RECENT PUBLICATIONS BY LAW REFORM BODIES WORLDWIDE

COMPILED BY
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A. Australia

Privilege in Perspective: Client Legal Privilege in Federal Investigations
Final Report (ALRC 107)
December 2007
http://www.austlii.edu.au/au/other/alrc/publications/reports/107

This Report combines the conceptual issues surrounding client legal privilege with the practice of federal investigative bodies as discussed in an earlier Discussion Paper (DP 73) produced by the Commission. The Report also contains a number of recommendations for reform of the current legal framework, taking into account the views of various parties involved in the investigative process. It was commissioned by the Attorney General in the context of the rapidly increasing number of federal agencies with investigative powers which have been operating in Australia in recent years. The Report also affirms that the doctrine of client legal privilege remains a fundamental principle of the common law, and that insofar as problems have occurred in relation to claims of client legal privilege, these lie broadly in the area of practice and procedure rather than rationale.

The main recommendation of this Report is that the Federal Australian parliament should enact legislation of general application to protect client legal privilege claims in federal investigations, where federal bodies use coercive information-gathering powers. The Commission recommends that any new legislation should clearly set out the situations where client legal

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privilege can be modified or abrogated. Since Australia is a federal legal system, the Commission also recommends that the Attorney General of Australia would initiate a process to encourage all states and territories within Australia to enact legislation in accordance with the federal standard. In relation to the abrogation or modifications which the legislation could recognise as legitimately limiting client legal privilege, the Report recommends that these exceptions should take into account the subject of the investigation and its importance, whether there is any alternative means of obtaining the information in a timely and complete manner, and whether the information is vital to the success of the investigation in question. A full list of recommendations precedes the main body of the Report.

B. British Columbia

Predatory Lending Issues in Canada
CCEL Report No. 4 / BCLI Study Paper No. 3
February 2008
http://www.bcli.org/pages/projects/predatory/Predatory_Lending_Study_Paper.pdf

This Study Paper was prepared by the Canadian Centre for Elder Law, a division of the British Columbia Law Institute. It aims to promote discussion on the issue of predatory lending in Canada. Predatory lending occurs when a lender deceptively persuades a borrower to agree to abusive loan terms. The Paper suggests that the issue is closely related to abuses in the sub-prime loan market whereby vulnerable borrowers are victimised due to their desperate financial circumstances. In particular, it emphasises that the elderly are especially vulnerable to predatory victimisation because of their reliance on fixed incomes, the substantial concentration of equity vested in their homes and their unfamiliarity with the credit market.

The Study Paper is split into six parts. Part 1 challenges the assumption that predatory lending practices are infrequent in Canada. Part 2 analyses the issues raised by predatory lending practices. Part 3 discusses the factors in the Canadian mortgage market that may encourage or deter the development of such

practices. Part 4 highlights the inadequacies of the existing Canadian legal measures to remedy abusive lending practices; measures which it suggests are outdated and piecemeal. Part 5 summarises several options for reform of the law which are based on American legislation and the suggestions of leading academics in the field of predatory lending. Part 6 calls for further research into predatory lending issues in Canada and urges the legislature to acknowledge the issue. Though the Paper suggests that predatory lending is an emerging issue and that it would be premature to call for law reform at such an early stage, it is clear from the content and tone of the Paper that the Institute believes that some reform of the law should be implemented.

C. England and Wales

Insurable Interest
Issues Paper 4
January 2008
http://www.lawcom.gov.uk/docs/Insurance_Contract_Law_Issues_Paper_4.pdf

This Paper was drafted by the teams working on the insurance contract law review at the English and Scottish Law Commissions and sets out a number of tentative proposals on reforming the law of insurable interest. Insurable interest requires that an insurance policy holder must gain a benefit from the preservation of the subject matter of the insurance or suffer a disadvantage if it is lost. The Paper notes that the law is very complex due not only to inconsistent legislation but also due to differences between different types of insurance. The Paper distinguishes between the different types of insurance including indemnity and non-indemnity insurance and discusses a number of related issues.

The Paper identifies a number of problems with the current law. It suggests that the rules are particularly restrictive with regard to life assurance. In particular the Paper highlights concerns relating to the legal recognition of life insurance policies taken by non-spouses, the unsuitability of assignment as a remedy in this regard, the limitations relating to the insurance of

employees considering the "pecuniary interest recognised by law" rule, the insurability of interest payable on an open ended debt, technical requirements requiring the naming of policy-holders and issues relating to group insurance. Problems created by both archaic and recent statutory provisions relating to indemnity insurance are also identified.

The Paper then raises the question of whether the doctrine of insurable interest is necessary at all. It identifies two purposes of the doctrine relating to the definition of insurance (which allows it to be distinguished from other schemes for regulatory and tax purposes) and as an instrument of social policy. In the first regard, the Paper concludes that it is possible to identify insurance products without preserving the doctrine of insurable interest. With regard to insurable interest as an instrument of social policy, the doctrine can prevent people from insuring the lives of strangers (*e.g.* celebrities); a practice which the Paper suggests is distasteful and potentially dangerous. The Paper recommends retaining the doctrine in this regard; however, the Commissions also suggest that categories of insurable interest be expanded to give people more rights to insure the lives of others such as cohabitees. The Paper tentatively concludes, however, that the doctrine is unnecessary in the context of indemnity insurance because the indemnity principle sufficiently guards against moral hazard and gambling in the guise of insurance. The Paper welcomes views on these issues.

Reforming Bribery
Consultation Paper 185
http://www.lawcom.gov.uk/docs/cp185.pdf

This Paper followed the Commission's Report on *Legislating the Criminal Code: Corruption* (LC248). It re-considers the specific issue of bribery in light of criticisms of its previous Report and new international obligations. The broader issue of corruption is not addressed. The Commission identifies a number of problems with the current law which it suggests is in need of rationalisation and simplification. It suggests that the current law makes an imperfect distinction between bribery in the

public sector and bribery in the private sector, and questions the desirability of a presumption of corruption in public sector cases.

The Paper questions whether the law should continue to draw a distinction between public sector bribery and private sector bribery. Though it considers the submission that higher standards should be expected of persons in public office, it rejects that this is sufficient to maintain a distinction in the law. The Commission suggests that it is difficult to define with sufficient clarity the distinction between public and private sector functions, especially where public sector functions are often contracted out to private companies, and where public bodies often form joint ventures with private companies. The Commission further suggests that the preferable way to impose stricter standards on public officials is not through the criminal law but rather through dismissal by the State. The Commission recommends that the threshold for the criminal offence of bribery should be breach of a legal or equitable duty that involves the betrayal of trust or duty to act impartially or in the best interests of another. Where a person breaches that duty in return for the conferral or promise of an advantage from another, both should be guilty of bribery irrespective of whether the recipient is a public official.

The Commission also notes that due to the co-existence of a number of statutes governing bribery, problems are created by the possibility of charging an accused under the wrong statute, the scope of the statutes and inconsistent terminology used in the statutes. The Commission also explains its provisional proposals for a discrete new bribery offence to deal with the bribery of foreign public officials. Furthermore, the Commission considers corporate liability for bribery and criminal liability for bribery committed, assisted or encouraged outside England and Wales. Part 12 of the Paper lists all of all the provisional proposals and questions raised in the course of the Paper. The deadline for comments on these proposals closed on the 20th March 2008.

D. Hong Kong

Criteria for Service as Jurors
HKLRC Consultation Paper
January 2008
http://www.hkreform.gov.hk/en/docs/juries_e.pdf

The purpose of this Consultation Paper is to examine whether the current criteria for jury service in Hong Kong relating to education, age, residency, character and disability are still appropriate, or are in need of reform. This Paper is divided into six parts. The first part of the Paper deals with the existing law and practice in this area in Hong Kong. It notes that the current criteria are based on the English system and lists the requirements for jury service as follows: a juror must be a resident of Hong Kong, between 21 and 65 years of age, not afflicted by blindness, deafness or other disability preventing him from serving as a juror, be of good character, and have a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings.

The second part of the Paper describes the criteria for jury service in other jurisdictions, with a view to finding proposals for reform. This leads to the third part of the Paper which analyses the common law position on this matter under the criteria described above. The issues for consideration and reforms in other jurisdictions are discussed in the fourth part of the Consultation Paper, which include the representative nature of the jury according to the notion of trial by one's peers, the upper and lower age limits, the definition of good character in terms of criminal records, and the manner of assessment of education and disability criteria.

In the fifth part of the Paper, proposals for reform are made, and these are summarised in the sixth and final section. The Consultation Paper recommends that the lower age limit remain at 21 but that the upper age limit should be extended to 70, with an option for those between 65 and 70 to refuse jury service on grounds of age. In relation to the residency requirement, the Commission proposes that 3 years' residency, as verified by the issuing of a Hong Kong resident identity card, would be sufficient

to qualify for jury service. As regards the "good character" requirement, the Commission believes this should mean that the person has not been convicted of a crime, is not awaiting trial, or has not been remanded in custody for a criminal offence. The Commission also recommends that the current educational standard for jury service be enshrined in legislation and that the current criteria concerning exclusion on the basis of disability should be retained. Comments on these proposals will be accepted by the Commission up to the 30th April 2008.

E. Ireland

Civil Liability of Good Samaritans and Volunteers
Consultation Paper (LRC CP 47 – 2007)
November 2007
http://www.lawreform.ie/Consultation%20Paper%20on%20Good%20Samaritans%20final%2016%20Nov%202007.pdf

On the 30th January 2006, the Irish Law Reform Commission received instructions from the Attorney General to examine the legal duty of care of Good Samaritans and volunteers. This request arose in the immediate context of the defeat at second stage of the private members bill, the Good Samaritan Bill 2005, debated before Dáil Eireann on the 6th and 7th December 2005. This Paper is divided into five chapters. In Chapter 1, the Commission analyses the request of the Attorney General and the 2005 Bill in the policy context that persons should not be discouraged from helping strangers who are in danger, and that volunteers should not be discouraged from taking part in activities of benefit to the community. It then distinguished the parameters of the request of the Attorney General from the provisions of the Bill. Chapter 2 analyses the concept of a duty to intervene. It discusses whether the common law and civil law jurisdictions recognise a positive duty to intervene, and it analyses the specific contexts where Irish statute law imposes this duty. The Commission recommends that there should be no change in the position of the current law, which refrains from imposing any general positive duty on Good Samaritans or any other types of volunteer. In the Commission's opinion, the

specific situations where a statutory duty to intervene arises are more suited to individual development by the legislature.

Chapter 3 analyses the extent to which a Good Samaritan or other volunteer who chooses to intervene is under a duty to act with reasonable care. The chapter concludes, following the application of proximity and foreseeability tests, that Good Samaritans and other volunteers may be potentially liable for injuries they cause to the rescued party, though the extent of this liability is uncertain. The Commission notes the absence of such litigation in practice; however, it nevertheless suggests that it would be preferable if legislation stated clearly the precise scope of liability that may arise. Chapter 4 defines the parameters and mechanisms of provisionally proposed legislation. It suggests that liability should arise pursuant to a gross negligence test, as laid down in *The People (Attorney General) v. Dunleavy* [1948] I.R. 95. On this basis, liability would arise when the negligence is of a very high degree, such that the activity of the Good Samaritan or volunteer falls below what could have been expected in the circumstances and that the actions contribute to the injury sustained. Chapter 5 summarises the provisional recommendations arising from the discussions in previous chapters. The deadline for submissions on this Paper closed on the 31st March 2008.

Homicide: Murder and Involuntary Manslaughter
Report (LRC 87 – 2008)
January 2008
http://www.lawreform.ie/publications/Homicide%20Report%20ONLINE.pdf

This Report is based on material discussed in two Consultation Papers: *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP17-2001) and *Consultation Paper on Involuntary Manslaughter* (LRC CP44-2007). It is divided into 6 chapters. Chapter 1 examines the labelling and moral culpability of murder and manslaughter and it analyses the difficulties arising from the mandatory life sentence. The Commission recommends that the murder/manslaughter distinction be retained. It further recommends that the mandatory

life sentence should be abolished and replaced with a discretionary maximum sentence of life imprisonment. The Commission suggests, however, that the continued existence of the mandatory life sentence should not preclude expansion of the mental element of murder. Chapter 2 discusses whether there are morally culpable killings currently outside the definition of murder which should be punished as such. It then evaluates whether intention to cause serious injury should continue to form the *mens rea* for murder and, if so, whether "serious injury" should be defined.

Chapter 3 makes a number of recommendations: the expansion of the fault element of murder to include reckless killing manifesting an extreme indifference to human life; the retention of serious injury as an element of the fault requirement for murder; that the fault element of murder should not be expanded to embrace recklessness as to serious injury; that the term "serious injury" should remain undefined, and that a new definition of murder should be adopted. Chapter 4 analyses the current law on manslaughter in Ireland. It discusses the potential effect that expanding the mental element of murder would have on the current scope of involuntary manslaughter. The current law on unlawful and dangerous act manslaughter and related issues, negligent manslaughter and related issues and motor manslaughter and related driving issues is also analysed.

Chapter 5 recommends the retention of the existing parameters of unlawful and dangerous act manslaughter and the creation of a new offence of assault causing death. The Commission considers death by drug injection but recommends that this should not come within the scope of unlawful and dangerous act manslaughter. It also recommends the amendment of the test in *The People (Attorney General) v. Dunleavy* [1948] I.R. 95 for gross negligence manslaughter, so that the capacity of the accused person to consider the risk involved is relevant to liability. Finally, the Commission recommends the retention of the existing statutory offences of "dangerous driving causing death" and "careless driving" in addition to the more serious offence of manslaughter, and it recommends the creation of a new offence to recognise the culpability of careless driving which can also result in death. Chapter 6 summarises the recommendations

made in previous chapters. The appendix to the Report contains draft legislation.

Privity of Contract and Third Party Rights
Report (LRC 88 – 2008)
February 2008
http://www.lawreform.ie/publications/PDF%20Privity%20online.pdf

This Report follows the publication of the *Consultation Paper on Privity of Contract: Third Party Rights* in 2006. The Report, which is concerned with the role of privity in modern contract law, is subdivided into four chapters. Chapter 1 provides an overview of the current law on privity in Ireland. It analyses the general rule whereby only contracting parties have enforceable rights and obligations under the contract and then discusses the various exceptions to this rule. Chapter 2 reflects on the merits of reforming the rule. Though the Commission considers the arguments against changing the general rule, it decides that the law in this regard should be reformed and that third parties should be allowed to enforce rights under contracts made for their benefit. The Commission concludes that although the most appropriate method of reform is detailed legislation, this should not constrain judicial development of third party rights, and it advocates a number of guiding principles that should be considered in any legislative reform of the law.

Chapter 3 addresses a number of specific issues in formulating a new comprehensive statutory regime. The Commission makes numerous recommendations in this chapter; the primary recommendation is that the contractual term is only enforceable by the third party when it was clearly intended by the contracting parties that he should be allowed to do so under the contract. Furthermore, the third party does not need to provide consideration, or to have relied on the contract to his detriment. The contracting parties may not vary or cancel the rights of the third party once any of the contracting parties are aware that the third party has assented to the contract. An express term may, however, be included in the contract which permits the contracting parties to vary or terminate it. The rights of the third

party are subject to the usual defences and remedies, in the same way as if one contracting party takes an action against another. Finally, the proposals advanced by the Commission are intended to be facilitative rather than mandatory, and therefore the Commission recommends that the contracting parties should be allowed to exclude the proposed legislation. A full summary of the 46 recommendations made in the Report are available in Chapter 4. The appendix to the Report contains draft legislation.

(The Report is considered in greater detail in an article in this edition.)

Inchoate Offences
Consultation Paper (LRC CP 48 – 2008)
February 2008
http://www.lawreform.ie/publications/InchoateCP%20online.pdf

This Consultation Paper examines the inchoate offences of attempt, conspiracy and incitement with a view to exploring options for reform. Inchoate offences are described by the Commission as offences which criminalise behaviour that is working towards, or leading up to, the completion of a crime. The Paper is divided into five sections. The first part discusses the rationale behind applying liability to inchoate offences, beginning with the historical context, addressing the links between this type of offence and general criminal law theory, and concluding with the current codification of inchoate offences in this jurisdiction.

The next three sections of the Consultation Paper deal with the three types of inchoate offences described above in turn. In the section describing attempt offences, the issues discussed include: the components of an attempt offence, *actus reus*, *mens rea* and target, categories of impossible attempts (such as where the person believes they are committing a crime, but because of facts unknown to them, this is not actually possible), and the relevance of abandonment of an attempt in determining liability for the offence. The section which deals with conspiracy offences discusses agreement by parties to a conspiracy, the unlawfulness requirement of the offence, specific common law conspiracies such as conspiracy to defraud, and the means of restricting conspiracies. The fourth section addresses incitement offences in

a similar manner but also discusses issues unique to incitement, such as the importance of free speech and the gap in liability where the target crime is never attempted.

Finally, in the fifth section of the Report, the Commission proposes a number of provisional recommendations for each category of offence. In relation to attempt, the Commission recommends that the *actus reus* of attempt is in need of clarification and legislative definition, and recommended that the *mens rea* for attempt should remain intention, including direct and oblique intention. The Commission proposes that intra-jurisdiction offences be capable of trial in Ireland, and also suggests that impossibility should not be a bar to liability for any of the inchoate offences discussed. As regards conspiracy offences, the Commission provisionally recommends that the *actus reus* be based on agreement, the *mens rea* should include a requirement that the conspiratorial plan be carried out, and the target should be limited to criminal acts. Finally, the Commission's recommendations for incitement offences state that the *actus reus* should be based on a definition of "commands, encourages or requests". The closing date for submissions on these proposals is 30th May 2008.

Aspects of Inter-Country Adoption Law
Final Report (LRC 89 – 2008)
February 2008
http://www.lawreform.ie/publications/Adopt%20Report%20online.pdf

This Report follows a Consultation Paper on the same topic (LRC CP 43-2007) and addresses the issues of the status and rights of children subject to foreign adoption orders, the constitutional and legal rights of the adoptive parents, and the duties of the State in respect of such a child under Articles 40.3 and 42.5 of the Constitution. The first chapter of the Report introduces the concept of inter-country adoption by defining adoption, and discussing recent developments in adoption case law in Ireland, particularly focusing on the High Court decision in *Attorney General v. Dowse* [2006] I.E.H.C. 64. In this section, the Commission proposes that guiding principles for regulation of

inter-country adoption should be based on the concept of the best interests of the child and the Constitutional guarantee of equality, and therefore that a presumption in favour of recognition of foreign adoption orders should apply.

With regard to the status and rights of the child in these proceedings, the Commission considers guidance from European and International Conventions on the subject of cancellation of foreign adoption registrations. The Commission proposes that Ireland should ratify and incorporate the *Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption*. It also recommends that a child adopted by an Irish citizen should be considered to have full citizenship rights, even where the child was resident outside of the State, bearing in mind issues of practicability and enforceability in the Irish Courts. Similar practical considerations are taken into account by the Commission in terms of the legal duties of parents and the State. However, this Report recommends that the Attorney General should retain the power to initiate proceedings in the High Court to ensure the fulfilment of Constitutional duties in respect of an adoptive child residing outside the State.

In its final recommendations, the Commission proposes that the Adoption Board should prepare guidelines on the validity of inter-country adoptions and that the Board should have appropriate, independent legal advice at its disposal when considering the compatibility of foreign adoption law with Irish adoption law for the purposes of recognising foreign or inter-country adoptions. The Commission also recommends that consideration be given to the appointment of a designated High Court judge to deal with all adoption cases and that section 6 of the Child Care Act 1991 be amended to provide that post-adoption services including counselling be made available on a statutory basis for both domestic and inter-country adoptions.

F. New South Wales

Jury Selection
Report 117
September 2007
http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r117.pdf/$file/r117.pdf

In September 2007, the New South Wales Law Reform Commission released *Report 117: Jury Selection*. This Report is a comprehensive examination of the appropriateness of current statutory qualifications for jury service in New South Wales. The Report also analyses potential criteria for excusing persons from jury service, and the criteria utilised in other jurisdictions related to the selection of jurors. The Commission makes a total of 74 specific recommendations.

Upon examining the role, composition and qualifications of the jury in the justice system, the Commission recommends that every person who is enrolled on the electoral register should be liable to serve as a juror in New South Wales. It qualifies this, however, in suggesting that it is necessary to disqualify persons with a criminal history. Such disqualification is necessary to preserve the integrity of the justice system, because such persons may not be impartial in the administration of criminal justice. The period of disqualification would depend on the nature of the offence committed and the length of the custodial sentence imposed.

The Commission also considers ineligibility arising from a person's occupational position. The Commission recommends that certain specified office holders, including the Governor, anyone acting as Governor, members or officers of the Executive Council, the Ombudsman, Deputy Ombudsman and judicial officers including acting judicial officers, should be excluded from jury service during the currency of their term of office and potentially for a period thereafter depending on their particular position. Officers and other staff of either or both houses of the Parliament should, however, be eligible for jury service. As a class, Australian lawyers should also be eligible for jury service, though this recommendation is subject to certain exceptions

specified in the Report. The Commission recommends that numerous law enforcement agencies such as the New South Wales police force should continue to be excluded from jury service also. The Commission also considers other grounds for the exclusion of persons from jury duty, and suggests that jurors must be capable of reading and communicating in the English language to a sufficient standard to be eligible in this regard.

The Commission advances their analysis of eligibility for jury service by addressing and evaluating the issue of exemption as of right. Such an exemption may arise by virtue of specified occupation, personal characteristics or previous jury service. The Commission recommends that persons may not be excluded from jury service simply by reason of their profession, personal characteristics or circumstances. Rather they must apply to the court and advance reasons for their own particular exclusion. The Report recommends that, in certain circumstances, jurors should be allowed to state their reasons for exclusion in a document that is then handed to the judge, rather than having to provide any such explanation in open court.

With regard to identifying jurors, the Commission identifies a number of problems with the current practice of including on the jury rolls those registered electors who are resident in the electoral districts closest to the relevant courts. The Commission raise concerns relating to the accuracy of the electoral roll and the means of determining jury districts. The Commission recommends that the Sheriff should be able to access and use a "smart electoral roll", if it becomes available, for the purpose of establishing jury service areas and summoning jurors. In the absence of this system being developed, the Commission recommends that the Sheriff be given real time access to the existing electoral rolls. The Sheriff should also be able to double check the potential jurors' data with other governmental agencies, and investigate his criminal and custodial history. The Commission also considers issues relating to the management of juries, their empanelment and their discharge for cause, and irregularities in empanelment. The Commission then proceeds to consider the financial allowances, conditions of service and the protection of the employment of serving jurors. Finally the Commission considers the costs and benefits of the recommended

changes. A full list of the Commission's recommendations is available preceding the Introduction to the Report.

Complicity
Consultation Paper (NSW LRC CP 2)
January 2008
http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/cp02.pdf/$file/cp02.pdf

This Consultation Paper was undertaken to determine whether the criminal law regarding complicity in New South Wales is in need of reform. In the Paper the Commission analyses the present law in this area, which recognises that secondary liability can derive from the same criminal activity. The Commission classifies the legal rules in this area as criminalising joint criminal enterprise, extended common purpose, and accessorial liability. However, the Commission also distinguishes complicity from inchoate offences such as attempt, conspiracy and incitement. In assessing the current law, the Commission defines the present test for extended common purpose as a subjective one of possible foreseeability.

This Consultation Paper addresses the criticisms which have been made of the present law on complicity in New South Wales. Some of these general criticisms suggest that the present test for complicity is too wide, and that it should be better aligned with notions of moral culpability. The Commission also notes that the use of this test has created undue complexity in the conduct of trials, ultimately resulting in a large number of appeals.

With regard to murder, the Commission notes that the present test unjustly holds a secondary participant liable for the same murder on a lesser form of *mens rea* than the primary participant who commits the murder. In addition, it was argued that present test creates a serious disparity between the subjective element required in aiding, abetting, counselling or procuring a murder, and that required for extended common purpose liability in murder. Finally, the Commission recognises that the present test expands the potential for a secondary participant to be found guilty of murder, and lessens the ability of a jury to reach the alternative verdict of guilty of manslaughter.

In conclusion, this Paper briefly outlines the potential solutions to problems created in criminalising secondary activity. The law in England and Wales and other codified jurisdictions are considered, and a number of tentative proposals for an alternative test for complicity put forward, including intention, recklessness and probability. These options will be considered further in the Commission's final Report on this issue, taking into account the desirability of uniformity in this area in all Australian states. The deadline for submissions on this topic closed on 31st March 2008.

G. New Zealand

Privacy Concepts and Issues
Study Paper (NZLC SP 19)
February 2008
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_129_390_SP19.pdf

This Study Paper is the first stage of a broad-ranging Review of Privacy which has been undertaken by the Law Commission of New Zealand. It also further examines the issues raised in an earlier Miscellaneous Paper on *A Conceptual Approach to Privacy* (NZLC MP19). This Paper begins with analysis of privacy from a conceptual point of view, discussing the many competing theories and definitions of privacy. The Commission have attempted to define the concept of privacy in this Paper with regard to two core values: the autonomy of human beings to live a life of their choosing, and the equal entitlement of people to respect.

Privacy, as described by the Commission, is divided into two main dimensions: informational privacy and local or spatial privacy. Informational privacy relates to control over and access to personal information, although the Commission recognises that not all personal information can be regarded as private. Local or spatial privacy is concerned with control over access to persons and private spaces, which can be more easily acknowledged as falling within the traditional legal concept of privacy.

The Commission analyses privacy using a policy-based approach, to determine how privacy should be balanced against competing issues such as freedom of expression. This analysis demonstrates that an all-encompassing approach to regulating the law on privacy is not possible, since the context in which a violation of privacy occurs alters the legal position. The development of privacy law in New Zealand through statute and common law is also discussed in this Paper, and particular emphasis is placed on the Privacy Act 1993, which protects informational privacy in New Zealand.

Media attitudes towards privacy are also discussed, along with broader societal attitudes to the interaction between privacy and a number of other factors including age, culture and technology. Finally, the Commission considers the international dimension of privacy, looking to other jurisdictions and the international community in general for guidance on specific issues such as privacy as a human right, privacy in the healthcare context and privacy in the workplace. These issues will be re-considered throughout the Commission's *Review of the Law of Privacy* project.

Public Registers: Review of the Law of Privacy Stage 2
Final Report (NZLC 101)
February 2008
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_129_391_Public_registers_web_72.pdf

This Report forms the second part of the New Zealand Law Commission's Review of the Law of Privacy. It also follows on from a previous Issues Paper (NZLC IP 03) on the same topic. In Chapter 1 the Commission discusses public registers in their historical context, as registers were developed to record information such as births, deaths or marriages. Such registers were generally open to the public, and issues of open access were of particular interest to the Commission throughout this Report.

In Chapter 2 of the Report, the Commission considers the various terminology surrounding public registers and the potential definitions of a public register. The Report recommends that a public register should be defined as "a register, list, or roll of data,

created and maintained pursuant to an enactment, open in whole or in part to public inspection, copying, distribution or search, and under a specific access provision of the enactment creating the register". Chapter 3 considers the current legal regulation of public registers in New Zealand, including the Privacy Act 1993, the Domestic Violence Act 1995 and Official Information statutes, while Chapter 4 discusses the principles, issues and interests which should be taken into account in producing a comprehensive reform proposal. The value of easily accessible information, and the limits imposed on open information by protecting personal or sensitive information, are considered by the Commission to be some of the most important principles to be taken into account.

In the final chapter of this Report, the Commission sets out its proposals for reform. The Commission proposes that all statutes regulating public registers should be revised and consolidated into a single Bill, taking into account the principles of free flow of information, transparency, privacy interests, accountability and public safety and providing a comprehensive definition of what constitutes a public register. To protect sensitive personal information, the Commission recommends that a single protective mechanism allowing for suppression of certain information should be introduced for all registers (excluding the electoral roll). The Commission also provides a list of criteria to be taken into account by the decision-maker in determining whether to suppress certain information on a register: the proposed use of the information, the public and private benefits, the risk to privacy, the adequacy of existing safeguards and the cost to others of providing additional safeguards. Complaints regarding the misuse of a public register should, according to the Commission, be directed to the Privacy Commissioner, an office established by the Privacy Act 1993.

Public Inquiries: Draft Report
Issues Paper (NZLC IP 5)
November 2007
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_127_376_IP05.pdf

In this Issues Paper the Law Commission proposes reform in the regulation of public inquiries in New Zealand, namely, royal commissions, commissions of inquiry and non-statutory ministerial inquiries. The Commission identifies three broad problems with the existing inquiry structure. Firstly, the primary legislation on this issue, the Commissions of Inquiry Act 1908, is extremely out-dated. Secondly, royal commissions and commissions of inquiry are costly, adopt inappropriate legalistic procedures, and are constrained by the culture that has developed around them. Finally, non-statutory ministerial inquiries do not have any coercive powers, offer no protection to those who take part, and suffer from a lack of clarity about how procedures such as judicial review apply to them.

To solve these problems, the Commission proposes that a new Public Inquiries Act is necessary. This Act would replace the investigations described above with "public inquiries" which could be made on any matter of public importance. The Commission recommends the removal of the adversarial nature of these procedures as outlined in the 1908 Act, replacing them with flexible provisions in accordance with the principles of natural justice. The Commission also recommends the removal of the anachronisms of the 1908 Act, including complicated provisions relating to contempt and differing powers depending on the status of individual inquirers.

This new Act would create offences directed at controlling behaviour both before and outside public inquiries, aimed at enhancing the ability of inquirers to control abuse of their processes. The Commission also recommends that guidance be given to those establishing inquiries by way of the Cabinet Manual, and those conducting them by way of Department of Internal Affairs guidelines, in order to increase clarity about the powers of inquirers. In the Commission's view, the reforms contained in this new Act will minimise costs and delays in litigation surrounding public inquiries, and give inquirers a more flexible and modern framework within which to conduct procedures. The deadline for submissions on these proposals closed on 31st January 2008.

Disclosure of Previous Convictions
Issues Paper (NZLC IP 4)
November 2007
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_136_374_IP04.pdf

In this Paper the Commission attempts to predict the response which will be made by the courts to the Evidence Act 2006, which allows evidence of previous convictions to be admissible in court, subject to the traditional restrictions applicable to other misconduct or bad character. This Paper aims to discuss how considerations of relevance and prejudice can be balanced by the requirements of the new legislation.

Firstly, the Paper describes the previous law in New Zealand under which evidence of previous convictions was inadmissible in court, whereas evidence of previous misconduct or bad character was admissible only if it exhibited particular features which gave it probative value beyond mere propensity.

Secondly, the previous law is contrasted with the new position in the Evidence Act which, in the Commission's view, is merely a restatement of the previous similar fact rule which applied to all character evidence. With regard to the defendant's veracity, the Commission notes that there is an uncertainty in the new legislation as to whether the prosecution is entitled to give evidence as to the defendant's previous convictions when the defendant does not give evidence himself or herself, particularly where a statement made by the defendant to police is offered in evidence.

Thirdly, similar laws in other jurisdictions with regard to propensity and veracity are considered by the Commission. The laws of England, Australia, Canada and the United States are considered in terms of their rules on admissibility regarding similar fact evidence. Most of these jurisdictions have rules which exclude previous convictions as inadmissible evidence in court. Other issues which the Commission considers in this Paper include the value of proof of circumstances in previous convictions, unauthorised disclosures made to juries, and the use of old convictions in evidence. The Commission also considers the efficacy of judicial directions to jurors, the cross admissibility

of evidence where there are multiple complainants, and the need for a special class of offence within which standard restrictions upon propensity would not apply. Finally, the Commission discusses the values, policies and alternative approaches to weighing probative value against prejudicial effect in the current legislation in New Zealand, and suggests that the Evidence Act should be amended to ensure that it is not interpreted as a re-statement of old rules on similar fact evidence, but as a new code. The Commission also notes that judicial clarification regarding the Act's effect on a defendant's veracity is necessary before further reforms are suggested in this area. The deadline for comments on these proposals closed on 15th February 2008.

Presentation of New Zealand Statute Law
Issues Paper (NZLC IP 2)
September 2007
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_132_373_IP02.pdf

In this Paper the Commission discusses the accessibility of statute law in New Zealand, and is currently accepting submissions for reform in preparation for a final Report on this issue. The Paper begins with an assessment of the current availability and presentation of statute law in New Zealand, which the Commission describes as "untidy and unwieldy, and… difficult to find, understand and use". According to the Commission, the problems which have arisen are primarily due to the order of the statute book, a lack of plain English drafting, heavily amended older Acts, and a lack of consistency as between Acts.

To address these problems, the Commission discusses the nature of the State's obligation to ensure that Acts of Parliament are accessible to citizens, and how this obligation might be fulfilled by making Acts readily available, navigable and clear to the public. The Commission also refers to how the current problems with inaccessible legislation are dealt with through the Public Access to Legislation (PAL) project initiated by the Parliamentary Counsel Office. This project aims to provide electronic copies of all statutes free of charge to the public via an

internet website. Although the Commission recognises the worth of this project, and views it as an important step in making legislation accessible, it suggests that hard copies of statutes, particularly Historical Acts, should also be available for viewing by members of the public, and that this project will merely act as a starting point for broader reform.

This Paper discusses in detail the value of a number of proposed reforms to the current system, including a detailed official subject index, reprinting of previous statutes, revision of current statutes, codification of the law, and a programme of revision to reform the statute book, headed by a member of the Parliamentary Counsel Office. In order to implement the necessary reforms, the Commission proposes introducing a new Legislation Act which will serve the dual purposes of rationalising the law relating to legislation and giving effect to the other recommendations contained in earlier chapters of the Issues Paper. In order to prepare a draft of the Legislation Act, the Commission is considering similar legislative instruments from other jurisdictions and carrying out consultations with interested parties in this area. The Commission's final recommendations and draft legislation will be published in a final Report.

***Habeas Corpus*: Refining the Procedure**
Report 100
February 2008
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_133_387_R100.pdf

The Law Commission recommended a simplified procedure for dealing with *habeas corpus* applications in 1997, and this was implemented by the Habeas Corpus Act 2001. Though this Act was largely successful, some practical problems did emerge. This Report addresses these issues and makes a number of recommendations for reform. The Commission first questions the requirement that *habeas corpus* applications be given precedence over all other court business in every case. It suggests that there are other circumstances when other cases may deserve at least equal precedence. Though the Commission originally recommended repeal of the precedence requirement in

its Study Paper, this Report suggests that precedence should remain the ordinary rule, but that a Judge would have the discretion to relax the requirement if the circumstances so require. The Commission also addresses the statutory time limit of hearing the *habeas corpus* application no more than three days after the filing of the application. While acknowledging that such applications must be heard as soon as possible because issues of liberty are at issue, the Commission suggests that practical realities mean that some complex cases take more than three days to prepare. Accordingly, the Commission recommends that Judges be given the power to relax the three day time limit provided that they hear from the parties prior to extending it.

A number of other issues are also addressed by the Report. Though legislation provides for a right of appeal against the refusal of a writ of *habeas corpus*, it does not provide for the right to appeal against the grant of a writ. The Commission describes this as particularly problematic where the decision on the application creates a legal precedent which affects other detained persons. Unlike the Commission's Study Paper, which offered proposals for reform, this Report reserves any recommendations on the right of the defendant to appeal the writ of *habeas corpus*. The Commission also suggests that if in, for example, a *habeas corpus* application relating to the custody of children, the High Court recommends that the appropriate response is to transfer the application to the Family Court, then it may do so without first determining the application.

Furthermore, the Commission notes that sometimes *habeas corpus* applications have been brought using the wrong procedure, in circumstances where the issues are not susceptible to summary determination. This often occurs for the purposes of securing an early hearing. Therefore the Commission recommends that the High Court should have the power to dismiss *habeas corpus* applications in those circumstances, though the court could at the time of dismissal indicate the appropriate procedures by which their application could be pursued. Finally, the Commission recommends that there be express provisions for pre-hearing conferences, including telephone and video link conferences, where this would facilitate the speedy resolution of matters (for example by easing the

burden on counsel by focusing the matter to be heard in the substantive hearing), and that inconsistencies in the language used in legislation be amended. A full summary of recommendations and draft legislation are appended to the Report.

The Partial Defence of Provocation
Report 98
October 2007
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_138_366_R98.pdf

In 2001, the Law Commission reviewed some of New Zealand's criminal defences, focusing particularly on their applicability to battered defendants. That Report (NZLC R73, 2001) recommended the repeal of the partial defence of provocation. It also recommended the abolition of the mandatory life sentence in murder cases, favouring instead sentencing discretion. Though the recommendation to abolish the mandatory life sentence was implemented, some government agencies questioned whether repealing section 169 of the Crimes Act 1961, relating to provocation, had been fully considered. This Report reconsiders the issue, particularly with regard to battered defendants again, but also considering the prejudicial effect of such repeal on the cases of mentally ill or impaired persons.

The Commission reports that there was widespread dissatisfaction with the operation of section 169 among crown solicitors, the defence bar, senior members of the judiciary and mental health professionals (though these groups differed with regard to how the issue should be resolved). The Report notes that there was almost universal recognition that provocation benefits very few defendants who are mentally ill or impaired. The Commission suggests that the same was true for womens' groups considering the defence from the perspective of women generally and battered women in particular. The Commission also records the negative social effects, such as where the defence has been used to partially excuse intentional killing in response to a homosexual advance.

The Report notes that the historical rationale behind partial defences was to reduce a murder conviction to one of

manslaughter, thereby avoiding the mandatory death sentence (which was later reduced to a mandatory life sentence). The Commission notes, however, that this rationale has dissipated somewhat in recent times, given that the imposition of a life sentence is no longer mandatory in New Zealand. The Report undertakes an examination of New Zealand case law utilising the defence. It suggests that the high number and frequency of the appellate decisions and the lack of consensus therein illustrates the fraught nature of the defence. The Commission suggests that the appellate courts have struggled with the defence because it is irretrievably flawed. The Report canvasses a number of legal, conceptual and practical difficulties relating to the defence, and frames these difficulties against the larger question of how society should respond to violence.

Though the Commission discusses arguments in favour of maintaining the partial defence, it refutes each of these in turn. In particular it rejects the assertion that provocation is the best mechanism by which to recognise reduced culpability in murder cases, and it does not consider any mechanism for keeping the defence as viable. It recommends that defendants relying on provocation should be convicted of murder, and evidence of alleged provocation in the circumstances of the particular case should be weighted with other aggravating and mitigating factors as part of the sentencing exercise. It agrees with the English Law Commission (LC 290, 2004 and LC 304, 2006) that the issue of fair labelling for crime is of secondary consideration to the sentence mitigation principle, which allows for a more rounded consideration of the issues. The Report recommends the drafting of sentencing guidelines covering the relevance of provocation in this regard.

Tribunals in New Zealand
Issues Paper 6
January 2008
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_131_385_IP6_Tribunals_in_NZ.pdf

Tribunals exist to resolve citizens' problems. They must be effective, efficient and fair; however, this Paper suggests that the

system of tribunals in New Zealand is beset by problems. The tribunals have been created *ad hoc*, with no overall pattern, and their powers and procedures are inconsistent. Some tribunals do not provide persons with the right to appeal decisions, and where such a right to appeal exists, the procedures relating to the appeal often differ from tribunal to tribunal without justification. The Commission criticises the speed and efficiency of the tribunals, and raises issues relating to the administrative support between the tribunals and their variable caseload. More significantly, perhaps, the Commission expresses concerns about the variability in the accessibility of tribunals. In particular, citizens are not always advised that they may appeal the decisions of government agencies to a tribunal; there are discrepancies in the availability of legal aid, and reasons are not always given for decisions.

The Commission also raises concerns relating to the independence of the tribunals. They must not be subject to the interference of government departments. They must be independent, transparent and seen as promoting justice. The appointment of members of the tribunals must also be merit-based, and such members must be adequately trained. The Commission notes that there is a lack of coherence, unity and oversight of the tribunals as a whole. The Commission considers tribunal reform in Victoria, New South Wales, Western Australia, South Australia, Australian Capital Territory, United Kingdom, Quebec and British Columbia. It notes that overall there has been a move towards a more consistent and coherent approach towards tribunals. Most of the jurisdictions have amalgamated or integrated tribunals, and provided for the leadership and oversight of the tribunal system.

The Commission outlines five non-mutually exclusive options for reform: the standardisation of processes, the provision of a single body to co-ordinate the tribunal processes, clustering tribunals, with common administrative services, unifying the administration of all tribunals and combining all tribunals together into a ‘super-tribunal’. The Commission welcomes submissions on these suggestions.

Review of the Laws of Evidence
Discussion Paper 113, Project 126
http://www.doj.gov.za/salrc/dpapers/dp113.pdf

This Discussion Paper is the first investigation of the South African Law Reform Commission into reform of the law of evidence. The project arose from a preliminary study conducted in 2002 in which it was decided that relevance and hearsay would be the first two topics for analysis. The Paper is divided into four chapters. Chapter 1 considers the structural issues in the court system regarding evidence law reform, including the limited role of lay assessors and the adversarial nature of proceedings. Chapter 2 considers the policy considerations underlying criminal and civil trials. It considers that the relative strength of the parties, the nature of the criminal sanction, and the consequential disparate application of constitutional rights, are the most important factors influencing the policies underlying criminal and civil trials. These factors require a more cautious approach to be taken to the admissibility of evidence in criminal trials.

Chapter 3 specifically analyses the issue of relevance. It analyses the general rule that relevant evidence is admissible while irrelevant evidence is not. It then considers the qualifications to this rule arising from policy considerations which require the exclusion of relevant evidence. It notes that relevance is not an absolute concept, and asserts that the proof of one fact which makes another more probable does not in itself guarantee relevance. It analyses the concept of legal relevance and the difficulties in ascertaining it. The Paper analyses the approaches taken in the United States, New Zealand and Australia. These jurisdictions were chosen on the basis that their relevance rules have been codified or that codification has been proposed on the basis of accessibility. This chapter concludes that the greatest difficulty with the relevance rule is that its application is determined by the presiding officer's common sense, which is shaped by his own personal experience, and therefore has the potential to be discriminatory. This bias may be guarded against through constitutional values or legislation guiding judicial

discretion. The Commission advances a number of benefits in distinguishing relevant evidence and legally relevant evidence, and it notes that though the absence of a legal definition of evidence has not given rise to difficulties in practice, there would be no apparent disadvantage in defining it. A list of recommendations is appended to this chapter.

Chapter 4 specifically analyses the issue of hearsay. It considers the rationale underlying the rule and analyses a number of propositions in this regard. It considers whether adversarial systems need a hearsay rule; whether it would enhance accurate decision-making and cost-effectiveness; whether it encourages the production of the best evidence; and the associated complications and societal dimensions. It also raises issues about whether the rule is necessary to prevent the abuse of state power and whether it is constitutionally required. An analysis of the approach taken to the hearsay rule is undertaken in the jurisdictions of the United States, New Zealand, Australia and the United Kingdom. The Commission advances a number of options for reform, notably the retention of the status quo with or without the introduction of a notice requirement, the free admission of hearsay evidence unless excluded on some other ground, free admission coupled with decision rules pertaining to weight, and the application of different rules in civil and criminal trials. Draft legislation and a list of recommendations are appended to the Report.

I. Victoria

Review of the Bail Act
Final Report (VLRC 13 – 2007)
October 2007
http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb31754f26d6bb0/Web_version_Bail_Report.pdf

In this Report, the Victorian Law Reform Commission recommends replacing the Bail Act 1977 with a new Act written in plain English and using a simpler structure. The Commission also recommends that the bail form should be simplified to clarify

bail conditions and surety requirements for accused persons, decision-makers and those providing sureties. While acknowledging that the police make most bail decisions, which can then be reviewed by a bail justice or court, the Commission proposes that a revised Bail Act should specify all decision-makers who have powers relating to bail, and clearly set out the limits of these powers. In the Commission's opinion, future legislation should clarify that all bail decisions are capable of judicial review. The Commission also recommends simplifying the bail test to one of "unacceptable risk", and abolishing reverse-onus provisions which currently apply to certain offences.

To improve coherence in bail decision-making by police, the Commission proposes that a code of practice should be developed in this respect, that only senior police officers should make bail decisions and that the accused person should only be brought to court if bail is denied or if the person has committed a crime while on bail. In addition the Commission recommends that the new Bail Act should simplify the process of changing the conditions of bail, clearly specify which conditions are acceptable to use when granting bail and emphasise that a court should have the power to review these. The Commission also recommends that courts should have to provide written reasons for decisions in all bail hearings to the accused and the prosecution.

Since Victoria is the only Australian State to use a system of trained volunteers who make bail decisions after hours, known as "bail justices", the Commission recommends that some improvements in training and limitation of powers of bail justices are necessary. With regard to victims, the Commission proposes that only victims of "crimes against the person" should be told about the results and conditions of a relevant bail hearing. Finally, in relation to marginalised groups, the Commission urges sensitivity in bail hearings, particularly where children or indigenous people are involved. It is also suggested that an increase in appropriate support services for these types of accused persons would benefit all parties in the bail process.

Law of Abortion
Information Paper (VLRC IP 3 – 2007)
September 2007
http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe9b44e28c7f10/final_web_version_info_paper.pdf

This Paper aims to explore options for reform of the Crimes Act 1958 (Vic.) which provides that it is a criminal offence to bring about, or to attempt to bring about, or to assist a person to bring about, an unlawful termination of pregnancy. The Commission's aim is to clarify the operation of the current law in relation to a termination of pregnancy, and to decriminalise terminations performed by qualified medical practitioners, with regard to current clinical practice and community standards.

In this Paper the Commission analyses the current status of the law on abortion in Victoria, and notes that the legislation and case law in this area are unclear and do not provide a comprehensive list of situations where a termination of pregnancy is considered lawful. The Paper describes the primary definition of a lawful abortion in Victorian case law, as given by Menhennit J. in *R v Davidson* [1969] V.R. 667, using the concepts of necessity and proportionality. According to this test, a doctor can lawfully terminate a pregnancy where necessary to protect the woman from a serious danger to her life or to her physical or mental health, and where the termination is a proportionate response to such a danger.

The Commission then examines similar laws from other States which provide for a lawful termination of pregnancy, paying particular attention to recent reforms in other Australian States and some common law jurisdictions, with a view to providing proposals for reform. One prominent example is the State of Tasmania, which has recently amended its criminal code to provide that medical terminations are now lawful if the woman has provided informed consent, and two medical practitioners certify that continuation of the pregnancy would involve greater risk of injury to the woman's physical or mental health than termination. The Commission does not provide any proposals for reform at this stage but will do in a final Report. The deadline for

accepting submissions on these proposals closed on the 9th November 2007.