

**RECENT PUBLICATIONS BY LAW  
REFORM BODIES WORLDWIDE**

COMPILED BY

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*A. Australia***Review of Secrecy Laws**

Issues Paper no. 34

December 2008

<http://www.austlii.edu.au/au/other/alrc/publications/issues/34/>

In response to a reference from the Attorney General of Australia, the Australian Law Reform Commission (ALRC) is undertaking a major review of Australia's federal secrecy laws. This Issues Paper is the first step in the review process. It is designed to begin a national discussion on the most appropriate legal framework for secrecy laws. "Secrecy Law" is a general term used to describe any law that prohibits (or limits) the disclosure, copying, usage, obtainment or solicitation of information gathered and used by government agencies. The ALRC has identified 450 such provisions, covering a broad swathe of the federal statute book.

Secrecy laws are never absolute: the collection and disclosure of information is essential to the smooth and efficient operation of government. For example, in order to properly combat crime, various government agencies must be able to share information. In other areas, information may need to be shared with the private sector. It is also necessary for a modern democratic government to be as open and accountable as possible, while ensuring that citizens' personal information is protected from unnecessary disclosures. A key goal for this

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review is to strike the appropriate balance between competing public interests; the foremost balancing exercise being between the need for secrecy to protect citizens' rights and to effectively combat crime (particularly terrorism), and the need for an open and accountable government. It is clear that the spectre of 9/11 looms large in the Paper.

As this is an Issues Paper, no concrete proposals for reform are offered. Instead, the key questions for future reform are set forth. At present, secrecy laws in Australia apply to a wide variety of individuals employed or contracted by the federal and state governments. A breach of a secrecy law is usually deemed to be a criminal offence of some type. Sanctions imposed range from small fines to imprisonment; administrative penalties are applicable in some instances. Numerous exceptions and defences are also in existence.

One major question for the review is whether there is a need for secrecy laws at all. There is a suggestion that the interests at stake are already protected by other areas of the law, such as privacy and freedom of information. However, if the continued existence of secrecy laws is accepted, the question is what form they should take, and the sanctions they should impose. The ALRC specifically raises the question as to whether civil, as opposed to criminal, sanctions should play a greater role in this area; and also whether there is a need for a whistleblowers' charter to protect those who disclose information in the public interest. This latter question is being considered in a more general context by a committee in the Australian House of Representatives.

A discussion paper dealing with this topic is due to be published in May 2009, and a final report is due in October 2009.

### **Review of the *Review of the Royal Commissions Act***

Issues Paper no. 35

April 2009

<http://www.alrc.gov.au/inquiries/current/royal-commissions/>

In response to a reference from the Attorney General of Australia, the Australian Law Reform Commission (ALRC) is considering the need to reform the legislative framework for

public inquiries. This necessitates an investigation into the provisions and operation of the Royal Commissions Act, 1902.

Royal Commissions are the highest form of public inquiry in Australia. Whenever a controversial issue arises which is felt to be incapable of appropriate consideration by the traditional branches of government, there is usually a call for the establishment of a Royal Commission. They are not just used to investigate alleged corruption or wrongdoing; they are also used to inquire into the functioning of industry or the shape of public policy. They are designed to be public in nature, and independent from government. They also have considerable fact-finding powers at their disposal, but their determinations can only ever be advisory in nature.

Despite the generally high regard for Royal Commissions, concerns have been expressed in recent years about their costs, and the antiquated nature of the 1902 Act. Consequently, one of the major purposes of this Review is to consider whether a more modern and flexible system of public inquiry can be placed on a legislative footing. Forms of inquiry alternative to Royal Commissions are presently in existence, but they are usually created on an ad hoc basis.

As this is an Issues Paper, no concrete proposals for reform are offered; instead, the focus is on the major questions that future reforms would need to address. Foremost among these is the fate of the 1902 Act. The ALRC suggests that it could be either: (i) repealed and replaced by a general statute that allows for the creation of a variety of public inquiries; or (ii) retained while a new general statute is introduced to provide for the establishment of different types of public inquiry – this new act would then exist alongside the 1902 Act. The Commission is agnostic as to the desired resolution, and is willing to entertain alternative schemes.

After addressing the major question about the fate of the Royal Commissions, the next set of questions will concern the operation of any alternative forms of public inquiry. In particular, the following will need to be determined: what coercive powers should be at their disposal; the rights and duties of witnesses appearing before them; whether they should be entitled to impose sanctions and penalties; the reviewability of their decisions; and,

finally, how they are to be funded and administered. The ALRC asks 40 specific questions on these topics.

This Issues Paper will be followed by a Discussion Paper in August 2009, and a final report will be submitted to the Attorney General at the end of October 2009.

### *B. British Columbia*

#### **Report on Relief Under Legally Defective Contracts**

BCLI Report No. 52

October 2008

<http://www.bcli.org/bclrg/projects/defective-contracts-relief>

Contracts that conflict with recognised heads of public policy or statute are illegal. Under common law, neither party is entitled to any relief under an illegal contract. The same rule applies in relation to trusts and gifts. On the surface, this position seems sensible, but practice paints a different picture: the common law rule is absolute, and often leads to unjust windfalls and unrecoverable losses. Furthermore, because the rule does not concern itself with the culpability of the parties, the term “illegal contract” has unnecessarily stigmatic connotations.

Remedying the existing law on relief under illegal contracts is the goal of this Report from the British Columbia Law Institute (BCLI). As is noted by the BCLI, the courts have themselves been active in this area. Indeed, several exceptions to the general rule have been created through recent case law. And a trend towards greater flexibility in the treatment of illegal contracts is discernible. However, it is felt that reform through case law will be piecemeal and uncertain. So, the BCLI recommend that the *Uniform Illegal Contract Act* (UICA) be enacted into the law of British Columbia.

The UICA was drafted by the Uniform Law Commission of Canada. One of the goals of this body is to harmonise, where necessary, civil law across the Canadian provinces. The UICA does not attempt to restate or codify existing law in the area of illegal contracts. Instead, it aims to cut through the incoherence and technicality of the present system and provide courts with an

extensive and flexible framework of remedial powers for cases involving illegal contracts. The remedial powers made available to the courts under the UICA will include: restitution, apportionment of loss, declaratory relief, and severance of illegal terms. There will also be the power to effect “notional severance”. This would entitle the court to read down or limit the effect of an “illegal term”.

Although the BCLI is strong in its recommendation of the UICA, it does offer several minor amendments. Foremost among these is a change in terminology: in order to limit potentially stigmatising inferences, the BCLI recommends that the term “illegal contract” be replaced by “legally defective contract”. A draft bill, with the proposed amendments, is appended to the report.

### **Proposals for a New Commercial Tenancies Act**

Consultation Paper

September 2008

<http://www.bcli.org/bclrg/projects/commercial-tenancy-act-reform-project>

This Consultation Paper is part one of a major project to reform the Commercial Tenancies Act, 1897 (CTA), in British Columbia. Part two will consist of the final report, which is due for completion in June 2009. Even in this digital age, the leasing of premises for the purposes of conducting business remains a key component in the economic life of British Columbia. It is somewhat surprising to find, then, that the legislative framework governing this area has been without major reform since it was first enacted over 100 years ago.

The Consultation Paper has two main sections. The first section details the legal history of commercial leasing in British Columbia. It also makes the case for reform. The CTA was enacted as part of an effort to consolidate English law dating from the eighteenth and nineteenth centuries, and to remedy deficiencies in the common law. The BCLI identify two major reasons for reforming the law. First, the CTA is linguistically and conceptually antiquated: it uses arcane and incomprehensible terminology; and it refers to several types of lease that are no

longer in use. Second, a modern legal framework, that is both accessible and sophisticated, will be a major benefit to the commercial sector.

The second section of the Paper offers tentative proposals for reform. One general proposal and 58 specific proposals are made. These are to be the subject matter of the consultation process. The general proposal is that the existing CTA be repealed and replaced by a new Act with the same name. The 58 specific proposals, made under 15 separate headings, give the details of this new Act.

These specific proposals include the following. The existing law implies two terms into every commercial lease. The first concerns the landlord's duty to respect the tenant's quiet enjoyment of the premises; the second concerns the tenant's duty to treat the premises in a tenant-like manner. The BCLI recommend that a more specific set of implied terms be set out in legislation. Parties will be free to derogate from these implied terms by express agreement.

The existing law provides a landlord with "distress for rent". This entitles the landlord to seize and sell the goods of the tenant that are present on the leased premise, when rent is in arrears. This is a contentious rule, and the BCLI recommend that it be abolished or significantly modernised. A considerable expansion of dispute resolution procedures is also recommended. This would encompass disputes concerning a landlord's right to re-entry and overholding tenants. Finally, the Commission recommends that all provisions of the existing CTA concerning obsolete types of lease be discontinued.

### **Assisted Living**

Discussion Paper

October 2008

<http://www.bcli.org/bclrg/projects/assisted-living-past-present-and-future-legal-trends-canada>

Aging demographics are a concern in many developed countries. This Discussion Paper, produced by the Canadian Centre for Elder Law (a division of the BCLI), is designed to

facilitate public consultation and debate on the specific topic of assisted living for the elderly.

If one were to organise potential housing options for the elderly along a continuum, with independent living at one end and full-time institutional care at the other, then assisted living would lie somewhere in between. It is, in effect, the “middle option”. As the Canadian population ages, it is clear that sensible legislative and regulatory systems will need to be available to both users and providers of assisted living facilities. In order to encourage public discussion, this Paper looks at the past, present and future trends surrounding assisted living.

The first part of the Paper discusses the social and political history of seniors’ housing. It is noted that assisted living is a relatively modern concept, with its origins in the 1980s.

The middle part of the Paper focuses on the current legislative and regulatory frameworks governing assisted living. This takes up the bulk of the Paper. It begins by highlighting the three main areas of the legal landscape that are implicated in assisted living: (i) tenancy law; (ii) consumer services and protection; and (iii) health and safety. It then discusses the existing law in the different Canadian provinces. A picture emerges of a disjointed, disconnected and unnecessarily complex set of legal and regulatory structures. Any proposed reform to the area should aim to make the law more accessible and understandable to those who will use and provide assisted living facilities.

The third part of the Paper looks at issues that will be relevant for the future of assisted living facilities. In particular, the following topics are raised: lesbian, gay, bisexual and transgendered issues; smoking, alcohol and drug use; and physical and mental challenges. Again, any proposed reform will have to deal with these issues.

The Paper closes by asking a series of questions for the purposes of consultation. Some of the key questions include: whether there should be a standardisation of terminology for assisted living across Canada; and whether the topic should be covered by a single piece of legislation or by several pieces of legislation (covering residential tenancy, consumer protection, and health and safety).

Since the Paper is designed to facilitate public discussion, no specific legislative reforms are recommended. Reforms will be suggested in a final report, due for completion later this year.

### *C. England and Wales*

#### **Consumer Remedies for Faulty Goods:**

Joint Consultation Paper (Law Com 188 and Scot Law Com 139)

November 2008

<http://www.lawcom.gov.uk/docs/cp188.pdf>

When we purchase goods, we expect them to conform to certain standards. We expect them to match their description; we expect them to conform with samples supplied to us by the vendor; we expect them to be of satisfactory quality. But what happens when the goods fail to conform to these standards? With this question we enter the territory of faulty goods and consumer remedies. This is the territory covered by this Consultation Paper.

Existing UK law on consumer remedies is confused. The confusion arises from the existence of two overlapping systems for remedy: one based on UK statute law, and the other on the EU Consumer Sales Directive (CSD). Under UK law, full refund for faulty goods is permissible within a reasonable period of time. Thereafter, the consumer has a right to damages only. Under the EU directive, two tiers of remedies exist: the first involves repair and replacement; the second involves rescission or reduction in price. The continued existence of these two systems renders the law needlessly inaccessible to the average consumer.

The goal of this Consultation Paper is to rationalise and simplify the existing scheme of remedies. The Paper is written against the backdrop of proposed reform of the CSD. The ultimate form of the new CSD will restrict the scope for domestic reform: should the EU opt for maximum harmonisation, the scope for domestic reform will be eliminated; should they opt for minimum harmonisation, additional remedies may be supplied by domestic law. With this backdrop in mind, the Law Commission offers some potential reforms for consideration.

These are offered as a contribution to both domestic and EU law reform debates.

First, the Commission suggests that there be a 30-day period within which a consumer has the right to reject any faulty goods. This should be the remedy of first instance for the consumer. The right to reject should also cover latent defects that become manifest after this 30-day period. The Commission invites submissions as to whether there are reasons for extending or reducing this proposed 30-day period. Where the right to reject is exercised, there will be a reverse burden of proof in favour of the existence of a fault. The right to damages after this 30-day period should remain. But the Commission is unsure as to whether damages should be subject to statutory guidelines or left within the remit of the common law.

Recommended reforms of the CSD are also offered for consideration. The Commission suggests that the two-tiered system remain in place. After two failed repairs, or one failed replacement, a consumer will be entitled to a second-tier remedy. An exception may arise if the product was manifestly dangerous or the vendor behaved unreasonably.

Ideally, the CSD and UK remedies should be bound together by the concept of *rejection*. Under such a system, the acceptance of a repair or a replacement would amount to waiver of the right to rejection. Second tier remedies would continue to exist.

Finally, the need for consumer education is highlighted by the Commission. Any scheme of remedies risks irrelevancy if it remains unknown. Notices posted at the point of sale are thought to be the most obvious educational tool, but submissions are welcomed on the precise content of such notices.

### **Intoxication and Criminal Liability**

Final Report (Law Com 314)

January 2009

<http://www.lawcom.gov.uk/docs/lc314.pdf>

Intoxication is a catalyst of violence: alcohol and other drugs are estimated to be factors in over 50% of violent attacks. This statistic and others like it are presented by the English Law

Commission in this report. The link between intoxication and crime seems clear. But since intoxication evidently affects the capacity to reason about one's actions, should it somehow limit or prevent liability for crimes? This old question is given a thorough reappraisal in this Report.

The current position on intoxication and criminal liability is superficially straightforward: voluntary intoxication can never ground a defence to a crime, unless the crime is one of "specific" and not "basic" intent. This has been the rule in England since *DPP v. Majewski* [1977] A.C. 443. At the same time, involuntary intoxication can be a defence.

The superficial simplicity of the present law masks three deficiencies. First, the line between voluntary and involuntary intoxication is unclear. Second, there are no agreed-upon criteria that allow an offence to be considered one of "specific" intent, as opposed to one of "basic" intent. And third, there is uncertainty as to what should be done when the offence charged is one of accessory or inchoate liability. In order to resolve these deficiencies, thirteen recommendations are made.

The first three recommendations try to clear up some of the confusion arising from the *Majewski* decision. The distinction between "specific" and "basic" intent is abandoned, and the focus switches to *integral* and *non-integral* fault elements. Integral fault elements would be the following: (a) intention as to consequence; (b) knowledge as to something; (c) belief as to something; (d) fraud; and (e) dishonesty. If the definition of an offence contains an integral fault element, the prosecution will have to prove that the defendant possessed the requisite subjective fault. This applies irrespective of whether the defendant was voluntarily intoxicated. If an offence does not contain an integral fault element, voluntary intoxication will not offer a defence.

Recommendations 4, 5 and 6 deal with the relationship between intoxication and defences involving mistaken beliefs. It is recommended that voluntary intoxication should never be allowed to support a defence of mistaken belief. If such a defence is argued, the proper test is a counterfactual one: would D have had the mistaken belief had he/she been sober? This test would also apply to offences involving the failure to comply with an objective standard of care.

Recommendations 7, 8 and 9 deal with accessory and inchoate liability. It is recommended that the revised form of the *Majewski* rule apply to these types of offences. In other words, if the actual offence involved or would have involved an integral fault element, then the fault needs to be proved by the prosecution irrespective of whether D was voluntarily intoxicated. But where the fault element is non-integral, voluntary intoxication will not offer a defence.

Recommendations 10-11 concern the status of involuntary intoxication. The main recommendation is that involuntary intoxication may be taken into consideration when determining whether D met the required standard of fault. The distinction between integral and non-integral fault elements does not apply to these cases. Involuntary intoxication may also be used to support a defence of mistaken belief. A non-exhaustive list of situations in which intoxication may be deemed involuntary is provided.

Finally, recommendations 12 and 13 deal with evidence and proof. Should the prosecution allege that D was intoxicated at the time of the offence, it will be up to them to prove (beyond a reasonable doubt) that this was the case. A hierarchy of presumptions will apply. First, it is presumed that D was not intoxicated. Second, if intoxication is proved, it is presumed to be voluntary. Should D contend that the intoxication was involuntary, he/she will have to prove this (on the balance of probabilities).

Where D alleges that he/she was intoxicated at the time of the offence, D will bear only an evidential burden to support this claim. The prosecution will need to disprove the claim beyond a reasonable doubt. Again, in this situation, a hierarchy of presumptions will apply. If D alleges the intoxication was involuntary, he/she will need to prove this (on the balance of probabilities).

A draft bill is appended to the report.

**The Illegality Defence**

Consultative Report 189

January 2009

<http://www.lawcom.gov.uk/docs/cp189.pdf>

The extent to which illegal conduct should prevent one from enforcing one's normal legal rights is the question explored in this Consultative Report. This is a question that arises in many areas of the law. The following are discussed by the Law Commission: enforcement of contract; reversal of unjust enrichment; recognition of legal title to property; enforcement of equitable interests; and in cases where compensation is claimed for injuries sustained whilst engaging in an illegal activity.

The Commission had previously recommended statutory reform in this area. A less sweeping style of reform is now offered for consideration. It is recommended that in the areas of contract, tort and unjust enrichment, development of the illegality defence be left to the courts. One important consideration should guide the court in reaching their decisions in these matters: *transparency*. This requires some explanation.

The scope of the illegality defence is largely a matter of policy. Indeed, the Commission offers five policy reasons in favour of limiting someone's legal rights when they have engaged in illegal activities: (a) furthering the purpose of the rule which the illegal activity infringed; (b) consistency with other rules; (c) preventing someone from benefiting from wrongdoing; (d) deterrence; and (e) maintaining the integrity of the legal system. Against these policy considerations must be balanced the legitimate expectation that legal rights will be enforced. In balancing these considerations, the court should bear in mind the possibility of injustice, and the connection between the illegality and the right claimed. The Commission recommend that the court be transparent about the balancing test they employ. This would help the development of the law in this area.

The Law Commission identifies a need for legislative reform in relation to one matter: trusts that have been set up to hide the true ownership of property for illegal purposes. The leading House of Lords authority on this matter, *Tinsley v. Milligan* [1994] 1 A.C. 340, leaves no room for lower courts to

exercise discretion. Legislation will be needed to reintroduce limited discretion. The Commission is in the process of drafting a bill that will do just that.

### **Reforming Bribery**

Final Report (Law Com 313)

February 2009

<http://www.lawcom.gov.uk/docs/lc313.pdf>

Corruption damages the operation of private and public bodies. An effective law of bribery is an essential weapon in the fight against corruption. However, the existing UK law of bribery is diffuse and complex: it is covered by several statutes and a common law offence of bribery; and it makes needless distinctions between bribery in different types of institution. This Report recommends serious rationalisation and simplification of the law.

It is recommended that the various offences of bribery be replaced by five new offences. Two will be general and concern the behaviour of both parties to a bribe. The first of these will make it an offence for someone to offer a bribe designed to induce or reward someone for improper behaviour. The second will make it an offence for someone to accept a bribe that induces or rewards improper behaviour; or to accept a bribe where the acceptance is itself improper. "Improper behaviour" is defined as being the failure to live up to expectations of good faith, trust and impartiality.

The third offence concerns the bribing of a foreign public official (FPO) in their capacity as an FPO. It will be a defence to a charge of bribing an FPO, if the person can show that they reasonably believed the offer to be compliant with the law binding on the FPO. The fourth offence concerns bribes offered on behalf of a body corporate. It will be an offence for a corporation to negligently fail to prevent such bribes being offered. It will be a defence to a charge of negligent failure, if the corporation can show they had adequate procedures in place to prevent bribes being offered.

The fifth and final offence also relates to a body corporate. It allows directors to be charged with bribery, in their personal

capacity, if they consent to or connive in the commission of a bribery on behalf of the body corporate.

The Law Commission recommends that the new offences apply to all British citizens and companies irrespective of where the bribery took place. A draft bill is appended to the report.

### **The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales**

Consultation Paper 190

April 2009

<http://www.lawcom.gov.uk/docs/cp190.pdf>

How best to establish the reliability of expert evidence is the question at the heart of this Consultation Paper. To answer it, two issues need to be addressed. First, there is the fundamental issue concerning the general reliability of a given body of knowledge; and second, there is the issue of how a particular expert witness has drawn from that body of knowledge. This Paper deals primarily with the first issue, albeit with some attention directed at the second.

In Part 3 of the paper, the Law Commission explores the problems with the current approach to the reliability and admissibility of expert evidence. The current position, as set down in several leading English cases, is that the evidence must be “sufficiently well-established to pass the ordinary tests of relevance and reliability”. In practice, this means that the judge decides whether a body of knowledge is sufficiently well-established, and the jury decide whether it is reliable. The major problem with this is that there are no consistent guidelines in place to aid the judge in establishing the sufficient reliability of the evidence.

In Part 4, the Commission consider the options for reform. In light of the deficiencies of the present position, the Commission propose that a substantive reliability test be placed on statutory footing. This test would require an active assessment of the nature of the evidence being submitted. To make the test viable, training for both the judiciary and practitioners would be required. Part 6 sets out the specific hurdles that the evidence would need to overcome.

As this is a consultation paper, all proposals are left open for consideration. The Commission seeks feedback on four topics: (i) the precise content of the reliability test; (ii) where the onus of persuasion should lie; (iii) the potential need for assistance by court-appointed assessors; and (iv) the education of judges and the accreditation of expert witnesses.

#### *D. Ireland*

##### **Bioethics: Advance Care Directives**

Consultation Paper (LRC CP 51–2008)

October 2008

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

An advance care directive (ACD) exists when a person consciously sets out their wishes as to what should happen to them in the event of an incapacitating accident. These are sometimes referred to as “living wills”, but the term “advance care directive” is preferred. This Consultation Paper offers a general view of the issues involved in the legal regulation of ACDs in Ireland.

At present, ACDs operate within a legal vacuum: they are not illegal, but there are no definitive standards concerning their scope, content or form. Proposed changes to the Powers of Attorney Act, 1996, would create an ability to grant the power of attorney over minor medical matters, but this would not cover all situations in which ACDs might arise. The goal of the Consultation Paper is to provide a more robust legal framework for those who might wish to draft a directive.

The Consultation Paper avoids the most controversial ACDs concerning euthanasia and psychiatry. The latter (the so-called “Ulysses directives”) arise when a person consents to psychiatric treatment prior to developing a mental illness. Such prior consent would override any apparent rejection of treatment whilst suffering from a mental illness. Despite avoiding these hot-button topics, the Consultation Paper does deal with an area of recent controversy: refusal of treatment on religious grounds.

As this is a consultation paper, only provisional recommendations are offered. Among the provisional recommendations were the following. First and foremost, the commission suggests that only negative ACDs be permissible. Such directives would reject certain types of medical care. This could include “Do Not Resuscitate” orders. Submissions are invited on this particular issue. A refusal of basic or palliative care is recommended to remain off limits.

The Commission suggests that a refusal to consent to medical treatment on religious grounds should be legally acceptable, subject to constitutional considerations. Those who draft an ACD will be encouraged to consult with a medical professional. In cases where the directive rejects life-sustaining treatment, such consultation will be mandatory.

There will be a rebuttable presumption in favour of the capacity of an individual to draft an ACD. In cases where a rebuttal arises, a functional test of capacity will apply. Statutory guidelines should aid healthcare professionals in reaching decisions with respect to capacity.

In cases where life-sustaining treatment is rejected, a written ACD will be required. This will need to be witnessed by at least one person. Otherwise, witnesses are not a prerequisite. Furthermore, a prescribed form for an ACD is not recommended. A directive will be rejected if: the author lacks capacity; the creation of the directive was involuntary; the author communicated a change of mind, or did anything that reasonably suggested a change of mind; or witnessing and consultation were not obtained in the case of life-sustaining treatments.

ACDs should be reviewed regularly, but there should be no time limit on their validity. Finally, the Commission recommends that a healthcare professional should not be held liable for following an ACD that is believed to be valid. On the other hand, submissions are invited as to whether sanctions should be imposed when an ACD is ignored.

**Trust Law: General Proposals**

Final Report (LRC 92-2008)

December 2008

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

This Report aims to create a modern legislative code concerning the duties, responsibilities and powers of a trustee. The Trustee Act, 1893, as amended, remains the major source of law in this area, and is the primary target of reform. But the task is complicated by the trust's tendency to pop-up all over the legal landscape. For example, some aspects of trust law will need to be reconsidered following the expected passage of the Land Law and Conveyancing Law Reform Bill, 2006. Furthermore, this report does not cover pension trusts. These are covered by the Pensions Acts, 1990-2008. An additional complication arises in relation to charitable trusts. Although these are covered by the report, everything said therein is without prejudice to the Charities Bill, 2007.

To reiterate, the Report focuses on the duties and powers of a trustee, and it includes a draft Trustee Bill. A significant number of final recommendations are made. The following is a non-exhaustive summary. As a general point, the Commission recommends that there be an express legislative statement confirming that a trustee must perform a trust honestly and in good faith for the benefit of the beneficiaries.

Chapter 2 details recommendations in relation to the appointment, retention, dismissal and retirement of trustees. It is recommended that general qualifying criteria as regards the mental capacity of a trustee not be introduced. Instead, a functional approach to capacity should apply. There should be no restriction on the number of trustees that can be appointed to a trust. A statutory power to appoint a trustee without recourse to the courts should also be introduced. This would be subject to a number of limitations and qualifications. Similar provisions are recommended in relation to the dismissal of trustees.

Chapter 3 concerns the duties of a trustee. It recommends the introduction of a statutory duty of care for trustees. The standard would be founded on an objective-subjective test. The objective component focuses on general reasonableness;

the subjective component considers any special knowledge the trustee might be expected to have. A higher standard of care is recommended for professional trustees.

Chapter 4 deals with exemptions from duties. It is recommended that the status of exemption clauses be made clear in legislation. Exemptions from core duties will not be permitted.

Chapter 5 considers the trustees' duty to provide information to their beneficiaries. It is recommended that beneficiaries should have a statutory right to be provided with the deed of settlement, but that disclosure of other documents should be a matter of discretion.

Chapter 6 discusses the delegation of functions. A trustee will be permitted to delegate functions to an agent. But the following functions should be non-delegable: (a) functions relating to the distribution of assets during the lifetime of the trust; (b) the power to decide whether payments due should come out of the income or capital of the trust fund; (c) powers of appointment; (d) the power to delegate functions.

Chapter 7 looks at whether there is a need to expand a trustee's power of insurance. It is recommended that powers of insurance be expanded beyond the existing limit of "loss or damage due to fire". This expansion should include the power to insure trust property up to replacement value. The power of insurance will fall under the general statutory duty of care, but there will be no actual duty to insure.

Chapter 8 deals with powers of investment. It is recommended that the default powers of investment remain governed by Section 1 of Trustee (Authorised Investments) Act, 1958. But the list of authorised investments should be revised and rendered more accessible. Additionally, investments should be reviewed annually as opposed to every six months.

Chapter 9 looks to improve trustees' powers in relation to debts and liabilities. Chapter 10 examines the power to advance funds to beneficiaries. A general statutory power to apply income for the maintenance of beneficiaries is recommended. A statutory power to advance capital to beneficiaries is also recommended. The amount advanced should not exceed half the share of the beneficiary.

Finally, Chapter 11 considers the power to buy and sell land. It is recommended that a trustee have the power to buy land, with a mortgage if necessary. This power may be excluded by express wording in the trust instrument. A statutory power of sale should also be introduced. This would be subject to restrictions either in the trust instrument, statute or the general law of trusts.

### **Expert Evidence**

Consultation Paper (LRC CP 52–2008)

December 2008

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

This Consultation Paper examines the nature of expert evidence in Irish law. Two areas are under the microscope: (i) the rules concerning the admissibility of expert evidence; and (ii) the rules concerning the role and function of the expert witness. These issues had previously been addressed in context of setting up a DNA Database (*Report on the establishment of a DNA Database*, LRC 78-2005). This Report is more catholic in its scope.

Civil and criminal trials often involve complex technical evidence. Such evidence, provided through the medium of expert opinion, should assist the court in deciding the ultimate issue. It should not decide that issue for the court. Nor should it cover an area of “common knowledge”. These traditional positions are not challenged in this Consultation Paper, but several key reforms are offered for consideration. As this is a consultation paper, the recommendations are provisional.

Significantly, the Commission recommends that all expert evidence should pass a reliability test prior to admission. This would be similar to the position in other jurisdictions. General acceptance of the ideas within the field of expertise is deemed to be too onerous a standard; instead, the evidence should be assessed on its own merits. The formulation of a judicial guidance note on the standards of reliability would support this proposal.

Turning to the role and function of the expert witness, the Commission would like to see a clear definition of what the term “expert” means for the purposes of giving evidence.

It recommends that consideration be paid to the individual's various qualifications, and their time spent both in and out of the field of expertise. Submissions are invited as to whether "experience only" expertise is acceptable.

The drafting of a formal guidance note on the duties of the expert witness is recommended. This would be based upon that provided in the English case of *The Ikerian Reefer* [1993] 2 Ll 68. It would include an overriding duty to the court, and a duty to disclose any relationship with any of the parties.

The Commission would like to prohibit fee arrangements with an expert witness that are conditional upon the outcome of the case. Pre-trial meetings between experts are felt to be appropriate to aid the drafting of an expert's report. Furthermore, a party would be required to answer any questions about the content of their expert reports prior to trial, if asked to do so by the other party. Submissions are invited as to whether complete disclosure could be ordered by the court where this is felt necessary to create a comprehensive expert report. A set format for all expert reports is recommended.

The creation of a regulatory authority for expert witnesses is not recommended. But the Commission would encourage all relevant professional bodies to set up their own regulatory and disciplinary procedures for professionals wishing to act as expert witnesses.

Finally, the status of immunity from suit for expert witnesses is left open for discussion, but it is recommended that such immunity should not encompass disciplinary proceedings from professional bodies.

**Posthumously Conceived Children: Intestate Succession and Dependants Relief**

Report No.118

November 2008

<http://www.gov.mb.ca/justice/mlrc/reports/118.pdf>

Due to advances in assisted human reproduction, it is now possible for a child to be conceived after the death of one of its biological parents. This Report, from the Manitoban Law Reform Commission, looks at the rights of such children to claim inheritance from a deceased parent who has died intestate. It also considers whether such children should be eligible to inherit from a relative of their deceased parent, who has also died intestate.

In this brief report, it is recommended that the Intestate Succession Act (CCSM c I85) be amended to include a right for posthumously conceived children to inherit from and through their deceased parents. However, a number of conditions would need to be met: the child would have to be conceived within two years of the grant of administration of the deceased's estate; notice would have to be given by the other parent that they have gametic material available for the purpose of posthumous conception within six months of the grant of administration; proof of a biological link would have to be provided; and the deceased must have provided written consent for both the use of the gametic material and the creation of potential inheritance rights.

The Report also considers the status of posthumously conceived children under the Dependants Relief Act (CCSM c. D37). This Act allows certain statutorily defined persons to claim relief from the estate of a deceased person when they are in financial need. At present, the Act only includes children born during the lifetime of the deceased. The Commission recommend that the definition of "child" be expanded to include posthumously conceived children. The conditions outlined above in relation to intestate succession would also apply to this scenario.

The Report recommends two other minor amendments to the Intestate Succession Act. The first of these is, again, designed to include posthumously conceived children within the remit of the legislation. The other amendment is unrelated to the topic of posthumously conceived children. Instead, it concerns the need for equal treatment of maternally- and paternally- related cousins for the purposes of intestate succession. Strangely, the existing position grants maternally- and paternally- related cousins a 50% share in the estate, irrespective of how many cousins exist in each block, *i.e.* if there were one maternal cousin and nine paternal cousins, the one maternal cousin would get 50% while the nine paternal cousins would share the other 50%. The proposed amendment would ensure that each individual received an equal share, *i.e.* 10% each.

### **Private International Law**

Report No. 119

January 2009

<http://www.gov.mb.ca/justice/mlrc/reports/119.pdf>

In this Report, the Law Reform Commission of Manitoba examines a number of matters arising out of the Supreme Court of Canada decision in *Tolofson v. Jensen; Lucas v. Gagnon*<sup>1</sup> (hereinafter *Tolofson*), namely the choice of law for tort actions, the characterisation of limitation periods and jurisdiction *simpliciter*.

Before the 1994 decision in *Tolofson*, Canadian courts in tort actions (such as negligence, trespass and defamation) applied the law of Manitoba. Following the Supreme Court decision however, the courts are now to apply the law of the country of the wrong; in other words the *lex loci delicti*. Speaking for the majority, Justice La Forest held that “it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred”.<sup>2</sup>

This decision has not escaped criticism, primarily on the basis of its lack of flexibility and injustice; where applying the

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<sup>1</sup> (1994) 120 D.L.R. (4<sup>th</sup>) 289.

<sup>2</sup> (1994) 120 D.L.R. (4<sup>th</sup>) 289, 305.

law of the country of the wrong would result in an injustice. In this Report, the Manitoban Law Reform Commission recommends enactment of legislation codifying the *Tolofson* rule with greater specificity. The Commission also recommends that Manitoba courts be empowered in exceptional circumstances to apply laws other than the law of the country of the wrong, where to do so would cause an injustice.

In summary, the Commission recommends that legislation should be enacted to provide that the applicable law is the law of the country in which the elements constituting the tort in question occurred. Where elements of the action occur in different countries, the Commission recommends that, in respect of personal injury, the law of the country where the individual sustained the injury should apply. In respect of property damage, the law of the country where the property was damaged should apply, and in any other case, the law of the country in which the most significant element or elements of the tort occurred. In order to avoid injustice, the Commission also recommends that where the issues in tort are more closely connected with a country other than the country where the tort occurred, the law of that place shall apply. Furthermore, the Commission recommends that the law of a country being applied to the tort should only include the internal law of the country, and not any of its rules on private international law.

On the issue of limitation periods, the Commission recommends a sweeping revision of the Limitation of Actions Act of Manitoba<sup>3</sup> codifying the court decision in this regard.

Finally, the Report deals with the establishment of jurisdiction of the Court of Queen's Bench, where a defendant has had to be served with the Statement of Claim somewhere other than Manitoba. In this Report, the Commission acknowledged that the case law in this area is uncertain, and therefore advocates that legislation should be enacted adopting the Uniform Court Jurisdiction and Proceedings Transfer Act. This Act comprises a harmonised system for granting judgments throughout Canada and has been enacted in British Columbia, Saskatchewan,

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<sup>3</sup> R.S.M. 1987, c. L150.

Nova Scotia and Yukon, and likely to be enacted elsewhere in Canada.

*F. New South Wales*

**Young people and consent to health care**

Report 119

October 2008

[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_r119toc](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r119toc)

In October 2008, the New South Wales Law Reform Commission published a Report reviewing the law concerning young people's consent to health care. The Report deals with young people (meaning people below 18 years of age) and the law that determines when they can make decisions about their health care and also when others can make those decisions for them. The Commission has been reviewing this area since 2002. This Report marks the final stage of that review process.

The Commission found that the current law seems to have general support, but that certain sections of it remain fragmented and incomplete. It is therefore necessary to implement a new legislative framework to regulate the assessment of a young person's competence to consent to or refuse health care, and, more importantly, to delineate the extent of parental and State involvement in the decision-making after that assessment.

In total 23 Recommendations are made in this Report. The scope and purposes of the new legislative framework are set out in Recommendation 1, while the details of that legislation are contained in the other recommendations.

The Commission believes that legislation regulating the decision-making process for young people should contain rules for determining when a young person is legally entitled to make a decision about his or her health care generally; when a young person is entitled to make a decision about particular types of health care; and when a young person's parent, legal guardian or other substitute decision-maker is entitled to override a young person's decision about his or her health care. This legislation

should also provide for the legal consequences of compliance and non-compliance with its provisions, definitions of the key terms and finally a statement of principles to guide the interpretation and application of the legislation.

With regard to the interpretation and application of the legislation, the Commission recommends that specific provisions should be set out regarding competency, whereby young people should be informed about all matters relating to their health care, taking account of their age and maturity, and respecting their autonomy, culture, disability, language, religion and sexuality. The best interests of the child should be the primary consideration at all times. Thus where a competent young person accepts or refuses treatment it is not necessary to obtain acceptance or refusal from a parent or guardian. The Commission defines a “competent young person” as one who understands all of the information that is relevant to making a decision about the health care, and appreciates the reasonably foreseeable consequences of that decision.

In terms of young persons who are not competent, the Commission recommends that a hierarchy of “persons responsible” who are authorised to make decisions on behalf of the young person should be outlined.

Finally, the Commission recommends that legislation should provide for a defence for health practitioners from civil or criminal liability, where such an action is based on the practitioner’s assessment of a young person’s competence.

### **Jury Directions**

Consultation Paper (NSW LRC CP 4)

December 2008

[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_cp04toc](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp04toc)

This Consultation Paper inquires into and reports on the directions and warnings given by a judge to a jury in a criminal trial. There is growing concern in Australia and overseas about the problems associated with jury directions. The question of reform was prompted, in part, by the Standing Committee of Attorneys General in Australia.

In this Paper, the Commission examines the problems that judicial instructions present in criminal trials, discusses a range of reform measures, and considers what limits should be imposed upon a trial judge's instructions. In addition, the Commission explores other methods of influencing judicial practice in this area, such as more appropriate directions in the bench book, and educating judges in communicating with juries.

Judicial instructions should achieve a number of outcomes. First, they should ensure a fair trial for the accused, or at least not detract from a fair trial. Secondly, judicial instructions should be accurate and adequate with regards to the law, as well as the alleged facts of the case and the arguments of counsel. Thirdly, the instructions should be clearly understandable to jurors, in order to assist them in coming to a verdict.

There are many challenges in seeking to achieve those aims. No matter how well crafted a judge's instructions may be, the language, length and complexity may be such that a jury will still not fully comprehend the instructions and, as a result fail, to correctly apply those instructions. Another challenge facing judges is to avoid unnecessary appeals arising out of the difficulties that judges have in summing up a criminal case. Such difficulties are due to the numerous and complex directions that judges must give concerning the elements of the offence or offences charged, the available defences and the comments which judges are obliged to make in relation to aspects of the evidence presented at trial.

This Consultation Paper contains ten chapters in total. In Chapter 1, the Commission sets out its terms of reference, what is meant by judicial instructions, the aims of judicial instructions, and finally the challenges that judges face. Chapter 2 provides an overview of the research that has been carried out in the area of jury directions, paying particular attention to whether jurors fully comprehend judicial directions or not. From this examination, the Commission found that serious questions needed to be raised regarding comprehension. Some of the directions that appeared to be particularly problematic included directions that are vital to the ability of juries to render correct verdicts.

In Chapter 3, the Commission examined model directions, also known as "standard" or "specimen" directions, which are

modified to suit each case. Here, the Commission acknowledged the benefits of the model directions in terms of time saving and neutral language. It was also recognised, however, that the model directions can be made up of complex lengthy sentences, replete with legal jargon and uncommon words. Bearing this in mind, the Commission discussed moving towards the use of plain language and also pointed out that, if the NSW Judicial Commission were to review the model directions in the Bench Book, they would need to consult widely with those who have expertise in communication, linguistics and psychology.

Chapter 4 of the Paper considered the directions that aim to give jurors general guidance as to how they go about their task, and whether this should be conducted in the opening remarks or at the closing stages. Here, the Commission also discussed whether judges should continue to use the expression “beyond reasonable doubt”, and if so, how this should be explained.

In Chapter 5, the Commission reflected on the external influences upon jurors (such as the media) and how judges should approach directions in this regard. In Chapter 6, the components for summing up a criminal case were examined. The primary aim of the summing up is to equip jurors for the task of reaching a verdict. Therefore, it is imperative that they understand it. Once again, the Commission recognised that jurors often have major difficulties with comprehension. The Commission explored whether the summing up by the judge should be before or after the addresses of counsel.

In Chapters 7 and 8, the Commission discussed directions about unreliable evidence (such as evidence from prison informers and accomplices) and evidence regarding the background of the accused (such as evidence of previous convictions) as outlined in the Evidence Act, 1995 (NSW).

In Chapter 9, the Commission deals with the issue of how a judge should instruct on the elements of the offence and any defences available and how the comprehension of jurors can be enhanced generally. The Commission pointed out that the most important means of improving comprehension is by using language that jurors understand, instead of highly-technical and legalistic language. Finally, in Chapter 10, the Commission outlines other ways to assist jurors in fully comprehending

judicial directions such as note-taking, directions in writing, audio visual presentations, deliberations aids and encouraging jurors to ask questions during deliberations.

### *G. New Zealand*

#### **Compensating Crime Victims**

NZLC Issues Paper 11

October 2008

<http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=155>

Over the past number of decades much has been done in New Zealand to assist victims of crime through compensation for injuries received as a result of a crime. In 1963, the Criminal Injuries Compensation Act was introduced, providing the first state-funded scheme to compensate victims of crime for personal injuries. This scheme was developed further in 1975 when it was subsumed under the new accident compensation regime, providing more comprehensive compensation.

These developments, however, have generally been introduced in an ad hoc and piecemeal fashion without having regard for the underlying principles about where the burden of compensation, resulting from the particular crime should fall. Thus, the focus of this Paper is to examine those existing arrangements, consider their adequacy and suggest what additional measures should be put in place. This paper is the first part of the Commission's Compensation for Victims of Crime Project.

This paper consists of four chapters. In Chapter 1, the Commission considers underlying principles. In particular, the Commission questions to what extent there should be an obligation to compensate victims of crime for injury, loss or damage they have suffered, and where that obligation should lie. The Commission reflects on the traditional distinction that existed between crime and tort, recent developments in the criminal justice system with regard to the compensation for victims, and the justification for such developments. In particular, the

Commission reflects on the concepts of “social contract”, “social utility” and “the symbolic value of tangible community recognition of victim’s losses”. These concepts have formed the basis of arguments that have been put forward in both academic literature and by other Commissions, in favour of compensating victims of crime.

Chapter 2 reviews the way victims of crime in New Zealand can receive compensation through the Sentencing Act, 2002, the Compensation for Personal Injury under the Accident Compensation Scheme, civil claims, and government-funded schemes. In Chapter 3, a comprehensive examination of compensation in comparable jurisdictions is carried out. One of the key findings of this examination was that many jurisdictions place a “cap” on state-funded compensation. This is not an element of the New Zealand system; however, one of the weaknesses of the New Zealand system, in comparison to elsewhere, is the limited provision for mental injury that did not include or stem from physical injury.

In Chapter 4, the Commission sets out the issues and options that need further discussion and examination. The Commission notes that there are a number of features in the current system that are inadequate and give rise to concern. For example, the fact that only 80% of a victim’s wages are compensated under the Injury Prevention Rehabilitation and Compensation Act, the limited provisions for compensation for mental injury, and the limited provision for costs of counselling, are all matters of concern for the Commission.

Therefore, at this stage of the review process, the Commission recommends that reform options should take account of the following aspects: increased entitlements for compensation for personal injury; extended eligibility for compensation for mental injury; provision for trauma counselling; improved mechanisms for recovering compensation from offenders; state-funded reparation; and the introduction of an offender’s levy.

**Presentation of New Zealand Statute Law**

NZLC R 104

October 2008

<http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=132>

In conjunction with the Parliamentary Counsel Office (PCO), this Report from the New Zealand Law Commission discusses the problem of access to New Zealand Acts of Parliament. According to the Commission, the state has an obligation to make law accessible to citizens. If people are expected to obey the law, they should be able to find it and understand it without difficulty. Accordingly, the law should be publicly available, it should be navigable, and it should be clear; that is, it should be as easy as possible to understand. This Report examines the problems that people face with regard to accessibility, and recommends that an index of Acts of Parliament be produced; that there be a programme devised to re-write and revise old Acts so as to make them easier to understand; and that obsolete Acts be repealed. The Commission makes a total of 23 Recommendations in this Report.

As regards historic New Zealand Acts, the Commission recommends that they should be captured digitally as soon as possible, and made publicly available online. As mentioned above, the Commission also recommends that an index to New Zealand Acts should be produced without delay. This index should be available in both hard copy and electronically, and should be continually updated in electronic form. In terms of the costs, the Commission recommended that all avenues should be explored; the PCO could produce the index, or the task could be tendered out to a commercial indexer. If a commercial indexer prepares the original text, the responsibility for updating should be carefully monitored.

In Chapter 7, the Commission recommends a systematic revision of the Acts on the New Zealand statute book, with the primary aim being to make the statutes more accessible without changing their substance. This process of revision would not change the substance of the law, only the presentation. According to the Commission, a programme of revision would remove obsolete Acts; it would draw together into one Act provisions on

the same subject; long Acts which contain a variety of subject matter would be divided into separate more coherent Acts; Acts that have been amended several times could be redrafted and made clearer; and finally, expression and language could be modernised and made plainer, and there could be more stylistic consistency. The Commission acknowledged that the PCO is appropriately placed to carry out this programme of revision.

The Commission recognises that this process of revision could not be carried out in one exercise. Therefore, a staged process is recommended, under which the PCO would put forward a programme nominating the statutes to be revised, every three years. This period would coincide with the New Zealand triennial electoral cycle. Furthermore, the Commission believes that legislation will be required to enact the new process of revising bills, and also to spell out the new duties to make legislation available electronically.

### **Private Schools and the Law**

NZLC IP 12

December 2008

<http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=1>

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In 2007, the Government asked the Law Commission of New Zealand to review the law relating to private schools. This Paper begins the examination process in this area, and sets out the Commission's preliminary views on the appropriate relationship between the state and privately run schools. At the time of writing, there were 99 private schools registered in New Zealand, catering for approximately 30,000 students.

By their very nature, private schools enjoy considerable freedom: they choose their own curriculum, qualifications frameworks and so on. The Commission advocates that they should continue to operate in this manner. However, it is evident that the legislation governing private run schools in New Zealand is old-fashioned, often unclear and, in some areas, incomplete. The aim of this Paper is to examine that legislation in-depth, and to ensure that it is adequate to achieve its desired purpose, now and in the future.

As part of the preparation for this Paper, the Commission conducted an information-gathering exercise by sending a questionnaire to private schools in New Zealand, private school associations, education sector unions and other relevant government agencies. As well as the questionnaire the Commission met with relevant organisations and private school representatives.

The Paper consists of nine chapters. Chapters 2 and 3 outline the nature and development of private schools in New Zealand, and the current relationship between the state and private schools. Chapter 4 examines the legal position, while Chapter 5 reflects on the position elsewhere, primarily Australia and the United Kingdom, in order to give a comparative perspective. Drawing on preceding chapters, Chapter 6 considers the key issues or problems that need to be addressed in this review process. In the final three chapters of the Paper, the Commission sets out options for reform. For example, the Commission examines the registration criteria and process for such schools, issues of compliance, and the powers of state agencies in relation to private schools.

The Commission clearly makes the point that this review has not uncovered any significant problems in the private schooling sector. The changes recommended are provided to ensure that the law in this area is clear and adequate in the modern world, and (most importantly) that the law contains measures to deal effectively with serious problems that may arise.

Finally, the Law Commission considered the question of codification, recommending that the prospect of codification should be considered when a programme of revision has been completed or nearly completed.

**Suppressing Names and Evidence**

NZLC IP 13

December 2008

<http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=149>

This Issues Paper involves a review of sections 138 to 141 of the Criminal Justice Act 1985, and forms part of the Criminal Procedure (Simplification) project being conducted jointly by the New Zealand Law Commission and the Ministry for Justice. These sections contain statutory mechanisms designed to respond to the risks to the interests of justice that might arise from an entirely open judicial system. Public access to the court is an essential element of the system of justice in New Zealand, as in other Commonwealth jurisdictions; however, this principle is not absolute. There are exceptions to this rule; there are situations in which doing justice in public would frustrate justice itself.

Given that this Paper focuses specifically on sections of an Act, it is useful to set out those provisions briefly. Section 138 contains powers to clear the court, forbid publication of any report or account of the evidence adduced or submissions made, and forbid publication of the name or identifying particulars of any witness. Section 139 prohibits publication of the name or identifying particulars of the victim in certain sexual offences. Section 139A prohibits the publication of the name or identifying particulars of any person under the age of 17 who is called a witness in criminal proceedings. Section 140 gives the court a broad discretion to prohibit publication of the name, and identifying any particulars, of any person accused or convicted of an offence. Finally, section 141 provides for exceptions in relation to publication by or at the request of the police, or other official in relation to their official duties.

The aim of this Paper is to examine and provide comment on the appropriateness of the suppression provisions of the Criminal Justice Act, 1985, as outlined above. The Commission questions whether they impinge too far on the principle of open justice, or whether they offer enough protection when risks to the interests of justice arise. The Commission examines the suppression of evidence, the suppression of names of accused

people, witnesses and victims and the grounds on which the court may be closed. The Commission also reflects on the challenges posed by the internet, and considers issues relating to the way in which the provisions of the Act currently operate in this regard.

Finally, the Commission considers a range of other issues raised by the provisions of the Criminal Justice Act, 1985, such as who has the standing to challenge a suppression order, whether there should be a national register of suppression orders, what is meant by publication, whether a breach of a suppression order should be a contempt of court, whether the current offence and penalty for a breach requires amendment and the effect of the In-Court Media Coverage Guidelines, 2003.

### **Tribunal Reform**

NZLC SP 20

December 2008

<http://www.lawcom.govt.nz/ProjectStudyPapers.aspx?ProjectID=131>

This Paper examines a range of options for reforming the tribunal system in New Zealand and follows on from an Issues Paper, *Tribunals in New Zealand*, published in January 2008. According to the President of the New Zealand Law Commission, reform in this area is essential. Tribunals exist to resolve citizens' problems, and to date tribunals have developed haphazardly; what is needed is a more systematic, efficient and better structured system.

Working closely with the Ministry of Justice, the Law Commission has analysed a number of options for reform and developed a preferred model for a new tribunal service. This Paper outlines and provides a record of the review process, and the reasons for proposing this particular model of reform. The Commission has also set out some further proposals on appeal rights from tribunals, principles for inclusion in a legislative framework and guidelines on the establishment of tribunals.

The Paper is divided into three parts. Part 1 examines tribunals in New Zealand, Part 2 sets out the Reform Options, while Part 3 outlines proposals for reform. According to the

Commission, tribunals are best described as adjudicative bodies; deciding questions and resolving disputes. Tribunals are not courts, nor do they form part of the executive. The Commission asserts the view that tribunals stand somewhere in the middle. Desirable characteristics of tribunals should include public accessibility, membership and expertise appropriate to the subject matter, actual and apparent independence, adherence to procedural rules, appropriate avenues for appeal and finally speedy and efficient determination of cases. In New Zealand, however, the Commission has found that such characteristics have not been present in a consistent and coherent manner. Tribunals have developed on an ad hoc basis, which has led to a fragmented system.

In proposing options for reform, the Commission first looks at recent reforms in other jurisdictions such as Australia, the United Kingdom and Canada, and finds that most have amalgamated tribunals into larger structures, to achieve greater coherence and efficiency. From this examination, a number of options for reform in New Zealand are set out. The Commission sets out 6 options in total. Under Option 1, tribunal procedure, powers, appeal rights and membership provisions would be standardised. Option 2 recommends a single administrative body for tribunals. Option 3 focuses on leadership across the tribunal system, and proposes that a new role of “head of tribunals” be created. Option 4 proposes the disestablishment of any tribunals that are no longer needed, while Option 5 proposes grouping or clustering tribunals together, for example, by function. Finally, Option 6, similar to clustering, involves unification, grouping like tribunals together into one structure.

After considering all of the options, the Commission finds that the unified structure outlined under Option 6, coupled with the single administration proposal of Option 2 and the concept of “head of tribunals” as set out in Option 3, was the most appropriate option for reform. The unified tribunal structure will bring 22 tribunals together in one structure, under the leadership and guidance of the Principal Tribunal Judge. The Commission advocates that this structure would form a unit in the courts system, similar to the current Environment Court. The unified tribunal structure will be divided into two primary divisions:

administrative review, and *inter partes* disputes. The “looser” category of occupational and industry regulation would form part of the structure, but would be different from the other two divisions. Within each division, further sub-groupings are proposed.

Though the primary aim of this Paper was to recommend and propose a more unified, coherent and manageable structure, the Commission also points out that it is important to ensure that this structure is “future proof” and flexible. Finally, the Commission recognises that further work is needed to develop this framework, and seeks comment on the proposals that have been set out in the paper.

### **Invasion of Privacy: Penalties and Remedies**

NZLC IP 14

March 2009

<http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=129>

This Paper reviews the adequacy of New Zealand’s civil, criminal and regulatory law to deal with invasions of privacy. It is the third part of a broad-ranging review of privacy, which has been undertaken by the Law Commission of New Zealand. Prior to this Paper, a Study Paper *Privacy Concepts and Issues* and a Report *Public Registers: Review of the Law of Privacy – Stage 2* have been published. This Part of the project deals with the most difficult aspect of the Commission’s original terms of reference – in particular, the tort of privacy and questions relating to surveillance.

Privacy is an issue of extreme importance. In recent years, the value placed on it has been amplified due to the increasingly sophisticated means of invading it. Given the importance of this area, this Paper involves an extensive review with a total of thirteen chapters, which are further divided into Parts. Part 1 examines the existing legal position. Part 2 looks at disclosure of personal information. In Part 3, surveillance and other intrusions are discussed while Part 4 provides an overview outlining some of the difficulties in the area, options for reform and lessons from other jurisdictions.

In Part 1, the Commission sets the currently available sanctions and remedies. In terms of civil remedies, the Commission recognises that a citizen can sue either for damages or an injunction. It is well established that various causes of action protect privacy indirectly, but the Commission notes that there is also growing authority in New Zealand suggesting the existence of a separate tort of invasion of privacy, that gives a cause of action if publicity is given to private facts about someone. As regards the criminal law, the Commission notes that there are many statutory provisions dealing, to some degree, with privacy; however, they are scattered over a large number of Acts, and lack coherence. In addition to enforcement through the courts, there are a number of other ways in which privacy can be enforced in New Zealand. The Privacy Act, 1993, for example, lays down a number of information privacy principles. Also in Part 1, the Commission examines the position with regard to privacy in other jurisdictions, and found that there is also a lack of coherence to be found elsewhere. In conclusion, the Commission found that the current piecemeal position is unsatisfactory and in need of reform.

In Part 2, the Commission deals with the protection the law provides against offensive disclosures of private facts. Most of the discussion here focuses on the case of *Hosking v. Runting*.<sup>4</sup> The *Hosking* tort is the separate tort of invasion of privacy, which gives a cause of action if publicity is given to private facts about someone. The Commission recognised that there are a number of inherent problems with this tort. The concept of “reasonable expectation of privacy”, for example, is extremely broad, and will involve judgment in each case. In light of the many uncertainties in this area, the Commission sets out options for reform in Chapter 7, and seeks the views of the public on such recommendations.

Part 3 examines surveillance and other forms of intrusive conduct. Surveillance is defined by the Commission as any device used to intentionally monitor, observe or record people’s actions or communications, such as CCTV. Again, as with the preceding Part, the Commission examines the different types of surveillance

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<sup>4</sup> [2005] 1 N.Z.L.R. 1.

equipment, and options for reform. As regards other forms of intrusion, the Commission reflects on the concept of “intrusion into solitude and seclusion”, a phrase originating from the United States. Examples include physical intrusions into spaces where a person could reasonably expect to be left alone. Also in this Part, the Commission examines surveillance and intrusion in relation to three specific areas: the media, the workplace and the private investigation industry.

Finally, in Part 4 the Commission provides an overview chapter, highlighting the difficulties identified in this study, and the problems with the current law. The Commission stresses the importance of receiving input from the public in this area, given the importance of privacy to every individual in society.

### *H. Queensland*

#### **Shaping Queensland’s Guardianship Legislation: Principles and Capacity**

QLRC WP 64

September 2008

[http://www.qlrc.qld.gov.au/wpapers/WP65.pdf](http://www qlrc.qld.gov.au/wpapers/WP65.pdf)

This Paper from the Queensland Law Reform Commission forms part of the ongoing review of the guardianship system in Queensland. It followed a request from the Attorney General to review aspects of the Guardianship and Administration Act, 2000 (Qld), and the Powers of Attorney Act, 1998 (Qld). This legislation regulates the decisions made by and for adults with impaired decision-making capacity.

In the first stage of this review, the Commission examined the confidentiality provisions of the above legislation, and published its findings in a Report titled *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (2007). In response to this Report, the Government in Queensland introduced the Guardianship and Administration and Other Acts Amendment Bill, 2008 (Qld).

The second stage of the review involves a more general consideration of the legislation in Queensland. In particular,

the Attorney General requested that the law relating to decisions about personal, financial, general health matters, and special health matters be considered. For the purposes of consultation, and to ensure the greatest response possible, the Commission is dealing with these matters in separate Discussion Papers.

This Paper deals with two issues: General Principles and the Health Care Principle, and the nature of decision-making capacity and the assessment of that capacity under the legislation.

As regards content, Chapter 2 of this Paper provides an overview of the guardianship system as it currently stands in Queensland. Chapter 3 examines the United Nations *Convention on the Rights of Persons with Disabilities* and the relevance of this Convention in guiding the Commission in its review. In Chapter 4, the Commission discusses the role and content of the General Principles, while Chapter 5 examines the role, content and application of the Health Care Principle. In terms of the Health Care Principle, the Commission considers whether the content of the principle, and in particular the best interests approach, is still appropriate. Finally, Chapters 6 and 7 deal with the test of decision-making capacity, how that capacity is assessed under the legislation, and the test of capacity as regards making an enduring document or an advance care directive.

Throughout this Paper, the Commission includes comparative legislative provisions from other jurisdictions as they apply to the subject matter covered by each chapter. It is also worth pointing out that, in order to facilitate wide consultation, this Paper is accompanied by a shorter Companion Paper titled *Shaping Queensland Guardianship Legislation: A Companion Paper*.

### **A Review of Jury Directions**

QLRC WP 66

March 2009

[http://www.qlrc.qld.gov.au/wpapers/WP66.PDF](http://www qlrc qld gov au/wpapers/WP66.PDF)

This Paper marks the first stage of the Queensland Law Reform Commission's enquiry into jury directions in criminal trials. Similar to recent publications by other Law Commissions throughout Australia, this Paper follows a request from the

Standing Committee of Attorneys General to inquire into the operation of the jury system, including matters such as eligibility, warnings and jury directions. Jury directions are the focus of this Paper.

The terms of reference for this review require the Commission to examine whether directions or warnings can be simplified or abolished; whether judges should be required to warn or direct juries in relation to matters that are not raised by counsel; the extent to which judges should summarise the evidence for the jury; and whether any assistance can be provided to jurors.

Thus the purpose of this Paper is to outline the function of jury directions, and problems that have arisen in relation to them, and provide options for reform in response to those problems. In total, the Paper consists of nine chapters. In Chapter 1, the Commission provides the background to this review and an overview of other law reform projects. Chapter 2 outlines the role of juries historically and in the present day. In Chapter 3, the Commission focuses on jury directions themselves examining a judge's directions, warnings and instructions to a jury. Specific directions form the subject matter of Chapter 4, while Chapter 5 examines the number of appeals in Queensland that involve allegations that a jury was improperly or inadequately directed. In Chapter 6, the Commission sets out some of the problem areas with regard to jury directions, such as the length of directions, the complexity of directions, and the style and language used by judges to convey this information to the jury. Two areas that cause problems with regard to jury directions, particularly in more complicated cases, are firstly, the concatenation of directions in cases of multiple charges or cases involving a number of defendants, and secondly, whether judges should give directions on alternative or lesser verdicts that may be available on the evidence of the case.

In Chapter 7, the Commission outlines the results of empirical research carried out into the ways in which juries respond to jury directions, instructions and advice given by judges. Finally, Chapters 8 and 9 set out ways of improving jury directions and methods of assisting juries in their deliberations,

whether through procedural techniques or technological or documentary techniques.

### *I. Scotland*

#### **Damages for Wrongful Death**

Report, Scot Law Com no. 213

September 2008

<http://www.scotlawcom.gov.uk/downloads/dps/dp141.pdf>

This Report from the Scottish Law Commission is concerned with damages resulting from wrongful death. “Wrongful death” includes situations in which a terminal illness is negligently induced – mesothelioma, which results from asbestos exposure, is a regrettably famous example. There are three types of individual who may have a right to sue in relation to wrongful death: the person who suffered the injury that leads to the wrongful death, the executor of that person’s estate, and the relatives of the person.

Damages for wrongful death are currently covered by two pieces of Scottish legislation: the Damages (Scotland) Act, 1976, and the Administration of Justice Act, 1982. The former Act deals specifically with the wrongful death scenario; the latter deals with personal injuries more generally. In conducting their review, the Commission discovered that there was no demand for fundamental reform of the law in this area. However, it was agreed that the law is somewhat incoherent, and needlessly complex: the 1976 Act has been subjected to numerous amendments, and the need to consult the 1982 Act in relation to certain matters adds to the confusion. Therefore, the Commission recommends that the 1976 Act be repealed and replaced by a more coherent and modernised piece of legislation.

Despite the lack of demand for substantive changes to the law, several are considered. These all relate to the damages available to the victim, the executor and the relatives. The only major proposed change is to the manner in which patrimonial damages for relatives are calculated. Patrimonial damages are designed to cover economic loss, such as lost income, due to

personal injuries; non-patrimonial damages relate to emotional distress, pain and suffering. It is recommended that relatives' patrimonial damages be limited to 75% of the victim's net income. The right to patrimonial damages should be restricted to members of the "immediate family". These recommendations would not affect the law in relation to damages resulting from cases of mesothelioma, as this disease is covered by a specific act: Rights of Relatives to Damages (Mesothelioma) Act, 2007.

### **Double Jeopardy**

Discussion Paper no. 141

January 2009

<http://www.scotlawcom.gov.uk/downloads/reps/rep213.pdf>

This Discussion Paper forms part of an ongoing review of Scottish criminal law, prompted by a reference from the Scottish Cabinet Secretary for Justice. The Paper deals with the rule against double jeopardy and the exceptions thereto. The rule against double jeopardy can be understood in two ways: either, the illegitimacy of a person being subjected to multiple aggravating charges for what is essentially the same offence; or, the illegitimacy of trying a person for an offence for which they have already been tried and acquitted/convicted. It is with the latter form of the rule that this Paper is concerned.

Several common law jurisdictions, including England, Australia and New Zealand, have introduced, or are in the process of introducing, exceptions to the rule against placing a person twice into jeopardy. The issue of introducing exceptions had been debated in the Scottish Parliament and came to public's attention following the collapse of the high-profile "World's End" murder trial. It is against such a backdrop that the present Paper was put together.

The paper has eight parts. Part 1 is a general introduction; Part 2 sets out the rationale for the principle of double jeopardy; Part 3 examines the existing Scots law; Part 4 focuses on relevant international agreements; Part 5 introduces a number of options for reform; Part 6 considers the need for statutory restatement of the law; Part 7 looks at the potential need for exceptions to the

rule; and finally, Part 8 lists some proposals and questions for discussion.

As mentioned, Part 5 looks at the options for reform. The Commission identifies six options. The first option is to abolish the rule against double jeopardy. The Commission rejects this: they feel the rule is an essential part of the rule of law, and also part of the UK's commitments under international law. The second option is to make no changes to the existing law. This is tentatively rejected on the grounds that the existing law lacks clarity; however, opinions are welcome from consultees on the merits of the existing law. The third option is to address ambiguities or anomalies in the existing law through minor statutory reform. This is rejected on the grounds that statutory reform should aim to be as comprehensive as possible. The fourth option is for a comprehensive statutory restatement of the law. This is the option favoured by the Commission and explored in more depth in Part 6 of the Paper.

The two other options for reform relate specifically to the need for exceptions from the rule. These are discussed in Part 7. Two types of exception are considered. The first would allow for retrial on the grounds that the original trial was "tainted" by an offence, such as jury intimidation; the second would allow for retrial when new evidence comes to light. The Commission has no definite opinions on either; instead, they discuss the pros and cons of each and offer a number of questions for consultation. One thing is, however, clear: the Commission is in favour of retaining the rule against double jeopardy, so any exceptions would need to be limited and subject to a number of safeguards.

### *J. South Africa*

#### **Report on Trafficking in Persons**

Report, Project 131

August 2008

[http://www.doj.gov.za/salrc/reports/r\\_pr131\\_trafficking\\_2008.pdf](http://www.doj.gov.za/salrc/reports/r_pr131_trafficking_2008.pdf)

Trafficking in persons involves the trading of persons as commodities. Persons are trafficked for various purposes

including sexual exploitation, forced labour or slavery, forced marriages, begging, adoptions or removal of body parts. Trafficking is a major problem in South Africa (both into and from), as well as across the borders within Africa. South African women and children are particularly vulnerable, and are continually trafficked for the purposes of sexual exploitation, domestic work and other forms of labour.

In January 2004, the South African Law Reform Commission published an Issues Paper on *Trafficking in Persons* with the aim of identifying aspects in need of reform. The Issues Paper was followed by a Discussion Paper, which set out the Commission's preliminary recommendations for reform as well as a draft Bill. The submissions received on the Discussion Paper form the basis of this Report, and set out the Commission's final recommendations for reform in the area of trafficking in persons.

The Report contains five chapters. In Chapter 1, the Commission sets out an introduction outlining the background of the Report. In Chapter 2, the current legal position in South Africa is dealt with. Chapter 3 discusses the prosecution of traffickers and other role players. In Chapter 4, the Commission examines means of protecting victims in trafficking. Finally, in Chapter 5, the Commission discusses generally the prevention of trafficking in persons. The Report, therefore, addresses three main aspects: (1) the prevention of trafficking in persons, (2) the prosecution of traffickers and other role-players, and finally (3) the protection of victims of trafficking.

As regards the prosecution of traffickers, the Commission recommends the creation of the following offences: the offence of trafficking in persons; debt bondage; destroying, confiscating, possessing and concealing documents of victims in trafficking; using the services of victims in trafficking; and facilitating trafficking in persons. The Commission also recommends that it should be an offence for a commercial carrier to transport a victim of trafficking across the borders of South Africa. Furthermore, the Commission makes the point that it is very important that the National Commissioner of the South African Police Service co-operates with other States given the global nature of trafficking.

In terms of protection for victims of trafficking, the Commission recommends that after an assessment, victims should be issued with a certificate giving that person the right to apply for a period of recovery and reflection for up to 90 days. This certificate will also mean that no criminal prosecution can be instituted against that person for illegal entry, falsifying identity documentation, or being involved in illegal activity where he or she has been compelled to do so. The Commission also recommends that an organisation to provide services such as counselling, rehabilitation and reintegration, to victims of trafficking should be set up.

Finally, the Commission recommends the establishment of an Inter-Sectoral Committee that will be responsible for the monitoring of the implementation of the proposed legislation, for ensuring that the different organs of state comply with their roles and responsibilities and for collating and analysing information relating to trafficking in persons.

### *K. Victoria*

#### **Assistance Animals**

Final Report (VLRC 16-2009)

January 2009

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

This Report from the Victorian Law Reform Commission is concerned with reform of the law in the area of assistance animals. It can be seen as part of the Commission's work in the area of "Community Law Reform": issues that are of general community concern but are relatively minor legal issues. At the time of writing, the Commission noted that there are approximately 300 assistance animals (all dogs) in Victoria. These dogs provide assistance for people with a wide range of disabilities, including sensory and physical disabilities as well as people with mental health disabilities.

Protection from discrimination for people using assistance animals is provided in both federal and state law, but is regarded

as “patchy” and inconsistent. Furthermore, there is no legal framework for regulating the quality of assistance animals working in Victoria.

Therefore, the aim of this Report is to examine and make recommendations in relation to the rights and obligations of assistance animal partnerships under the Equal Opportunity Act, 1995 (EOA), and provide recommendations for the establishment of a simple regulatory scheme for the training, registration and identification of assistance animals.

In Chapter 1, the Commission provides a background to this Community Law Reform project. Chapter 2 examines the current position with regard to assistance animals in Victoria, including who uses assistance animals and the roles they carry out. In Chapter 3, the Commission reflects on the legal position in this area, with a particular focus on the limitations of current legislation. In Chapter 4, the Commission sets out and discusses recommendations about possible reforms to the EOA, including proposals concerning the definition of assistance animals, the nature and scope of the specific rights and responsibilities under the Act, and areas where anti-discrimination provisions relating to assistance animals should apply.

Chapter 5 makes recommendations regarding the training of assistance animals, while Chapter 6 discusses the registration and identification of the animals. All of the recommendations made by the Commission in this area involve submissions received during the consultation process. Finally, in Chapter 7, other issues such as civil liability, community education and national consistency are discussed.

### **Surveillance in Public Places**

Consultation Paper (VLRC CP 7 – 2009)

March 2009

[http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb8232059ba1338/VLRC\\_SurveillanceConsultationPaper\\_online.pdf](http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb8232059ba1338/VLRC_SurveillanceConsultationPaper_online.pdf)

This Consultation Paper examines the use of surveillance and other privacy-invasive technologies in public places, in terms of risks and benefits and how it is regulated. This paper from the

Victorian Law Reform Commission forms the second phase of their inquiry into the use of surveillance and other privacy-invasive technology. In 2005, the Commission published a Report titled *Workplace Privacy*. Here, the focus is on surveillance in public places.

Surveillance is now a feature of everyday life, not only in Victoria but worldwide, and has many benefits including crime prevention and the general promotion of public safety. Despite this widespread use, however, the Commission notes that there is no comprehensive source of information about the extent of public place surveillance in Victoria, and thus such a review is necessary. From the outset the Commission points out the many negative consequences that flow from the increased use of surveillance, and reflects on the long term effect such surveillance may have on the way people enjoy public places in Victoria. Given that surveillance technology is developing at such a rapid rate, the Commission believes it is imperative and timely to carry out a review of this nature, and provide recommendations to counteract the shortcomings of current regulation in Victoria.

In Chapter 1, the Commission sets out the background, scope and purpose of this Paper, as well as an outline of the preliminary consultations which have been carried out with users of surveillance equipment and members of the community who have a greater understanding of surveillance practices. Chapter 2 provides an overview of the current practice of surveillance in Victoria, taking account of the driving factors for using surveillance, and also possible future trends. Privacy forms the subject matter of Chapter 3, and in particular, whether the concept of privacy extends to public places. In the Victorian Charter of Human Rights and Responsibilities Act 2006, privacy is a recognised as a human right, and there is a reasonable expectation that this should extend to public places as well as private.

In Chapter 4, the Commission looks at the benefits of surveillance, including increased safety and crime control. However, the Commission also recognises the risks of surveillance. In particular, the Commission reflects on the impact of the misuse of public place surveillance under the following headings: loss of anonymity in public places; possibility of error

and miscarriage of justice; discriminatory profiling of groups and exclusion of groups from public places.

In Chapter 5, the Commission deals with the current regulatory framework in Victoria, pointing out that the existing system is not well equipped to deal with the challenges posed by current and emerging surveillance technology. Within this chapter, the Commission considers recommendations of other law reform bodies as a means of providing solutions to the situation in Victoria.

Finally, in Chapter 6, the Commission outlines reform options, in an effort to provide greater certainty and guidance on which uses of surveillance are acceptable and which unacceptable. Some of the reform options include: a new independent regulator to monitor, report and provide information about public place surveillance; a best-practice standard; mandatory codes to govern the use of surveillance; and a licensing system for some surveillance practices that are found to be particularly invasive.