

**RECENT PUBLICATIONS BY
LAW REFORM BODIES WORLDWIDE**

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*A. Australia***For Your Information: Australian Privacy Law and Practice**

Final Report (ALRC 108)

August 2008

<http://www.austlii.edu.au/au/other/alrc/publications/reports/107/1.pdf>

This Report builds upon the contribution of a previous ALRC publication, the Report on Privacy (ALRC 22), which was published in 1983. It is a substantial project, comprising three separate volumes, and aims to deal with the privacy issues arising from the use of new technologies in the modern Information Age. In addition, the Commission wished to align Australia's privacy policy with those of its global trading partners, and to propose a common approach at federal level, addressing issues which had not previously been dealt with in the Privacy Act 1988. This federal approach could subsequently be adopted throughout all the states and territories in Australia.

In this Report, the Commission recommends that the Privacy Act be redrafted for the purposes of clarification, to contain one comprehensive set of privacy principles, which can be applied to information in both public and private sectors. This model of Unified Privacy Principles put forward by the Commission aims to cover anonymity and pseudonymity, collection, notification, openness, use and disclosure, direct marketing, data quality, data security, access and correction,

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identifiers, and cross-border data flows. More specific rules and regulatory mechanisms can be added to these principles, to achieve the necessary policy outcomes in different situations.

A three-tiered approach to privacy is also proposed to implement these principles. This involves high-level principles of general application, set out in the redrafted Privacy Act, regulations and industry codes, detailing the handling of personal information in certain specified contexts, and guidance issued by the Privacy Commissioner (and other relevant regulators) in dealing with operational matters and explaining to end users what is expected in various circumstances, as well as providing basic advice and education. The Report also contains more detailed recommendations on updating the definitions contained in the Privacy Act and reducing the number of exemptions to this legislation, improved complaint handling, stronger penalties, data breach notification, decision-making by children and young people, nominee arrangements, health information and greater facilitation of research.

B. British Columbia

Report on the Privacy Act of British Columbia

BCLI Report No. 49

February 2008

http://www.bcli.org/sites/default/files/Privacy_Act_Report_Website.pdf

This Report is concerned with the right to privacy in British Columbia. It acknowledges that privacy is a broad subject that has become an increasingly prominent concern in society. A substantial body of federal and provincial legislation now governs the collection, use and distribution of personal information by public and private bodies. This Report, however, is concerned specifically with the Privacy Act 1996. The Report notes that the Privacy Act was a progressive piece of legislation at the time of its enactment, but that it has failed to keep pace with modern developments. It builds on responses received by interested persons and groups to a previous Consultation Paper on

the same matter, and proposes seven technical amendments to the relevant legislation.

The Institute recommends the retention of the right to sue for a violation of privacy. It further recommends that liability for violation of privacy should be on the basis of intention and recklessness, rather than “wilfully and without a claim of right”. The right would not be breached where the actor honestly believed in a state of facts under which, if they had been true, the act or conduct would be legally justified. The Institute also provides for a number of specific contexts, such as those involving the use of audio-visual surveillance technology, that are violations of privacy unless the person who has authority to give implied or express consent has done so. Furthermore, the Institute states that persons may have a reasonable degree of privacy with respect to lawful activities that occur in a public setting but which are not directed at attaching publicity or the attention of others. The power to grant remedies other than damages is also expressly provided for in the recommendations. The Privacy Act would also be amended to specify that any rights and remedies that it provides are in addition to any other rights or remedies available to plaintiffs, and do not replace them. Any damages awarded from the violation of privacy need not be disregarded in the assessment of damages in other proceedings for the same violation of privacy. Finally, the Institute recommends that rights of action for certain violations of privacy are only conferred on individuals, not corporations, and that the Act also contain the statutory tort of stalking, similar to harassment under the Criminal Code of British Columbia.

Report on Proposals for a New Society Act

BCLI Report No. 51

August 2008

http://www.bcli.org/sites/default/files/BCLI_Report_on_Proposals_for_a_New_Society_Act.pdf

In July 2006, the British Columbia Law Institute commenced a two-year project to consider reforming the law relating to “Societies”, *i.e.* incorporated not-for-profit bodies. The first phase of the project involved the publication of a

Consultation Paper to seek the views of the public, on a number of tentative proposals for reform in this area. The publication of this Report is the culmination of the second phase of the project, which considers the initial proposals in light of the public responses to the previous Consultation Paper (BCLI Consultation Paper No. 14).

The first part of the Report introduces the scope of the project, as well as some introductory matters. The second part of the Report contains the recommendations for reform and draft legislation which is discussed in detail. The draft legislation provides for an updated version of the Society Act, modelled on the Business Corporations Act, which provides a modern framework for “for-profit” companies. The draft Act streamlines the relevant regulation of societies, providing for electronic incorporation of societies, and giving them the full capacity of natural persons, thereby abolishing any vestiges of the *ultra vires* doctrine. The majority of the rules on the constitution and by-laws of societies are maintained, but stringent procedures are proposed for access to a list of the members of a society, and societies will no longer be required to obtain a special resolution in order to issue a debenture. The proposed Act clarifies the procedural rules relating to directors’ appointment, removal etc., and it also contains modern regulatory rules to specify the duties, liabilities and conflicts of interest of officers of societies.

Furthermore, the required minimum number of directors of societies is lowered to one, and the new rules facilitate the meeting of members through electronic means of communication. Members’ remedies of investigation and oppression are also clarified and updated. Modern provisions are specified for the amalgamation and conversion of cooperative associations into societies, and a comprehensive regime is specified for the liquidation, dissolution and restoration of societies. The Committee concludes that the new Society Act should be enacted, to meet the needs of societies and harmonise corporate legislation in British Columbia.

Easements, Covenants and Profits à Prendre

CP 186

February 2008

<http://www.lawcom.gov.uk/docs/cp186.pdf>

This Paper is a substantial project that explores the reform of the law relating not only to easements and profits à prendre, but also the law of positive and restrictive covenants. The Commission defines easements as rights enjoyed by one landowner over another, *e.g.* vehicular or pedestrian right of way. Covenants are contractual promises that may be either positive or negative in nature, and profits à prendre give the holder the right to take something from another's land, *e.g.* fishing rights. This project is the first time that all such law in this area has been subject to comprehensive review by the Law Commission. It considers the role of land registration and human rights in making its recommendations for reform.

Though the Commission notes that the terminology and complexity of the law in this area is particularly difficult for the public to understand, the legal rules themselves continue to remain relevant in modern times, and the rules can have significant implications for a large number of landowners. Without easements and covenants, the full enjoyment and use of land could not be realised. The Commission makes four main recommendations for reform. Firstly, it recommends the abolition of the existing methods of prescriptive acquisition of easements, and the creation of a single new method of prescriptive acquisitions. Secondly, the current law regarding the extinguishment of easements should be rationalised. Thirdly, the Commission recommends the creation of a new interest in land, to replace positive and restrictive covenants. This called the "Land Obligation". Fourthly, the Commission recommends the modernisation of the statutory means by which restrictive covenants can be discharged and modified, and the application of those rules to easements, profits and Land Obligations. The Commission welcomes submissions on these proposals.

Housing: Proportionate Dispute Resolution

LC 309

May 2008

<http://www.lawcom.gov.uk/docs/lc309.pdf>

This Report is part of the Law Commission's broader programme of work on reform of housing law and practice. Its proposals are largely based upon responses to the concepts outlined in an Issues Paper and a Consultation Paper (CP 180) on the same subject. The Consultation Paper had proposed that housing disputes which cannot be resolved by any other means should be adjudicated on by the Residential Property Tribunal Service, which would comprise a First Tier and Upper Tier to resolve disputes on different issues. The key recommendations of this Report are also predicated on the adoption of principles outlined in *Renting Homes* (LC 297), as clarification in the law would simplify advice given to the relevant parties, and could result in fewer disputes.

The first key recommendation made by the Commission is that a system of "triage plus" should be adopted by those providing advice to parties in housing disputes. This term originates from the medical concept of initial diagnosis and determination of treatment priorities. In the context of housing disputes, triage plus has three aims: signposting to create a coherent advice and information system, oversight to identify systemic problems, and intelligence-gathering to facilitate signposting and oversight. Secondly, the Commission proposes that other means of resolving disputes, which are removed from the formal legal processes currently in place, should be encouraged and promoted. This could be done by formalising existing links between advice and information providers, and requiring courts and tribunals to inform potential litigants about the availability of these services.

Finally, the Commission recommends that there should be some re-balancing of jurisdictions between the courts and the two tiers of the new Tribunal Service, in addition to modernisation of rules of procedure, which could enable the courts to act more effectively in resolving disputes. The Commission suggests that this modernisation should be based on values identified in its

previous Issues Paper, which include accuracy, impartiality and independence, fairness, equality of arms, transparency, confidentiality, participation, and effectiveness. In conclusion, the reforms proposed aim to substantially improve the relationship between housing problems and the existing dispute resolutions processes.

Administrative Redress: Public Bodies and the Citizen

CP No. 187

June 2008

http://www.lawcom.gov.uk/docs/cp187_web.pdf

This Paper considers the reform of administrative redress in both private and public law. The Commission balances two main considerations to guide the formulation of proposals for reform. Firstly, claimants should be entitled to redress for loss caused by seriously substandard administration. Secondly, the commission considers the special position of public bodies in determining liability for loss. Four pillars or mechanisms for administrative redress are then considered and analysed: internal mechanisms (*e.g.* complaints procedures), external non-court avenues of redress (*e.g.* formal complaint procedures), public sector ombudsmen, and remedies under public and private law. The first three non-court mechanisms are considered in pursuance of the government policy of alternative dispute resolution, thereby relieving courts of potentially unnecessary case loads. In particular, the Commission recommends the reformation of rules relating to ombudsmen in two ways. Firstly, it recommends creating the power to stay actions before the courts, to encourage claimants to make claims to the ombudsmen before attempting to obtain a court remedy. Secondly, the commission suggests that access to the ombudsman be facilitated further, by removing certain statutory restrictions.

Though non-court mechanisms generally work well, the Commission considers that certain cases rely on the effectiveness of court-based remedies, so these are also given particular attention. The Commission considers that holding a public body liable for the entire loss of a claimant may be unreasonable, when the regulatory body was not the direct cause

of the claimant's loss. The Commission recommends ameliorating this defect through the use of rules on contributory negligence. A summary of specific points for consultation, relating to liability in public and private law, the relationship between ombudsmen and court-based options and the effect on public bodies is contained in the concluding part of the Report.

Housing: Encouraging Responsible Letting

LC 312

August 2008

<http://www.lawcom.gov.uk/docs/lc312.pdf>

This Report also forms part of the Law Commission's work on housing practice, and is influenced by the principles outlined in the previous Report *Renting Homes* (LC 297), particularly the concepts of landlord-neutrality, to facilitate social housing, and consumer protection, to ensure that both parties have clarification of their rights and responsibilities under a tenancy. The scope of this project focuses on regulatory challenges in the private rented sector, and aims to make the existing law in this area more effective in order to improve compliance.

The primary regulatory issues which the Commission identifies for examination in the Report are: repair and maintenance of the property, and harassment and unlawful eviction. In order to address these issues effectively, the Commission argue that there is a need for a new regulatory approach, similar to the concept of "smart regulation", where those affected by the regulation are involved in shaping regulatory principles. Other preliminary conclusions reached by the Commission include that the cost of compliance must be reasonable, that the introduction of a compulsory system of self-regulation may ultimately be required in this area, and that this should be preceded by a series of staged reforms to enhance the current emphasis on voluntary self-regulation. The Commission concurs with current government policy, which would require these staged reforms to undergo regulatory impact assessment to determine whether they are necessary, and can be effective in achieving their aims.

This Report also puts forward a number of suggestions for reform, including national provision of landlord accreditation schemes, establishment of a housing standards monitor, appointment of a stakeholder board, publication of a code of good housing management practice, setting up a national landlords' register, regulation of letting agents, development of new channels for dealing with complaints, and piloting home condition certificates. Each of these reforms is discussed in detail in Part 6 of the Report.

D. Hong Kong

Enduring Powers of Attorney

HKLRC Report

March 2008

http://www.hkreform.gov.hk/en/docs/repa_e.pdf

This Report was commissioned to investigate the requirements for executing an enduring power of attorney (EPA) in Hong Kong, as the number of orders made under the existing legal provisions was surprisingly low. The Law Reform Commission published a Consultation Paper on this issue in 2007 (HKLRC CP EPA), and undertook an extensive public consultation process to determine how the law in this area should be reformed.

There are three main chapters in the Report. Chapter 1 assesses the current law on enduring powers of attorney in Hong Kong. According to the Enduring Powers of Attorney Ordinance (Cap 501) enacted in 1997, a medical practitioner and a solicitor must be present at the creation of an EPA, and it must take the form prescribed in the schedule to the ordinance. In addition, the EPA is restricted to decisions concerning the donor's property and financial affairs, and cannot be extended to health care decisions.

Chapter 2 describes similar provisions on creating valid EPAs in other common law jurisdictions, namely, Australia, Canada, England and Wales, Ireland, New Zealand and Scotland. Ireland was the only jurisdiction in which a valid EPA had to

contain a statement from a registered medical practitioner to the effect that the donor understood, at the time of its creation, the nature and purpose of the EPA. However, no jurisdiction required, as is the case in Hong Kong, that a medical practitioner be present at the time the EPA was signed.

Finally, in Chapter 3, the Commission sets out its conclusions and recommendations for reform. It proposes that the requirement for a medical practitioner to be present at the time the EPA is signed by the donor be abolished, in favour of the Law Society issuing practice directions to its members, to ensure that a statement of capacity from a medical practitioner is included in an EPA, where there are doubts as to the client's capacity. In the event that this recommendation is not adopted, the Commission propose an alternative – that the EPA is signed by the medical practitioner, but that the donor and solicitor will have a further 28 days from this date during which they can sign the EPA. The Commission also recommends that the relevant public authorities, including the Government and the Law Society, increase public awareness about the existence, nature and purpose of EPAs. Finally, the Commission outlines alternative forms which should be used to create EPAs if its proposals are adopted. These appear in Annexes C and D to the Report.

Interim Proposals on a Sex Offender Register

HKLRC Consultation Paper

July 2008

http://www.hkreform.gov.hk/en/docs/sexoff_e.pdf

The Hong Kong Law Reform Commission recommends the establishment, on an interim basis, of a scheme to enable employers to screen people for certain specified sexually-related offences, before it hires such people to work with children or mentally incapacitated persons. Spent convictions would not be disclosed. The Commission suggests that the eventual aim is to devise an integrated and comprehensive scheme to treat, rehabilitate, assess risk and manage sex offenders. This system, they suggest, would offer more protection to the community, but would not compromise the rights of offenders and their families. This process may take some time, however, so the Commission

recommends implementing the interim proposals by administrative means, thereby avoiding the need for legislation.

The Commission recommends that the relevant criminal records may be accessed by police, but a register of sex offenders should not be open to general public access for a number of reasons. The current system of providing “no criminal conviction” certificates would be modified. The applicant must initiate the screening process, and the result of the check is communicated verbally to the applicant and his prospective employer. Presently, checks can only be conducted for state registered school managers, teachers, child-minders and social workers. They do not extend to other employment contexts involving children or mentally incapacitated persons. The Commission welcomes the views of the public on these proposals.

E. Ireland

Report on Multi-Unit Developments

Report (LRC 90)

June 2008

<http://www.lawreform.ie/publications/LRC%2090-2008.pdf>

This Report concerns “multi-unit developments”. Such units, often called condominiums in other jurisdictions, include blocks of apartments, commercial premises and duplexes or town houses. The Report follows a Consultation Paper on Multi-Unit Developments (LRC CP 42-2006), published in December 2006, addressing planning laws and their enforcement, the role of developers, ownership arrangements under law, title and conveyancing issues, the role and regulation of estate agents and property management agents and related consumer issues, service charges, building investment funds, and appropriate mechanisms to rescue developments in difficulty. The Report sets forth the Commission’s final recommendations on these issues, noting a number of developments in the intervening period between this Report and the preceding Consultation Paper. In particular the Report lists a number of new considerations

including the publication of planning guidelines addressing multi-unit developments, the development of industry guidelines for developers, the final report of the Company Law Review Group on the Company Law Code, developments in land and conveyancing, the forthcoming regulation of property management agencies by the National Property Services Regulatory Authority, and steps to deal with service charges and related consumer issues by the National Consumer Agency in conjunction with representatives of developers and property management agents. The Commission specifically considers the need for a dedicated regulatory body to deal with issues relating to multi-unit developments. Reflecting on a Government White Paper entitled "Regulating Better", the Commission concludes that such a body is unnecessary, given that existing mechanisms, with some adjustments, can effectively address the appropriate issues. In total, the Commission makes 67 specific recommendations, which are summarised in Chapter 8 of the Report. Draft legislation, entitled the Multi-Units Developments Bill, to implement the recommendations is appended to the Report.

Report on Statute Law Restatement

Report (LRC 91)

July 2008

<http://www.lawreform.ie/publications/reports.htm>

This Report examines the Statute Law Restatement Programme. It considers the objective of providing improved access to legislation, and the challenges presented to the programme presented by the legislative framework at present. The benefits of restatement and achieving eLegislation are discussed. The Report explores the context of statute law restatement in Ireland and the process and technology of restatement, and a number of technical recommendations are advanced.

In the context of Irish law restatement, the Commission regard the programme as an ongoing project which will continue to organise the statute book, make it more accessible and available online. The Commission suggest that in respect of

already restated Acts, the publication of future amending legislation should be integrated into the restated Act, thereby producing a new version of the Act. Though this will alter the method by which legislation will be enacted, it will help achieve the goal of greater accessibility of legislation.

The restatement process will involve the cross-checking of electronic and official printed versions of the legislation. The XML format will be used to store and edit the legislative data. A number of technical and procedural matters are also specified including provisions relating to commencement, annotation, colour coding, pre-certified restatements, restatement of groups of Acts and submission to the Attorney General. Technical recommendations regarding the technology of restatement are also provided, and the XML authoring tool will be based on the ActiveText Content Management System providing output in several different formats.

Alternative Dispute Resolution

Consultation Paper (LRC CP 50 – 2008)

July 2008

<http://www.lawreform.ie/publications/reports.htm>

The purpose of this Consultation Paper is to determine what aspects of alternative dispute resolution (ADR) should be enshrined in legislation in Ireland. This Consultation Paper discusses the current approach puts forward provisional recommendations for reform in this area, which will be shaped by a further process of public consultation with interested parties. In particular, the Commission considers the merits of providing a statutory basis for mediation and conciliation.

This Paper outlines provisional legislative definitions of ADR, mediation and conciliation in its recommendations for reform. It also proposes that any future legislation in this area should allow courts to make an order in civil litigation cases, requiring the parties to resolve the dispute through mediation or conciliation. The introduction of a voluntary mediation pilot scheme annexed to the courts is also recommended by the Commission, to determine the effectiveness of this ADR mechanism. Confidentiality in ADR proceedings is an issue of

particular importance, and the Commission has suggested that this concept should be enshrined in legislation, perhaps as a distinct form of privilege.

The Paper emphasises the importance of parties to ADR being well-informed as to the nature of the process, and participating voluntarily. In particular, it considers the special position of ADR in family disputes, and discusses issues such as whether children should participate, and whether collaborative lawyering and case-conferencing should be introduced. Other areas of law which are considered separately by the Commission in terms of their suitability for ADR include medical negligence, succession, commercial, consumer, community and property disputes. The Commission also considers whether training, accreditation, Codes of Ethics and compulsory regulation are appropriate for advisors engaging in ADR. Issues regarding the awarding of costs for parties refusing to consider mediation or conciliation, and the imposition of a good faith requirement, are also considered, with the Commission provisionally recommending that no statutory good faith requirement should be imposed by courts on parties in ADR proceedings.

All of the recommendations proposed in this Paper are provisional, and will be considered further in light of the public consultation process to be undertaken by the Law Reform Commission on this subject, prior to the preparation of a Final Report.

Consultation Paper on the Legislation Directory: Towards a Best Practice Model

Consultation Paper (LRC CP 49)

July 2008

<http://www.lawreform.ie/publications/reports.htm>

This Paper is part of the Commission's review of the Legislation Directory, and it is intended to serve as a focal point for public discussion on the provision of content to potential users. Historically, the Office of the Attorney General had responsibility for statute law restatement and the maintenance of the Chronological Tables of the Statutes. The Paper arises from

the transfer of these responsibilities to the Law Reform Commission, and both functions are viewed as consistent with the goal of the Commission to keep the law under review. Following the transfer of these responsibilities, the Commission has decided to change the name of the Chronological Tables of the Statutes to the Legislation Directory, because it is thought that this terminology will indicate more effectively in plain language terms the purpose of the directory as a guide to legislative effects.

The legislative directory is intended to be a publicly-accessible database that emphasises the transparency of statute law, and makes law more accountable. The Commission identifies the persons and groups of persons who may have an interest in accessing the Directory, and it emphasises that because people cannot be excused from legal obligations using ignorance as a defence, then the State must make the law accessible to the people. The Paper outlines the methods of publication and amendment of legislation, issues of accessibility and inaccessibility, the content and functionality of electronically available legislation and its role as a primary resource for users, project management, reliability, workflow and quality assurance. In total, the Commission makes 36 specific but provisional recommendations. The deadline for submissions on these proposals was 23rd October 2008.

F. Manitoba

Mandatory Arbitration Clauses and Consumer Class Proceedings

Report No. 115

April 2008

<http://www.gov.mb.ca/justice/mlrc/reports/ma2008.pdf>

In this Report, the Manitoba Law Reform Commission examines mandatory arbitration clauses in consumer contracts that attempt to prevent consumers from commencing court proceedings, including class actions / proceedings. This research is undertaken in light of recent case law emanating from the Supreme Court of Canada. The Report also reviews class

proceedings, arbitration and consumer protection in Manitoba, and engages in comparative research with a number of other jurisdictions to assess the need for legislative reform for the purposes of consumer protection.

The Commission notes that mandatory arbitration clauses generally appear in standard form contracts, which cannot be negotiated by consumers. Such clauses prevent consumers from taking class proceedings which can sometimes, due to the pooling of resources etc., be the most suitable route for consumers to obtain remedies. Recent case law has upheld the validity of such clauses, and the Commission is concerned that this could undermine consumer protection law, especially as the relevant consumer legislation is silent on the issue. Consumer protection regimes in the United States, the European Union and New Zealand are surveyed for guidance in this area. The Commission concludes that the legislature must legislatively intervene to invalidate or prohibit mandatory arbitration clauses, and specify that consumers may join class proceedings despite any contractual agreement to the contrary.

Enduring Powers of Attorney: Areas for Reform

Final Report (WCLRA Report #115)

2008

<http://www.gov.mb.ca/justice/mlrc/reports/epa2008.pdf>

This Report is the product of a collaborative project undertaken by the Western Canada Law Reform Agencies (WCLRA), namely, the British Columbia Law Institute, the Alberta Law Reform Institute, the Law Reform Commission of Saskatchewan and the Manitoba Law Reform Commission. Three major recommendations are made for reform to be unified throughout all the participating Canadian provinces: recognition of Enduring Powers of Attorneys (EPAs), duties of attorneys under EPAs and safeguards against misuse of EPAs.

In relation to recognition of EPAs, the WCLRA recommends that all provinces recognise, according to a uniform set of criteria, both continuing EPAs, where are in effect before the donor's incapacity, and springing EPAs, which come into effect at the beginning of the donor's incapacity. These uniform

criteria will make it easier for EPAs from participating provinces to be recognised, and the WCLRA also recommends that foreign EPAs be recognised, if they meet the formal requirements proposed.

The duties of attorneys under EPAs as proposed by the WCLRA are: to act honestly, in good faith, and in the best interests of the donor; to take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent; to use assets for the benefit of the donor; to keep the donor's property and funds separate, except as permitted by statute (co-mingling will be allowed only where there existed before the donor's mental incapacity an established pattern of co-mingling involving that asset); to keep records of financial transactions; to provide details of financial transactions on request; and to give "Notice of Attorney Acting".

Finally, the WCLRA recommends the introduction of certain safeguards to prevent the misuse of EPAs. These include the issuing of a "Notice of Attorney Acting", whereby the attorney accepts the duties given in the EPA and notifies persons at the donor's request, or, if no request is made, notifies the donor's immediate family and a designated public official. Any complaints about misuse of the EPA can then be reported to the designated public official. The WCLRA also recommends the introduction of a series of transitional provisions to bring about the proposed reforms in a fair and effective manner.

G. New South Wales

Role of Juries in Sentencing

Report 118

August 2007

[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r118.pdf/\\$file/r118.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/r118.pdf/$file/r118.pdf)

This Report signifies the final stage of the investigation of the involvement of juries in sentencing offenders by the Law Reform Commission of New South Wales. The inquiry arose from a reference by the Attorney General into the question of

whether judges in criminal trials by jury could consult the jury on the sentence to be imposed. This reference was a consequence of an address delivered by the Chief Justice of New South Wales, expressing the view that such a consultation would improve the sentencing procedures. An Issues Paper (IP 27) on the matter attracted a large degree of public and media attention. Concerns were raised by the proposal and the vast majority of submissions suggested that juries should have no role in sentencing following the verdict.

Ultimately, the Commission agrees with the conclusion that juries should not be any more involved in sentencing than they are at present. It concludes that the practical difficulties of implementing jury involvement in sentencing would outweigh any perceived benefits. Furthermore, the Commission raises concerns that such involvement could involve inequality between trials by jury and trials by judge without jury, and that such involvement may prejudice the ability of the offender to receive a fair trial. If a lack of public confidence in sentencing decisions exists, the Commission suggests that this would be better addressed by educating the public about the factors and rules that judges must consider when sentencing offenders.

Privacy Legislation in New South Wales

NSW LRC Consultation Paper 3

June 2008

http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp3pdf

This Consultation Paper focuses on the desirability of a consistent legislative approach to privacy within New South Wales, and evaluates the effectiveness of current legislative provisions protecting privacy. It is influenced by the completion of the Australian Law Reform Commission's review of privacy law, and the New South Wales Commission acknowledges that the reforms proposed should aim to achieve national uniformity and adopt principles of the Commonwealth legislation where possible. The scope of the proposed legislation on privacy in New South Wales is also restricted to personal information in the public sector, whereas the private sector will be covered by

Commonwealth legislation. The Commission also recommends restructuring current privacy legislation in this area to reduce complexity.

In order to reduce complexity, the Commission suggests that the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) should be merged, and a combination of principles from the current Information Privacy Principles (IPPs) and Health Privacy Principles (HPP) should be created, with appropriate safeguards relating to the handling of sensitive personal information. These safeguards include the provision that where public sector agencies subcontract the collection of personal information to other bodies, those bodies will have to abide by the relevant legislative codes of practice as if it were the state body itself which collected the information.

The Commission recommends introducing another exception to the current legislation to provide that information should not be collected from an individual if it is unreasonable or impractical to do so. "Collection" of information should be clarified in the legislation, to include a conversation with the individual where the information given is recorded. The Commission also proposes new principles to guide the flow of transborder data, and suggests that new principles regulating the use and disclosure of identifiers should be contained in the revised legislation. Finally, this Paper envisages a more active role for the Privacy Commissioner in New South Wales and outlines reforms for the system of administrative review of privacy-related decisions. The closing date for submissions on this Paper was 17th October 2008.

A New Inquiries Act

NZ LC Final Report R102

May 2008

<http://www.lawcom.govt.nz/ProjectGeneral.aspx?ProjectID=127>

This Report is based on the concepts outlined in two earlier papers, an Issues Paper and a Draft Report. It examines statutory commissions of inquiry and royal commissions outlined in the Commissions of Inquiry Act 1908, as well as non-statutory ministerial inquiries. Three broad problems have been identified by the Commission, namely the complexity and outdated nature of the 1908 Act, the costly nature of proceedings taken under the Act which has led to a lack of use, and the lack of regulatory legislation which could clarify the powers and immunities granted in non-statutory ministerial inquiries.

Due to the problems identified in the 1908 Act, the Commission recommends the introduction of a new Inquiries Act, and a draft Bill for this legislation is contained in an appendix to the Report. Two forms of inquiry are proposed in the new legislation – public inquiries, which will take the place of commissions of inquiry and royal commissions, and government inquiries, which will replace ministerial inquiries and be placed on a statutory footing. Government inquiries will be easier to establish, report directly to a Minister, and deal with immediate issues where an authoritative answer is required from an independent inquiry. The same powers and protections will apply to both types of inquiry, but the establishment and conclusion processes for both types will be different.

The new legislation will prioritise flexible processes, and will abolish the adversarial nature of previous inquiries and the legislative right to be heard, in favour of procedures which accord with natural justice. This aims to reduce the potential for costly and delaying litigation to disrupt the process of an inquiry. New offences will also be created to prevent the abuse of the inquiry process. Guidance will also be given to those establishing inquiries in the Cabinet Manual, and the Department of Internal Affairs can provide guidelines to those conducting inquiries.

The Commission emphasises that this revision of the legislation will make inquiries more effective and efficient, and will ensure that any matter requiring independent review can be subject of an official inquiry process.

Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character

NZLC R103 Final Report

May 2008

<http://www.lawcom.govt.nz/ProjectGeneral.aspx?ProjectID=136>

In this Report the Commission seeks to balance considerations of relevance and prejudice in determining when to disclose defendants' previous convictions, similar offending and bad character. The Report examines previous law on these matters, where the default position was that such evidence should be excluded, and discusses the changes brought about in the Evidence Act 2006, whereby propensity evidence is now permitted, provided it has a probative value which outweighs the risk of the prejudicial effect it may have on the defendant. Such evidence is also permitted according to the 2006 Act if it is "substantially helpful" in determining the defendant's veracity.

The Report considers the position on admissibility of propensity and veracity evidence in other jurisdictions, namely, England, Australia, Canada and the United States. It also discusses the position of co-defendants in New Zealand, which has preserved their freedom to give such evidence as long as it is "substantially helpful". Other relevant issues in the new legislation which the Commission considers include proof of circumstances of previous convictions, unauthorised disclosures, "old" convictions, efficacy of judicial directions, cross-admissibility of multiple complainants, special classes of offence, education and explanations, probative force, prejudice and the weighing exercise. In a previous Issue Paper on this topic, the Commission had proposed a number of options for reform in relation to propensity and veracity, but given that the Evidence Act is now in force, it has narrowed its scope to four main recommendations.

The Commission proposes that no change should yet be made to the provisions contained in the Evidence Act, but that the Commission should continue to review the use of the Act's provisions, and compile a further report for the Minister of Justice by 2010. In addition, the Commission suggests that the government should undertake an inquiry into whether the present adversarial trial process should be modified or replaced with some alternative model, either for sex offences or for some wider class of offences. Finally, the Commission recommends that the Taskforce on Sexual Violence should be asked to define the issues and possible options to be considered by that inquiry.

Review of the Civil List Act 1979

NZ LC Issues Paper 8

July 2008

<http://www.lawcom.govt.nz/ProjectGeneral.aspx?ProjectID=140>

The purpose of the Civil List Act in New Zealand is to provide for the appropriation of funds to pay the salaries and allowances of the Governor, Governor-General, members of Parliament and the Executive. It has been amended several times, due to changes in the Constitution and the structure of government, which have added to its complexity, and created overlap in some areas of the legislation. Therefore, the Commission seeks to clarify the Act to make it more accessible, and ensure that the processes provided for payment are as transparent and efficient as possible. However, the Paper does not consider changing the way in which parliamentary entitlements are determined.

This Paper contains 6 chapters. The first chapter discusses the history of the Civil List Act in New Zealand, which has been part of the jurisdiction's legal framework since 1858. Chapters 2 to 5 detail the various provisions in the current 1979 Act, relating to appropriations authorised under the Act, for the Governor-General, Ministers and members of Parliament, and entitlements for former Prime Ministers. In Chapter 6, three possible options for reform are discussed. The first option is to amend and retain the 1979 Act. This would involve renaming the Act, as the term "Civil List" is described by the Commission as being meaningless

to most New Zealanders. Greater transparency could also be achieved through amendments. However, the Commission suggests that separate legislation might be more appropriate to deal with the Governor-General's salary.

The second option is to dismantle the 1979 Act and redistribute its provisions among existing legislative instruments such as the Constitution Act 1986 and the Parliamentary Service Act 2000, in addition to creating new legislation regarding the Governor-General's salary. This could improve clarification of the relationship of existing legislative provisions to those set out in the 1979 Act, however, not all provisions could easily be located in existing legislation, which could cause further problems. The final option for reform is to introduce an entirely new Remuneration Statute, and a separate statute to regulate the Governor-General's salary. This option has the advantage of centralising all matters relating to payment of members of Parliament and the Executive. The Commission welcomes comments on the issues outlined in this Paper, and the closing date for submissions was 5th September 2008.

Towards a New Veterans' Entitlement Scheme: a Discussion Paper on a Review of the War Pensions Act 1954

NZ LC Issues Paper 7

July 2008

<http://www.lawcom.govt.nz/ProjectGeneral.aspx?ProjectID=151>

This Paper addresses the problems which have arisen from the now outdated War Pensions Act, and outlines the issues which are in need of reform. These include the fact that the Act focuses primarily on physical injuries, and does not take account of the other issues which may affect modern veterans; the Act does not take account of the fact that some veterans may qualify for Accident Compensation Corporation payments in addition to their war pensions; the decline in value of the rates of pensions; delays in processing applications; the discretion accorded to the Secretary of War Pensions, and the lack of acknowledgement of rehabilitation schemes as part of the compensation awarded.

The Commission proposes that the legislation be amended in accordance with the following principles: community

responsibility, fair entitlements, equality, benevolent approach to claims (such as removing “reverse onus” provisions), administrative efficiency and affordability. Definitions of veterans, war, and emergency will also have to be refined in any legislative reform. Links between service and injury will also have to be clarified, including reforming the types of evidence of injury necessary to take account of a broader scope of conditions. The Commission also suggests that the manner by which impairment is measured is in need of reform, and could be changed to a percentage scheme assessing total body impairment.

Reform of the definition of compensation is also considered in this Paper where various combinations of lump sums, periodic payments and flat rates are discussed, in addition to further support for veterans over 65. The importance of rehabilitation, ongoing health care and case management are also outlined by the Commission. Entitlements for families also form part of the compensation discussed and the Commission suggests revisiting the eligibility criteria, particularly for surviving spouses.

Proposals are also made regarding reform of the administration and assessment of claims, including the introduction of a centralised panel system with small numbers operating full time on the assessment of claims. Finally the Commission discusses the need for greater investment in research and monitoring of veterans in order to shape future reform. The Commission welcomes submissions on the issues outlined in this Paper, and the closing date for receipt of submissions is 28th November 2008.

Review of Prerogative Writs

Issues Paper No. 9

August 2008

http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_150_416_IP09.pdf

The New Zealand Law Commission emphasises that judicial review is of fundamental importance in public law. It is through this mechanism that the courts may make a valuable contribution to public administration. The procedures for judicial review in New Zealand are laid down in the Judicature

Amendment Act 1972 and the High Court Rules. Prior to 1972, the English and New Zealand courts also granted “extraordinary remedies”. A prerogative writ or prerogative order was granted when the application was successful. The 1972 Act, adopting the recommendations of the Public and Administrative Law Reform Committee, retained the old prerogative orders but expected them to become obsolete. The orders have continued to remain useful however, even though the judicial review procedure is quite complex and technical.

This Issues Paper focuses exclusively in the issue of judicial review procedure. It does not address a number of other matters, including the substantive rules relating to judicial review. The Commission considers whether there is a continued need for prerogative writs alongside other procedures, and it also considers a number of other matters relating to the reform of judicial review. The Commission opines that procedures should be as simple as possible, to reflect that judicial review is a very broad remedy taken against many different types of decision makers in many different circumstances. Furthermore, it also suggests that the rules should be set down by Parliament. The Paper also considers a number of different related matters including damages, evidence, the location of the rules for judicial review and the issue of a limitation period. The deadline for submission was 30th September 2008.

I. Queensland

Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System

QLRC R 62 Final Report

June 2007

<http://www.qlrc.qld.gov.au/reports/R62Vol1.pdf>

The primary issue in this Report is the adequacy of current confidentiality provisions of the Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld). However, the Commission is also conducting a broader review of general guardianship principles, and this Report highlights issues

for future consideration in terms of reforming these principles, where relevant. The Report is split into 4 main parts. Chapters 1 and 2 provide the terms of reference given to the Commission, and give a general introduction to the guardianship system in Queensland, outlining the current confidentiality provisions in the legislation. In Chapter 3, the main guiding principles for reform as chosen by the Commission are outlined. These include the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system itself. The importance of preserving existing relationships is also considered, along with the role of relevance in determining whether to disclose information from Guardianship and Administration Tribunal proceedings.

Chapters 4 to 7 consider in detail the current confidentiality provisions relating to Guardianship and Administration Tribunal. In relation to these, the Commission recommends that the legislation should be amended to allow the Tribunal to exclude a party which seeks to disrupt the proceedings, that there should be a legislative right to information about proceedings in which a person is involved (which can only be excluded by the making of a “confidentiality order”), and that as far as possible, hearings should be held in public. The Commission also recommends the introduction of “closure orders” and “adult evidence orders”, which exclude certain persons from the hearing if necessary to avoid serious harm or injustice. “Limitation orders” restricting the reporting of tribunal hearings are also highlighted for reform by the Commission, to ensure that they can only be made where necessary to protect the confidentiality of the individual parties to the proceedings.

In relation to non-disclosure of Tribunal decisions and reasons, as well as written copies of these to certain active parties, the Commission recommends that the current provisions allowing this be abolished. Instead, the Commission recommends that the Tribunal can delay disclosure by 14 days, if necessary to avoid serious harm to a person or the effect of the Tribunal’s decision being defeated. Reporting of tribunal proceedings is to be allowed, provided the adult subject to the hearing is not identified. The Tribunal can however make a “non-publication”

order to prevent the publication of any other information deemed necessary to avoid serious harm or injustice to any person.

Chapter 8 of the Report describes the general duty of confidentiality in current legislative provisions, and recommends that this should be retained and amended in accordance with the Commission's other recommendations. Draft legislation to implement the proposed reforms is contained in Volume 2 of the Report.

A Review of the Peace and Good Behaviour Act 1982

Report No. 63

December 2007

Volume 1: <http://www.qlrc.qld.gov.au/reports/R63Vol1.pdf>

Volume 2: <http://www.qlrc.qld.gov.au/reports/R63Vol2.pdf>

This substantial Report, spread across two volumes and twenty chapters, follows the request of the Attorney General to review the Peace and Good Behaviour Act 1982. Under the Act, a magistrate may require a person to keep the peace, be of good behaviour, and comply with other provisions of the order for a certain period of time. The task of the Commission in this Report is to determine whether the Act provides an appropriate, accessible and effective method of protecting the community from breaches of the peace. If the Act does not achieve this goal, the Commission must determine whether the goal may be achieved by changes to the existing mechanism or alternatively by establishing a new mechanism for this purpose.

Following a Discussion Paper (WP No. 59) on this issue, the Commission agrees with the majority of submissions which opined that the existing procedures relating to the order are too complex, restrictive and inaccessible. The Commission therefore concludes that a new mechanism called the Personal Protection Act should replace it. The Report commences with a discussion of the historical background to the Peace and Good Behaviour Act, its current provisions, and its relationship to the Domestic and Family Violence Protection Act 1989. The key features of the Personal Protection Bill are discussed. The Commission considers the court's power to grant personal protection orders, the eligibility of persons to apply for them, and those who can be

protected under them. Related matters such as workplace protection orders, which allow employers to apply for an order to protect their employees in the workplace, are also considered. The Commission also considers urgent circumstances in which orders may be required, the role of mediation and preliminary conferences in resolving disputes, the courts' powers to deal with the appearance and non-appearance of parties, interim protection orders, the consequences of granting the orders, the ability to vary or set aside the orders, the recognition of orders from other jurisdictions, the service of documents, and other miscellaneous issues. The Report also includes draft legislation implementing its recommendations.

A Review of the Excuse of Accident and the Defence of Provocation

QLRC R 64 Final Report

September 2008

[http://www.qlrc.qld.gov.au/reports/R%2064.pdf](http://www qlrc.qld.gov.au/reports/R%2064.pdf)

In this Report, the Commission addresses three aspects of the Queensland Criminal Code: the excuse of accident, the partial defence of provocation reducing murder to manslaughter, and the complete defence of provocation for assault. These issues were referred to the Commission following public debate over the use of the provisions in homicide trials to acquit defendants on the basis of accident where the victims had died from a punch, and where a defendant had charges reduced from murder to manslaughter because of provocation (*R. v. Sebo, ex parte Attorney General* ([2007] Q.C.A. 426). The Report builds upon the findings of the Department of Justice and Attorney General's audit on these defences and also considers the failure to enact the Criminal Code (Assault Causing Death) Amendment Bill 2007.

The main recommendations of this Report are as follows. A majority of the Commission recommends that the current provision which excuses a defendant from criminal responsibility for an event that occurs by accident should be retained. The majority also recommends that the event should continue to mean the death of the deceased. However, the Commission also recommends that the "eggshell skull" principle in the Criminal

Code relating to the excuse of accident should be amended to confine its application to unlawful acts. No new offences of “assault causing death” or “unlawful and dangerous act manslaughter” are proposed as alternatives to prosecution for manslaughter.

The Commission also recommends the retention of the partial defence to murder of provocation, with an amendment to ensure that, other than in circumstances of an extreme and exceptional character, the partial defence of provocation cannot be based on words alone. A further amendment should be made to the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased’s choice about a relationship. The Criminal Code should also be amended to state that the burden of proof for partial provocation is on the defendant, and the applicable standard of proof should be the balance of probabilities. A new gender-neutral defence relating to battered persons within an abusive relationship should also be considered for addition to the Criminal Code, according to the findings of the Commission. Finally, the Commission recommends the retention of the complete defence of provocation to an assault in its current form in the Criminal Code.

J. South Africa

Statutory Law Revision – Legislation administered by the Department of Transport

Discussion Paper 114

May 2008

<http://www.doj.gov.za/salrc/dpapers/dp114.pdf>

In this Discussion Paper, the Commission is charged with identifying legislation administered by the Department of Transport which should be repealed. This investigation is part of a larger inquiry into statutory revision of all statutes from 1910 to date. Though previous investigations selected legislation for repeal on the basis that it was redundant or obsolete, the emphasis in this Paper is to repeal provisions that are contrary to

Constitutional provisions on equality. Nevertheless, all provisions that are obsolete or redundant will also be recommended for repeal.

The investigation is necessary because legislation enacted before South Africa became a Constitutional Democracy remains in force, and a number of statutes are presently considered to be constitutionally non-compliant. In fact, some statutory provisions still on the books were enacted to promote apartheid. Such provisions are not only defunct but have also given rise to expensive, sometimes protracted litigation. The goal of this statutory law revision will be provide that such legislation now respects the constitutional provisions on equality, but also to modernise and simplify the statute book, to reduce its size so that people may source information in a more efficient and accurate manner. The Paper also includes a draft Bill entitled the Transport Acts Repeal Act. The full text of this Bill is included, so that submissions may be fully informed on all aspects of the recommendations of the Commission going forward. The Bill also preliminarily identifies such legislation to be repealed in whole or in part in its schedules. The deadline for submissions to the Commission was 31st August 2008.

K. Victoria

Civil Justice Review

Final Report

March 2008

<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Find/Publications/>

In this Report, the Commission examines the goals of the civil justice system, and the principles that should guide the rules of civil procedure. Twelve priority areas for reform are identified, with reforms proposed as outlined below. The goals of the civil justice system are determined in accordance with the Victorian Constitution and the Victorian Charter of Fundamental Rights and Responsibilities. These goals are divided into two categories by the Commission, with “fundamental goals” and “desirable goals”

outlined. Fundamental goals include ideals such as fairness and transparency, whereas desirable goals include accessibility and affordability. Factors influencing the civil justice system are also noted, including the complexity of litigation and the “adversarial culture” which permeates the civil justice system.

The specific recommendations for reform made by the Commission are as follows. Pre-litigation requirements are suggested as a means of facilitating the quick and inexpensive resolution of disputes. The Commission recommends that the standards of conduct of participants in litigation can be improved by introducing new statutory standards, which will include provisions to accelerate the disclosure of information and require verification from parties that allegations in proceedings have merit. Use of alternative dispute resolution (ADR) mechanisms will be encouraged through statutory provisions for mandatory referral to ADR in certain cases. The Commission also recommends that judges take a more proactive role in managing litigation, by for example using case-conferencing or other alternative means of hearing cases, and introducing measures to deter or curtail unnecessary litigation. Cost-effective early methods of disclosure are also promoted by the Commission, particularly pre-trial oral examinations and statutory provisions to enable confidential information to be available prior to the formal hearing.

Expert evidence is also to be subject to more judicial control than at present, according to the Commission’s recommendations. The Commission recommends that the procedure for group litigation should also be simplified, for example, to clarify that all the members of the group do not have to have individual claims against each defendant, as long as each member has a legal claim against one defendant. To assist self-represented litigants with language difficulties, the Commission suggests that further funding for interpreters should be provided. Vexatious claims can also be dealt with in part by broadening the *locus standi* requirements for those who wish to curtail these proceedings. The Commission also recommends the establishment of a Justice Fund to assist in funding civil litigation, and a Costs Council to rationalise and reduce the costs of litigation. Finally, ongoing review and reform of the civil justice

system should be carried out by the introduction of a Civil Justice Council.

Jury Directions

Consultation Paper No. 6

September 2008

<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Find/Publications/>

The process whereby trial judges give directions to juries is a major source of criminal appeals in Victoria. Therefore the Commission, in consultation with lawyers, judges and other law reform commissions, is examining the procedural, administrative, and legislative changes that may improve the quality of jury directions, and reduce the likelihood of successful appeal on this ground.

The Commission commences its investigation with an analysis of the broad generic rules on directions that apply in a high degree of varying circumstances. Problems created by more specific rules arising from certain cases are also discussed. Problems raised by the increasing number and stringency of legal rules, some recently imposed by legislation, on jury directions, including those related to judicial warnings are explored. The Commission then details its position on the issue, stressing the need to support the adversarial nature of criminal proceedings, and have certainty in directions, while also preserving judicial discretion in the area.

The Commission identifies four specific problems relating to jury directions in the context of sexual offences cases: numerous and sometimes contradictory legal rules, evidential directions in sexual offences cases, unnecessary directions given by overly cautious judges, and the lack of clear guidance from appeal court judges to trial judges. Three models for the simplification of propensity warnings are considered. These are the Leach Model, the UK model and the Zuckerman Model. Consciousness of guilt warnings are explained as an example of how complex the law relating to jury directions can be in certain circumstances and a number of options for reform are canvassed. These options include prohibiting the warning, making it

discretionary and removing the corroboration requirements. The extent to which the content of the warning should be specified in legislation is also discussed. The Commission also details the duty of the trial judge to instruct the jury about other possible defences not raised by counsel, and discussed the possibility of removing the need for certain rules in this regard when the accused is legally represented. The importance of early issue identification is discussed. In a concluding chapter, the Commission states the options for reform. The primary proposal for reform is to consolidate the law on directions and warnings into one piece of legislation and provide guidance on the specific content of selected directions and warnings.