the jurisdiction and development of the court system in Ireland is explored, concluding that the present day court system is firmly rooted in the 19th and 20th century. The Commission sets out eight separate issues pertinent to the jurisdiction of the courts and the Courts Acts in general, examining each of these issues separately and making recommendations where appropriate. The eight issues considered by the Commission are:

- the “case stated” procedure;
- the *in camera* rule and proceedings heard in private;

- fixed charge penalties and the removal of court jurisdiction in some areas;
- appeals in civil and criminal matters;
- increase in the general monetary limits in the civil jurisdiction of the District Court and Circuit Court;
- the rules of courts committees;
- the right to choose a specific court of trial in a trial on indictment (the “right of election”);
- the allocation of cases between the Circuit Criminal Court and the Central Criminal Court in criminal matters.

The Paper provides a comprehensive analysis of the experiences and approaches of other jurisdictions and advances a blueprint for a modern consolidated Courts Act. The Commission’s Working Draft of a consolidated Courts Bill is annexed to the Paper. The draft Bill integrates the text of existing legislative provisions concerning the jurisdiction of the courts, including some pre-1922 provisions, as well as appurtenant commentary on the statutory source for the text of each section. The draft Bill also contains a number of commentaries on individual sections of the Bill itself.

While the draft Bill reproduces the text of existing provisions in Courts Acts, according to the Commission, the commentary accompanying specific sections makes it apparent that many of these provisions would require revision, even if the core of their content was to be reiterated in a new Courts Act. Notably, the draft Bill does not emulate the Commission’s provisional recommendations. The purpose of producing the draft Bill in this form is to furnish interested parties with an illustration of what a consolidated Courts Bill might contain and to provoke comment on a full text draft of the existing provisions.

Statute Law Restatement

Consultation Paper (LRC CP 45-2007)

July 2007

<http://www.lawreform.ie/Restatement%20CP%20Final%20Printer%20Version.pdf>

In 2006, the Commission agreed to take over responsibility for the development of a Programme of Statute Law Restatement. Restatement, as provided for in the Statute Law Restatement Act, 2002, refers to the administrative consolidation of an Act, as amended subsequently, which is made available in printed electronic form in a single text and is certified by the Attorney General as an up-to-date statement of the Act in question, as amended. After certification, the Restatement must be laid before each House of the Oireachtas and it can then be published 21 sitting days later. Restatements may be likened to the notion of reprints and do not, therefore, involve any substantive changes to the law.

The Commission discusses the introduction of the Statute Law (Restatement) Act, 2002 and how its enactment dovetailed with the climate at that time – a climate of better regulation, which included the objective of making legislation more accessible. The Commission outlines how the development of a Programme of Statute Law Restatement will enhance its statutory mandate under the Law Reform Commissions Act, 1975 to keep the law under review. In terms of tidying up the Irish Statute Book, the Commission examines how the Restatement can supplement and reinforce the various other processes currently in operation in this state and internationally.

The Commission discusses the pre-1922 Acts Project carried out by the office of the Attorney General and elucidates some practical difficulties with regard to accessing the text of pre- and post-1922 Acts. The Commission considers comparable projects in other jurisdictions, including Australia, New Zealand and the United Kingdom, some of which have developed into *e*Legislation projects. The Commission considers its own role with regard to law reform generally, especially in light of the growth of the wider objective of Better Regulation.

The appropriate use of technology is crucial for the success of a Restatement programme. Specifically, the Commission discusses issues in relation to the future proofing or updating of Restatements, as well as issues of access, storage and maintenance. Generalities and specificities entailed in the preparation of a Programme of Statute Law Restatement are

outlined, including the inputs, work process and outputs involved and the principal issues identified are summarised.

Involuntary Manslaughter

Consultation Paper (LRC CP 44-2007)

March 2007

<http://www.lawreform.ie/Involunray%20Manslaughter%20Final%20D.pdf>

This Consultation Paper forms part of the Commission's *Second Programme of Law Reform 2000-2007* and follows on from the Commission's *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001). In this Paper, the Commission considers whether the existing construction of involuntary manslaughter should be preserved or whether its scope should be modified. This Paper also supplements previous work undertaken by the Commission on defences in the criminal law, specifically its *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003), *Consultation Paper on Duress and Necessity* (LRC CP 39-2006) and *Consultation Paper on Legitimate Defence* (LRC CP 41-2006). The objective of the Commission's work in this area is to lay the foundation for eventual codification of criminal law.

Involuntary manslaughter is comprised of two elements: unlawful and dangerous act manslaughter and gross negligence manslaughter. The Paper provides an overview of the historical distinction between murder, manslaughter and misadventure in Ireland and gives an account of the early development of unlawful and dangerous act manslaughter and gross negligence manslaughter. Manslaughter by unlawful and dangerous act (also known as constructive manslaughter) and judicial approaches to this type of manslaughter in Ireland, England and Australia are discussed. The Paper examines, in particular, judicial attempts to confine the scope of constructive manslaughter. Recent manslaughter by drug injection cases in England, issues of causation and both subjectivist and objectivist arguments in support of and against reform of the law in this area are examined.

The current law of gross negligence manslaughter in Ireland is outlined and developments in the early 20th century leading up to *The People (AG) v. Dunleavy* are discussed. The concept of “failure to perform a legal duty” is examined, as are duties arising due to blood relationships, duties arising outside the family setting, contractual duties and duties imposed by statute. The Commission considers the concept of voluntary assumption of duty and analyses duties owed by those possessing special skill and knowledge such as doctors. The distinction between negligence and inadvertence is discussed and the significance of the capacity of the accused is considered in relation to a finding of fault.

Manslaughter in the context of offences involving motor vehicles, specifically the offences of dangerous driving causing death and careless driving, is examined. The Commission discusses pertinent statutory provisions, case law and sentencing patterns in this state, as well as judicial ability to take account of the fact of death in careless driving cases. The Commission also examines legal standards and sentencing developments in England and Australia in relation to motor manslaughter and other statutory offences penalising bad driving causing death. Proposals for reform of the law of involuntary manslaughter are advanced and the Commission’s provisional recommendations summarised.

Aspects of Intercountry Adoption Law

Consultation Paper (LRC CP 43-2007)

March 2007

<http://www.lawreform.ie/Final%20Aspects%20of%20Intercountry%20Adoption%20Law%20Consultation%20Pa...pdf>

On 17 November 2005, the Attorney General requested that the Commission conduct an inquiry concerning the status and rights, including the citizenship rights, of a child resident outside the state who has been the subject of an intercountry adoption order made in favour of an Irish citizen or citizens living abroad. The Commission was also asked to consider the most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child and

the most effective means of ensuring the fulfilment of state duties in respect of such a child arising from Article 40.3 and Article 42.5 of the constitution.

This request was prompted by the High Court decision in *Attorney General v. Dowse* [2006] I.E.H.C. 64. The Adoption Act, 1991, amended by the Adoption Act, 1998, provides the current legislative basis for the recognition of intercountry or foreign adoptions. In 1998 the Commission recommended that the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* be ratified by the state. In this regard, the Commission notes that the Government's legislative programme published in January 2007 indicates that the Adoption (Hague Convention and Adoption Authority) Bill is scheduled for publication in 2007.

This Paper examines existing legislation in the context of the Hague Convention and its proposed incorporation into domestic law. The Commission provides a historical overview of intercountry adoption in Ireland and the international legal context in which international adoption takes place. The Adoption Act, 1991, as amended by the Adoption Act, 1998, is examined and the exact scope of the Attorney General's request is demarcated. The Commission elucidates a number of key principles guiding its consideration of intercountry adoption, including principles of equality and best interests. The decision in the *Attorney General v. Dowse* is discussed in detail. The revocability of adoption orders in Ireland and the relationship between adoption and citizenship law in Ireland and in other jurisdictions is examined, as is case law involving the rights of the child and the extra-territorial application of the Irish Constitution.

The Commission reiterates that the subject of the Consultation Paper is the adopted child who is not resident in the state. *Attorney General v. Dowse* is further examined against the background of the Hague Convention. The Commission discusses the most effective manner of ensuring the fulfilment of the duties of the state in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution and the role of the Attorney General in this regard. Certain procedural and other aspects of adoption law are considered, such as issues of authenticity with regard to

foreign adoption documentation, and the Commission's provisional recommendations are summarised.

Report: Spent Convictions

(LRC 84-2007)

July 2007

<http://www.lawreform.ie/Spent%20Convictions%20Report%20Final%20July%202007.pdf>

This Report forms part of the Commission's *Second Programme of Law Reform* and follows on from the Commission's preliminary examination of spent convictions regime in its *Consultation Paper on the Court Poor Box* (LRC CP 31-2004) and its *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005).

This Report explores the permanent nature of a criminal record for adult offenders in Ireland and the potential long term effects associated with this permanency, particularly in relation to future employment prospects and foreign travel. The Commission examines legislation introduced in other jurisdictions with the objective of countenancing some of these effects. The limited spent conviction scheme introduced in this State by section 258 of the Children Act, 2001 in respect of offences committed by persons under 18 years of age is considered and, subsequent to discussion on the general arguments for and against spent conviction laws, the Commission concludes by recommending the introduction of a spent conviction scheme for adult offenders in this state.

The Commission examines approaches taken to the introduction of spent conviction schemes in other jurisdictions, such as the United Kingdom, Australia, New Zealand and Canada. Spent convictions schemes in these jurisdictions are examined under a number of headings and the Commission recommends the introduction of a limited spent convictions scheme for adult offenders in Ireland. It is recommended that such a scheme should build on the existing regime in place for under-18 offenders in section 258 of the Children Act, 2001.

The Commission elucidates the various components of the proposed spent convictions scheme. The Commission also

considers the types of offences which should be excluded from such a scheme, the sentencing threshold which should apply and the requisite conviction-free period before which a conviction can be considered eligible for expungement. Whether or not such a system should be automatic or application-based and the circumstances in which the protection of the spent convictions legislation should not apply are discussed. The Commission deliberates on the nexus between a spent convictions regime and the issue of vetting or disclosure of criminal convictions for certain purposes.

The Commission examines the history of vetting in Ireland and its current operation. The Commission considers the operation of a vetting system in the context of a spent convictions regime and outlines proposals for reform of the operation of the vetting regime. A number of issues in relation to the issue of disclosure are discussed, such as the effect of the registration requirements for sex offenders and disclosure in the context of court proceedings. The draft Spent Convictions Bill contained in the Appendix gives effect to the Commission's recommendations. The Commission, acknowledging that the establishment of a spent convictions regime must be considered against a background of vetting and disclosure, expressly states that legislative reform in these areas is outside the scope of its remit.

F. Manitoba

Consultation Paper: Franchise Legislation

May 2007

http://www.gov.mb.ca/justice/mlrc/reports/2007-05franchise_legislation.pdf

A franchise is a contract between two businesses, in which the franchisor grants the franchisee the right to operate its business system in return for payment of fees and royalties. While franchising is an old phenomenon, it has become considerably more prevalent as a way of doing business.

The Paper was inspired by the fact that franchising is a growing and relatively unregulated field of business activity in

Manitoba and that there has been media attention focusing on the inequality between franchisors and franchisees.

It considers whether the regulation of franchises is desirable in Manitoba and provides an introduction to the history and various models of franchising, an overview of existing franchise regulation in Canada and other countries, and a comparison of the elements of Canadian legislative regimes. Finally, it asks whether franchise legislation is needed in Manitoba and, if so, what elements should be included in the legislation.

G. New South Wales

Report: Blind or Deaf Jurors

Report # 114

2006

http://www.lawlink.nsw.gov.au/lawlink/lrc/lr114_nsf/pages/LRC_r114toc

The Report enquires into whether persons with profound hearing or sight impairment should partake in jury service in New South Wales and, if so, under what circumstances. In undertaking the enquiry, the Commission had regard to The Anti-Discrimination Act, 1977 and the Disability Discrimination Act, 1992.

Among its conclusions, the Commission recommended that blind or deaf persons should not be precluded from jury service on the grounds of the disability alone. It also concluded that persons with such disabilities should be allowed exemptions from service. The Commission further recommended that the court should be entitled to stand aside a blind or deaf person, if, after ensuring that all reasonable adjustments are made, the court determines that the person is unable to discharge his or her duty in the circumstances.

The Report further recommends that guidelines should be developed for the provision of reasonable adjustments, including sign language interpreters, for use by deaf or blind jurors during the trial and deliberation.

Report: Uniform Succession Laws: Intestacy

Report 116

2007

http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r116toc

The Report, which was part of a broader enquiry undertaken in conjunction with the Queensland Law Reform Commission, examines the existing law and procedure in respect of succession and provides a model state and territories law on succession.

The Report notes that intestacy occurs quite frequently in Australia and arises typically where an old person has outlived his spouse and his children are not dependent. The Commission further notes that among the aims of the law on succession should be to make the rules simple, clear and certain, to carry out the presumed course of action that the intestate would have taken had he made a will and to account for the needs of the family members.

The Report makes forty-seven specific recommendations.

*H. New Zealand***Report: Search and Surveillance Powers**

Report NZLCR97

June 2007

http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_96_358_Part_1_R97%20part-1.pdf

This Report deals with the law pertaining to search and surveillance in New Zealand. The Report argues that the present law – contained in statutes which are 40 and 50 years old – is outdated, piecemeal and messy. Very often the law is the consequence of “the accident of legislative history.”

Non-police agencies, for example, have more far-reaching powers in certain important instances for no apparent reason. Similarly, in many instances, the law is not specific and does not give a clear indication of what the police can and can't do; far too much is left to discretion and individual police judgement.

Moreover, the law has not kept pace with the massive technological advances of recent times preventing the police from fighting high level organised crime which has become highly sophisticated. This is particularly the case in respect of electronic information, which leads to the loss of much valuable evidence needed to prosecute and convict offenders. In respect of surveillance, a visual device warrant scheme is required in a liberal society in order to keep a proper balance between effective law enforcement and civil liberties.

The Commission makes an array of suggestions in respect of the rules governing search and surveillance and argues that it should all be brought together in a single generic statute.

Further Reform of Habeas Corpus Procedure

Draft Study Paper NZLC SP18

August 2007

http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_133_359_SP18.pdf

Though the right of persons arrested or detained to apply for a habeas corpus are enshrined in the New Zealand Bill of Rights Act, 1990 and the Habeas Corpus Act, 2001, some relatively minor practical difficulties remain. For example, some applicants abuse the procedure whereby a priority hearing is required by law on a matter that should or certainly could be filed under another procedure, such as judicial review.

The Law Commission makes a number of practical recommendations for amendments to the 2001 Act. First, it recommends the repeal of the provision that applications and appeals take precedence over other court business. It further suggests that provisions be included to allow for High Court judges to relax the three day time frame and a right of appeal only where a writ of habeas corpus has been granted, but making it clear that a return to custody is not required. Furthermore, powers for High Court judges to transfer cases to the Family Court prior to the determination of habeas corpus applications and to convene telephone hearings where it would expedite the matter are recommended.

The Law Commission is seeking submissions before finalising its Paper.

I. South Africa

Review of the Interpretation Act

Discussion Paper 112

September 2006

http://www.doj.gov.za/salrc/dpapers/dp112_interpretation/summary%20&%20index.pdf

The Report notes that the Interpretation Act, 1957 is incongruous with both the current constitutional dispensation and the principles of drafting and interpretation which the legislature and the courts have adopted since 1994. The Report recommends that the new Act be called The Interpretation of Legislation Act to avoid confusion. It will govern all types and categories of legislation.

In respect of consistency with the Constitution, the Commission recommends that the supremacy of the Constitution is paramount; that the spirit and objects of the Bill of Rights must be promoted; and that any reasonable interpretation consistent with the Constitution must be preferred over any alternative that is not.

The Report makes an array of other recommendations, including that interpretation should take account of changing circumstances.

J. Victoria

Assisted Reproductive Technology and Adoption

Final Report

March 2007

[http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/\\$file/ART%20&%20Adoption%20Report%20FINAL.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/ART%20&%20Adoption%20Report%20FINAL.pdf)

This Report, published in March 2007, is the culmination of the Commission's work on assisted reproductive technology

and adoption. The report follows on from three 2005 Commission publications on issues of access to reproductive services, parentage and surrogacy. In this Final Report, the Commission makes a total of 130 recommendations designed to meet the needs of children born as a result of assisted reproductive technology and to provide a robust framework with the capacity to accommodate future technological and social change.

The Commission makes recommendations on a wide range of issues, including the release of donor information, access to treatment clinics, self-insemination, parental recognition, adoption, surrogacy and sex selection. The Commission advocates a new approach to regulation, elucidating a number of principles which should guide future regulatory developments in this area, including the best interests of child and the protection of the health and wellbeing of those receiving treatment.