

**RECENT PUBLICATIONS BY LAW
REFORM BODIES WORLDWIDE**

COMPILED BY

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*A. Australia***Secrecy Laws**

Discussion Paper 74

June 2009

<http://www.austlii.edu.au/au/other/alrc/publications/dp/74/>

The Australian Law Reform Commission (ALRC) is currently undertaking a major review of the federal 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 507 such provisions, spread across 175 different statutes. This discussion paper offers many tentative proposals for reform in this area.

The focus of the proposals is threefold. First, to provide a principled basis for the introduction of a revised general secrecy offence. Second, to set down criteria for the review of specific secrecy provisions. And third, to set down criteria for revised administrative and penalty structures that will foster effective information-handling in the public sector.

Chapter 6 of the Paper contains the proposal for a revised general secrecy offence. This will make it an offence to disclose protected information, provided that the prosecution can prove that the disclosure caused, or was intended to cause, harm to specified public interests. Chapter 7 considers which public interests should be included within the terms of the offence.

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Chapter 8 considers the various elements of the proposed offence, and Chapter 9 considers potential exceptions and defences. In particular, it suggests that any proposed reforms in this area be linked to provisions in public interest disclosure (or “whistleblower”) legislation.

Chapters 10-12 consider existing secrecy offences. It is suggested that these will need to be made consistent with the proposed general secrecy offence. This will involve careful examination of the elements of the offences, the punishments that apply, and the potential for unnecessary replication of offences.

Chapters 13-15 focus on the administrative secrecy framework. Chapter 13 looks at the obligations of those working in the Australian Public Service. It suggests that these obligations need to be clarified and consolidated. Chapter 14 proposes models for harmonising the secrecy regimes across different federal bodies, such as the police force and the defence force. It also considers mechanisms for regulating the conduct of those private sector workers who may be contracted by the federal government. Chapter 15 considers the overall effectiveness of these administrative regimes in contributing to compliance with secrecy laws. In doing so, it looks at the potential role of independent oversight bodies.

Royal Commissions and Official Inquiries

Discussion Paper 75

August 2009

<http://www.alrc.gov.au/inquiries/>

Royal Commissions are non-judicial, non-administrative institutions of inquiry. They are used to inquire into matters that it would be inappropriate to leave to the traditional branches of government. This would include investigations into government corruption and also investigations into the future shape of public policy. The legislation governing the setting-up of Royal Commissions dates back to 1902. This is the first major review of the system.

A primary concern for this review is the continued feasibility of the Royal Commission system. It is suggested that new forms of public inquiry are needed to cover specific subject

matters. This discussion paper offers some tentative proposals for reform in this area.

Part B of the Paper contains the core of the proposed reforms. It sets out a new statutory framework for public inquiries. In conversations with relevant stakeholders, the ALRC discovered that there was overwhelming support for the continued existence of the Royal Commissions. Thus, instead of abolishing them, the proposal is to introduce a new two-tier system for public inquiries. The first tier would consist of Royal Commissions, while the second tier would consist of Official Inquiries. This would involve the amendment of the existing Royal Commissions Act, as well as its renaming as the Inquiries Act.

The two types of inquiry will differ in their establishment, jurisdiction and powers. Here are some examples of those differences: (1) a Royal Commission will have to be established by the Governor-General of Australia, an Official Inquiry will be established by the relevant minister; (2) a Royal Commission will inquire into matters of *substantial* public interest an Official Inquiry will look into matters of public interest; (3) A Royal Commission will have the power to abrogate the privilege against self-incrimination, an Official Inquiry will not; and (4) a Royal Commission will have a broad range of coercive powers available to it, an Official Inquiry will have a narrower range of such powers.

Part C of the Paper looks at the funding and costs involved in both types of inquiry. Part D considers, in more detail, the specific powers conferred on the respective types of inquiry, as well as the protections afforded to those who are involved.

Capital and Income in Trusts: Classification and Apportionment

Law Com No. 315

May 2009

<http://www.lawcom.gov.uk/docs/lc315.pdf>

This Report deals with the rules governing the classification and apportionment of capital and income in two types of trust: (1) private trusts for interests in succession; and (2) charitable trusts. The former involves a gift of investments “for A for life, with remainder to B”; the latter involves a permanent endowment to a charity, with a protected fund of money that cannot be freely spent by that charity.

The capital of a trust is to the income, as the tree is to its fruit. The distinction is significant because capital and income are subject to different legal rules. Rules of classification determine what is capital and what is income. It is often the case that different people are entitled to capital and to income. Rules of apportionment are antiquated responses to rules of classification. They require returns on investments to be shared between capital and income, and sometimes they force the sale of trust property.

Rules of classification make it difficult for trustees to maintain balance between the capital and income beneficiaries. This often arises when the funds are initially invested in a manner designed to achieve balance, the subsequent investment does not achieve balance, and the situation cannot be rectified because of the initial classification. The rules also prevent a trustee from partaking in the most profitable investments.

In seeking to resolve these problems, the Commission is restricted by government tax policy. They would like to introduce a simplified set of rules on classification and give the trustee a new power of allocation. However, it has been discovered that such a reform could allow trusts to gain a tax advantage over other individuals. This report, therefore, contains two sets of recommendations. The first set is for immediate implementation given current tax policy; the second is more aspirational, and

describes how they would like to see trust law develop, irrespective of current tax policy.

Due to the restrictions, only two major recommendations are made in this report. The first concerns the rules of classification. Currently, shares that are distributed in a direct demerger are classified as income, despite the fact that shares are usually classified as capital. It is recommended that this be changed so that such shares are classified as capital. The second recommendation concerns the rules of apportionment. It is recommended that all rules forcing a trustee to sell certain investments be prospectively abolished.

Intestacy and Family Provision Claims on Death

Consultation Paper No. 315

October 2009

<http://www.lawcom.gov.uk/docs/cp191.pdf>

In an ideal world everyone would make a will. This is not an ideal world. Studies suggest that a large proportion of the British population dies intestate. Intestate rules are designed to deal with this situation. They are standardised and non-discretionary. They cannot deal with the needs of particular individuals to special treatment or provision. For this, an additional set of rules is required: the rules on family provision. These rules can modify the strict application of intestate succession. This consultation paper seeks views on the potential reform of both sets of legal rules.

The main body of the Consultation Paper contains many substantive suggestions for changes to the existing rules. It is not possible to do justice to those suggestions in this short space. Instead, a general idea of the motivations, goals and concerns addressed in the Paper will be offered.

The dual system of strict intestate rules, complemented by discretionary family-provision rules, is seen to be a great strength of the law. It is not suggested that this be eliminated. Nonetheless, significant changes in family structures – *e.g.* thanks to civil partnership, cohabitation, and the increased prevalence of divorce and second marriages – may not fit with the existing regime.

A major goal of this paper is to bring the law in line with the modern family.

Two other goals are mentioned. The first is simplicity. Simplicity is desirable but must be tailored to the potential complexity of the familial situation. The second is testamentary freedom. There is a strong desire to maintain a sense of freedom and not to slip into a system of “forced heirship”.

In addition to the goals, there are two concerns. The first arises from the size of the estate. Most intestate estates, when compared to their testate brethren, are of modest proportion. This modesty must influence any proposed schema of rules. For example, an “equal shares” regime may not be feasible given the modest size of an estate. The second concern relates to tax. Any proposed changes to the rules should be tax-neutral, *i.e.* should neither increase nor decrease tax liability.

Consumer Remedies for Faulty Goods

Law Com No. 317, Scot Law Com No. 216

November 2009

<http://www.lawcom.gov.uk/docs/lc317.pdf>

This is a joint report from the English Law Commission and the Scottish Law Commission. It aims to create a harmonious system of consumer remedies for faulty goods, and follows from a consultation paper earlier in the year.

When we purchase goods, we expect them to conform to certain standards. When they fail to conform to these standards they are deemed “faulty” and we are entitled to some remedy. The central question addressed here is: when can a consumer reject the goods outright and receive a refund, and when can they avail of some other remedy, such as repair or replacement?

UK law in this area is confused due to the existence of two overlapping regimes for remedy. One arises under UK statute and common law; the second under the European Consumer Sales Directive, 1999 (the CSD). The goal of this report is to simplify and clarify the available remedies. The report is made against the backdrop of a broader European debate on the reform of the CSD.

The existing UK remedies are as follows. A consumer is entitled to reject faulty goods and receive a full refund, unless a

“reasonable period of time” has elapsed, after which he/she will be deemed to have accepted the faulty goods. This remedy is referred to as the “right to reject”.

The CSD offers four remedies, organised into two tiers. The first tier remedies are repair and replacement. The second tier remedies are rescission and reduction in price. The consumer must begin by requesting first tier remedies, only moving to the second-tier if these fail.

The Report recommends the retention of the “right to reject” as the preferred remedy of first instance. It is simple, easy-to-use and inspires consumer confidence. However, this clashes with proposed EU reforms that might require repeal of the right. The potential clash could be avoided if (a) the new CSD is adopted as a measure of minimum harmonisation, allowing the UK to retain the right to reject, (b) the new CSD is adopted as a measure of maximum harmonisation, but incorporates the right to reject, or (c) the new CSD is adopted as a measure of “differentiated harmonisation”, with the right to reject falling outside areas of maximum harmonisation.

Although the preference is for retaining the right to reject, the right needs to be clarified and incorporated within the CSD system of remedies. As regards clarification, it is recommended that the right be forfeited after a normal period of 30 days. This 30-day period would apply to all types of contract. As regards incorporation, the following is suggested: (i) that a general concept of rejection be incorporated into the first-tier of remedies; (ii) that the concept of rejection be realisable in three ways (full refund, repair, and replacement); and (iii) that the second-tier remedies continue to exist as they currently do.

*C. Hong Kong***Enduring Powers of Attorney: Personal Care**

Consultation Paper

June 2009

<http://www.hkreform.gov.hk/en/publications/epa2.htm>

A power of attorney is a legal instrument enabling a person (the donor) to delegate legal authority to another (the attorney). An enduring power of attorney (EPA) arises when a person delegates authority while mentally competent and the power continues to exist (endures) even if the person becomes mentally incompetent.

This Consultation Paper considers three issues: (i) whether the powers that are delegable under an EPA should be expanded to include the power to make decisions relating to personal care, (ii) whether EPAs executed abroad should be recognised in Hong Kong, and (iii) what types of provisions are needed for the supervision and discharge of attorneys.

In relation to the first issue, it is provisionally recommended that the powers be expanded to include decisions relating to personal care. This would include decisions relating to living arrangements, basic healthcare, holiday plans, education and work. However, some decisions would be specifically excluded. These would include decisions relating to: the giving or refusing of life-sustaining medical care; the varying of a will; the exercise of voting rights; the offering of consent to a marriage or adoption of child; organ donation; and, finally, sterilisation.

In relation to the second issue, it is provisionally recommended that EPAs executed in another jurisdiction be recognised in Hong Kong, provided that they comply with the execution requirements in Hong Kong or the other jurisdiction.

In relation to the third issue, it is provisionally recommended that the attorney be under a statutory duty to act in the best interests of the donor. Furthermore, additional supervisory powers would be granted to the courts. These would include the power to direct an attorney to do or refrain from doing a specific act, the power to appoint a substitute attorney, and a general power to make such orders as the court feels to be in the

best interests of the donor. Similar powers would be granted to the Guardianship Board. However, the Board would also be entitled to vary the terms of an EPA, and offer interpretations on the content of an EPA.

Class Actions

Consultation Paper

November 2009

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

This Consultation Paper looks at the possibility of setting-up a system for multi-party litigation (class actions) in Hong Kong.

A class action arises where a group of individuals share a sufficient number of characteristics to allow them to be dealt with collectively by the law. The need for a class action is twofold. First, situations arise in which a large group of individuals has been adversely affected, but each individual's loss is so small that individual litigation is not viable. Second, situations arise in which a large number of individual claims are so similar that it is more efficient to deal with them collectively.

Facilitating class actions is desirable for a number of reasons: it would help to promote access to justice, it would help to reduce costs and enhance efficiency, and it would lead to greater consistency in judicial decisions.

The main outline of the Paper is as follows. Chapter 1 makes the case for the introduction of a class action regime. It does so by pointing out the deficiencies in the existing system. Chapter 3 argues that fairness, expedition and cost-effectiveness should be the principles guiding any proposed reform.

Chapter 4 deals with the important issue of whether the class action regime should be opt-in or opt-out. In other words, once the court has accepted that a class action is appropriate in a particular instance, should the members of the class be allowed to opt-in to the action, or should it be assumed that they are involved unless they opt-out within a specific timeframe. The Commission expresses a preference for an opt-out system.

Chapter 5 considers whether or not public law cases should be included within the class action regime. The concern is that an

opt-in system might be preferable in such cases. Four reform options are put on the table.

Chapter 6 worries about the possible abuse of the process. In particular, it is suggested that those who are financially capable of bringing an individual claim may abuse the regime by selecting impecunious plaintiffs to be the class representatives. Some set of rules for ensuring that this does not happen, and that the genuinely impecunious still have access to justice, is needed. Requiring class representatives to pay security for costs would be one way of ensuring this.

Chapter 7 looks at the scenario involving class members from outside the Hong Kong jurisdiction. It is suggested that an opt-in procedure should be the default for such individuals.

Chapter 8 focuses on funding issues arising from a class action regime. It is suggested that a person entitled to legal aid should continue to receive such aid, but only to the extent required as an individual, not as a representative of a class. The question of recognising and regulating private litigation-funding companies is also asked.

Finally, Chapters 9 and 10 set out more detailed procedural recommendations and questions for consultation.

D. Ireland

Civil Liability of Good Samaritans and Volunteers

Report, LRC 93

May 2009

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

Two major issues lie at the heart of this Report. First, whether there should be a general statutory duty to intervene in the event of an injury to a third party. And second, whether those who voluntarily intervene in such situations should be liable if they exacerbate the injury. In addressing these issues, the Commission is aware of the need to encourage a culture of volunteering, while at the same time protecting the rights of those who might be injured.

In Chapter 2, the Commission examines whether there should be a general statutory duty to intervene. Currently, there is no such general duty. However, specific duties do exist for certain individuals, in certain circumstances. For example, under the Safety, Health and Welfare at Work (General Application) Regulations, 2007, employers must provide First Aid for employees who may be injured in the course of work. After weighing up the pros and cons of introducing a general duty, the Commission decide that it would be inappropriate to do so, even in so-called “easy rescue” scenarios. It is likely that such a duty would deter any prospective volunteers.

In Chapter 3, the Commission considers the potential liability of those who do intervene. There are two classes of individual concerned: volunteer service-providers, and members of the general public (Good Samaritans). Under the present law of negligence, there is great uncertainty as to the liability of both classes of individual. Given this uncertainty, the Commission recommend statutory statement of the relevant duty and standard of care.

In Chapter 4, the Commission gives a list of detailed recommendations for the proposed legislation. This includes the recommendation that all individuals who intervene in the event of an injury to a third party can be liable if their conduct is grossly negligent. A statutory test for gross negligence is then set out.

Legal Aspects of Carers

LRC CP 53

July 2009

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

The proportion of the Irish population aged 65 and over is increasing. The majority of such individuals wish to live at home, as opposed to in a hospital, nursing home or other care facility. However, some such individuals will need to be cared-for in their place of residence. This consultation paper looks at the need for legal regulation of such domiciliary care. At present, no such regulation exists, and this exposes vulnerable adults to unnecessary risk.

The Commission makes a number of provisional recommendations for reform in this area. In Chapters 1 and 2, it recommends expanding the authority of the Health Information and Quality Authority (HIQA – set up under the Health Act, 2007) to include the regulation and monitoring of domiciliary care. HIQA should publish standards that deal specifically with domiciliary care. These standards should aim at promoting the well-being and independence of the service-recipient.

In Chapter 3, the Commission suggests that the terms and conditions for the provision of domiciliary care be set down in a “care contract”. This contract should contain specific provisions covering procedures for (a) the entering and exiting of the service-recipient’s home by the carer, (b) the handling, by the carer, of the service-recipient’s money or personal property, and (c) the management of medication.

Chapter 4 considers whether or not a person should be able to contract for the provision of domiciliary care through an intermediary, be it a state or private-sector body. The intermediary would then act as the employer and not the service-recipient, as might otherwise be the case. It is recommended that this type of arrangement be permissible. Any contract for the provision of care should include details of the employer’s responsibilities, *e.g.* those arising under health and safety legislation.

Chapter 5 deals with the situation in which there has been abuse or ill-treatment by the carer. It is recommended that an offence of ill-treatment or wilful neglect be introduced. This is in line with proposals under the Mental Capacity Bill, 2008. Arrangements for the reporting of abuse are also considered.

Limitation of Actions

LRC CP 54

July 2009

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

If one wishes to bring a civil suit against another person, one only has a limited window of time available in which to do so. The laws detailing these time constraints are referred to under the general heading of the “limitation of actions”. The Statute of

Limitations, 1957, as amended, represents the basic Irish law in this area. And the potential reform of the 1957 Statute is the subject matter addressed in this paper.

A difficulty for any proposed reform arises from the fact that specific time limits, for specific types of civil action, are contained in specific pieces of legislation. The Commission considers it undesirable to try to compile these specific time limits into one legislative device. Instead, the focus of the Commission is on the limitation periods applying to common law actions, such as: claims for recovery following breach of contract, debt recovery, and various tort actions, including personal injuries.

In Chapters 1 and 2 of the Paper, the Commission considers the flaws of the 1957 Statute. Briefly, it is concluded that the 1957 Statute is ill-fitted to present needs: it is unnecessarily complex and fails to give due consideration to the competing rights of plaintiff and defendant under the Constitution and the ECHR.

Chapter 3 considers the available reform options. It does so by reference to other jurisdictions. The trend in other jurisdiction is to introduce a “core limitations” regime. This would incorporate a uniform basic limitation period, a uniform commencement date, and a uniform ultimate limitation period (or “long stop”). It is provisionally recommended that such a regime be introduced in Ireland.

Chapter 4 addresses the appropriate length of the basic-limitation-period. Two proposals are offered for consideration. The first envisions a single two-year basic limitation period. The second envisions three separate limitation periods of one year, two years and six years, respectively. As regards commencement dates, it is provisionally recommended that a “date of knowledge” test apply.

Chapter 5 addresses the appropriate length of the ultimate limitation period. This would involve the imposition of an ultimate bar on proceedings, irrespective of whether the cause of action has accrued or been discovered. The Commission makes no recommendations on this matter; it simply examines what has been done elsewhere. Ultimate limitation periods of 10, 15 and 30

years are considered, as well as the all important question of when the clock starts running.

Chapter 6 assesses the merits and demerits of granting the courts a discretion to extend or dis-apply limitation periods. It is suggested that this will not be necessary in the context of the proposed reform. However, in Chapter 7, the Commission suggests that the proposed new regime would be without prejudice to the inherent power of the court to dismiss claims for want of prosecution.

Bioethics: Advance Care Directives

Report, LRC 94

September 2009

<http://www.lawreform.ie/publications/Report%20ACD.pdf>

An advance care directive (ACD) exists when someone sets out, in advance, arrangements for their care in the event their incapacitation. The Commission has considered using alternative terminology to describe such instruments, for example the term “living will”, but has decided ACD is the most appropriate.

The main proposal contained in this report is that a legislative framework should be set up to facilitate someone wishing to draft an ACD. At present, no such framework exists and so ACDs exist in a legal vacuum.

The proposed framework would not compromise current criminal offences. This means that euthanasia and assisted suicide would remain illegal. Indeed, ACDs would only be able to specify which treatments an individual does *not* wish to receive in the event of incapacitation. Furthermore, the proposed framework would not encompass mental health treatments.

As regards the actual drafting of an ACD, the Commission recommend that the principle of informed decision-making is key. However, people are entitled to refuse care for religious or seemingly irrational reasons. Additionally, the principles of dignity, autonomy and privacy are of considerable importance. Where any doubt arises as to the legitimacy or meaning of an ACD, the presumption shall be in favour of life-preservation.

The Commission recommends a number of limitations with respect to the types of care that can and cannot be refused in an

ACD. Basic and palliative care cannot be refused in an ACD. “Basic care” here includes the provision of warmth, hydration, oral nutrition and hygiene. An ACD may reject “life-sustaining treatment”. This is clearly meant to refer to the use of life-support devices that replace basic bodily functions.

A number of specific recommendations are made concerning the procedure for drafting an ACD that rejects life-sustaining treatment. Any such ACD must be in writing and must be witnessed by at least one person.

As regards liability for health care professionals, the Commission has two major recommendations. First, there shall be no liability if someone follows the terms of an ACD they believe to be valid and applicable. Second, should they not comply with the terms of a valid ACD, a good-faith defence should be open to them.

The Commission makes a number of additional recommendations on the appointment of health care proxies, the drafting of an ACD code of practice, the existence of a rebuttable presumption in favour of mental capacity to draft an ACD, and the empowerment of the High Court to determine whether an ACD is legitimate.

Personal Debt Management and Debt Enforcement

LRC CP 56

September 2009

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

This Consultation Paper aims to provide a modern and comprehensive legal framework for dealing with personal indebtedness. This is huge area of concern in the present economic climate. The length and scope of the Consultation Paper pays tribute to both the importance and the complexities of the issues involved.

In examining what the law can do for personal indebtedness, a number of issues need to be considered: (1) the need for preventative measures to reduce the scale of indebtedness; (2) the need for effective interventions when indebtedness arises; (3) the need to bring debt enforcement procedures in line with best international practice; (4) the need to

question the utility of imprisonment for personal indebtedness; and (5) the need to examine where all of this fits within the general regulatory scheme for financial services. Of these, the law on debt enforcement is the primary focus in this paper.

Given the depth and breadth of the Consultation Paper, the following amounts to an inexhaustive summary only.

Chapter 2 sets out the general principles that inform the Commission's proposals. The Commission maintains that any legal system for dealing with indebtedness must be balanced, proportionate and clear. It must maintain equilibrium between the rights of creditors, debtors and the broader society. It must distinguish between those who cannot pay and those who will not. And it should reserve imprisonment for those who will not pay.

Chapters 3 and 4 look at measures for preventing and alleviating the problem of personal indebtedness. Following the European Commission guidelines, there are three principle mechanisms for prevention. They are: encouraging responsible lending practices; encouraging responsible borrowing (through consumer education); and encouraging responsible arrears-management. As regards alleviation, debt-counseling and personal insolvency law are considered. Chapter 4 looks at areas for future research.

Chapter 5 offers some recommendations for the reform of personal insolvency law. It is provisionally recommended that a non-judicial debt-settlement scheme be introduced. This would supplement the existing, court-based settlement scheme under the Bankruptcy Act, 1988.

Chapter 6 sets out a number of detailed proposals for reform of the debt-enforcement procedures. The suggested reform would be of a fundamental nature. A Debt Enforcement Office would be set up, and would take most debt enforcement procedures out of the courts. The goal would be to create more streamlined procedures, which are fair and proportionate, and which would encourage debtor participation.

Legal Aspects of Family Relationships

LRC CP 55

September 2009

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

This Consultation Paper deals with the legal position of non-marital fathers and members of the extended family with respect to what are traditionally called “guardianship”, “custody” and “access” rights. The Commission states clearly that all its proposals are made with respect for the best interests of the child, as set down in the UN Convention on the Rights of the Child, 1989.

Chapter 1 of the Paper deals with terminological issues. It is suggested that the terms “guardianship”, “custody” and “access” are antiquated and should be replaced by the terms “parental responsibility”, “day-to-day care” and “contact”, respectively. This would be in line with the changes wrought in other jurisdictions. The Commission invites proposals on the precise statutory definition of each term.

Chapter 2 examines the law with respect to the registration of birth. At present, only the mother’s name is required on the registration form. The Commission canvasses a number of proposals for reforming this position. These include: whether joint registration should be compulsory, whether the father should have the option of independent registration, and whether the registration should be automatically linked to parental-responsibility rights. The latter is not recommended, nor is a proposal to alter the current presumption that a woman’s husband is the child’s father.

Chapter 3 considers whether or not an unmarried father should have automatic guardianship/parental-responsibility rights. It is provisionally recommended that there be a statutory presumption in favour of granting an order of guardianship/parental-responsibility. This can be rebutted if it is shown that it would be contrary to the welfare or best interests of the child.

Chapter 4 looks at the position with respect to members of the extended family. The first part of the chapter deals with the ability of such family members to apply for access/contact rights.

It is suggested that the present “leave stage” of such applications be removed. The second part of the chapter deals with the situation in which (a) a member of the extended family is acting as a de facto parent and (b) the parents are unwilling to care for the child. At present, in such situations, members of the extended family cannot apply for guardianship/parental-responsibility rights or custody/day-to-day care rights. It is provisionally recommended that the law be changed so as to allow them to apply for such rights. The question as to whether access to such rights should be expanded to include “persons with a bona fide interest”, and/or step parents, is also considered.

E. Manitoba

Limitation of Actions

Consultation Paper

June 2009

http://www.gov.mb.ca/justice/mlrc/reports/actions_act.pdf

Statutory limitation periods are designed prevent a person from enforcing a legal right they might otherwise have had, provided a certain period of time has elapsed. There have been major reforms to the limitation legislation in other Canadian jurisdictions in recent times. In this consultation paper, the Manitoba Law Reform Commission offer a number of provisional recommendations for similar reform of the Manitoban limitation of actions regime.

Many detailed proposals for reform are made. It is not possible to cover them in this short space. A selective summary is all that can be provided.

The main proposal for reform is the repeal of the old legislation and the introduction of a new Limitations Act. The Act would apply to any claim made to remedy injury, loss or damage resulting from an act or omission. The Act would set out a basic and an ultimate limitation-period for all such claims.

The basic limitation period would be two years. The clock would start to run as soon as the injury, loss or damage is discovered. “Discovered”, in this context, would require

knowledge of the damage, the fact that it was caused by the defendant, and the fact that a viable cause of action exists. A reasonableness test will apply to the date of discovery: if a reasonable person, sharing the characteristics of the plaintiff, would have known sooner, then the earlier date is the relevant one.

An ultimate limitation period of 15 years, beyond which no claim could be brought, should apply. In this case, the clock would start to run from the date of the actual act or omission causing the damage, and not from the date of discovery. A number of exceptions are made to the ultimate limitation period. For example, the clock will be stopped during any period in which: (a) the defendant wilfully conceals the fact of the damage from the plaintiff; (b) the plaintiff is a minor; or (c) the plaintiff is mentally or physically incapacitated.

As regards the burden of proof, the plaintiff must prove that the claim has been brought within the basic limitation period; whereas the defendant must prove that the claim has come after the ultimate-limitation-period.

The court will retain a discretion to extend limitation periods, and parties may agree to extend (but not shorten) limitation periods themselves.

A draft bill is appended to the Consultation Paper.

Waivers of Liability for Sporting and Recreational Injuries

Report 120

January 2009

<http://www.gov.mb.ca/justice/mlrc/reports/120.pdf>

This Report deals with the use of written contractual waivers¹ of liability by both business and non-profit providers of sporting and recreational activities. Contractual waivers are usually required to participate in a wide variety of activities such as skiing, horse-back riding, rock-climbing and charitable events. Frequently the waiver is contained in a written document, but it

¹ Within this report the word “waiver” includes all documents including releases, indemnities and covenants not to sue designed to allocate the responsibility for wrongdoing causing personal injury or death to another person.

may also be found on tickets or signs located at the site of the activity.

This Report considers whether it remains good policy in the 21st century to permit providers of sporting and recreational activities to allocate the burden of their negligence to the consumers of these activities.

The Report begins in Chapter 2 with an examination of the legal principles relating to the potential liability of providers and the validity and scope of contractual waivers. In Chapter 3, the Commission analyses judicial decisions of cases dealing with the validity of waivers. Chapter 4 provides an overview of the impact of Manitoba's consumer protection legislation on the validity and scope of waivers. In Chapter 5, the Report from the Law Reform Commission of British Columbia *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* is discussed while in Chapter 6, the Commission reviews the approach to waivers contained in unfair contract terms legislation in England, Wales and Northern Ireland. From here, the Commission reflects on the arguments for and against the enforceability of waivers in Chapter 7 and in Chapter 8 sets out the options for reform. In Chapter 9 the Commission reviews any submissions that were made, while Chapters 10 and 11 set out the final recommendations of the Commission.

The Commission made 8 recommendations in total in this Report, which can be found in Chapter 11 of the Report. Amongst the recommendations made, the Commission proposes that Manitoba should enact legislation that provides that no waiver of liability for personal injury or death resulting from negligence in sporting and recreational activities is valid or binding, and that the use of such a waiver of liability is prohibited. In the alternative, the Commission proposes that no such waiver is valid, unless in all circumstances of the case it is fair and reasonable and without limiting the circumstances to be considered in any case.

The Commission also recommended that the Government of Manitoba should conduct public awareness initiatives with respect to waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities.

Report – Invasion of Privacy

Report 120

April 2009

<http://www.lawlink.nsw.gov.au/lrc>

This Report follows the Commission's Consultation Paper, *Invasion of Privacy*. In that Paper, the Commission raised the question of whether there was support in New South Wales for the greater protection of the privacy of individuals; in particular, whether privacy should be protected through the introduction of a statutory cause of action for invasion of privacy. In the Consultation Paper the Law Commission recommended that the Civil Liability Act, 2002 (NSW), should be amended to provide a cause of action for invasion of privacy in the terms of draft legislation.

In maintaining its position since the publication of the Consultation Paper, the Commission recommends that any statutory cause of action should not attempt to define privacy or to develop a statutory tort, or tort of privacy. Furthermore, the Commission was advised during the consultation process and through submissions that providing a non-exhaustive list of examples of privacy invasions could have the unintended effect of restricting the proper development of the action. The Commission, therefore only recommends that the statute should identify the general conditions in which an invasion of privacy is actionable, allowing the contexts in which the action applies, to respond to societal and technological change. The Commission considers it integral to the making of that identification that relevant public interests are taken into account. These include the important public interest in freedom of expression or of speech. A major part of the Report focuses on how this can be achieved.

Furthermore, the Report endorses the proposal in the Consultation Paper that, in responding to an invasion of privacy, the courts should have at their disposal a range of remedies free from the jurisdictional and other restraints on remedies that exist in general law.

Other issues that are considered in this Report are the defences that ought to be available to the statutory cause of action; the effect of death on, and the limitation period applicable to, the statutory cause of action; and the relationship of the cause of action to the general law, and to the statutory regimes that focus regulation principally upon information privacy in New South Wales.

This Report most also be seen as part of the broader scope of research by the Commission in this area. In June 2008, the Commission published a Consultation Paper, titled *Privacy Legislation in New South Wales*. The Commission intends to publish a Report on the issues raised in the Consultation Paper *Privacy Legislation in New South Wales* in due course

Report – Emergency medical care and the restricted right to practise

Report 121

April 2009

<http://www.lawlink.nsw.gov.au/lrc>

This Report deals with the question of whether a medical practitioner whose right to practice is restricted by conditions, should, contrary to those conditions, provide medical care to a person in need of urgent attention. In particular, the Report deals with the interaction between two provisions in the Medical Practice Act, 1992 (NSW) (hereinafter “the Act”) namely ss. 36(1)(C) and 36(1)(L).

The Report comes about as a result of a request by the Attorney General to inquire into and report on whether it is appropriate to amend the Medical Practice Act, 1992 (and in particular the definition of “unsatisfactory professional conduct”), and any other related like legislation, so as to make plain whether individuals whose legal right to practise medicine is restricted ought to be under any obligation, and if so, what obligation to provide emergency medical care contrary to the restriction on their right to practise. These terms of reference arose directly from the recommendations in a report of the Special Commission of Inquiry into Acute Care Service in New South Wales Public Hospitals.

In New South Wales, medical practitioners are licensed to practise under the Medical Practice Act, 1992. However, their registration may be subject to conditions. These conditions can be divided into two broad categories: inherent conditions and imposed conditions.

The Medical Practice Act, 1992, provides that a medical practitioner may be guilty of “unsatisfactory professional conduct” if he or she fails, “without reasonable cause”, to render “urgent attention” which he or she has reasonable cause to believe is needed “unless the practitioner has taken all reasonable steps to ensure that another registered medical practitioner attends instead within a reasonable time”.

As set out by the Commission, the chief problem arising in relation to the “urgent attention” provision is the interaction with the provision which states that unsatisfactory professional conduct includes “any contravention by the practitioner (whether by act or omission) of a condition to which his or her registration is subject”. The two provisions create a conflict for practitioners whose practices are subject to conditions and who are confronted with situations requiring urgent medical attention.

Thus the purpose of this Report was to recommend reform in order to ensure clarity; and make clear that a medical practitioner should not be subject to professional disciplinary action for failing to provide “urgent attention” in circumstances where he or she is subject to relevant restrictions but no other suitably qualified practitioner is readily available.

In this short Report, the Commission put forward three recommendations; firstly, that the Act should be amended by substituting “in need of emergency medical attention” for “in need of urgent medical attention”. Furthermore, “emergency medical attention” should be defined as medical attention that is required as a matter of urgency and is necessary to save a person’s life or prevent serious damage to his or her health.

Secondly, the Commission recommended that the Act should be amended by adding a section to the effect that a registered medical practitioner is not guilty of unsatisfactory professional conduct if the practitioner renders emergency medical attention to a person in need of it unless (a) any condition excludes the rendering of emergency medical attention and

(b) any condition to which his or her registration is subject excludes the rendering of emergency medical attention of a particular kind or in a particular circumstance.

Thirdly, the Act should be amended so that it is clear that the practitioner does not have to be “requested” to act, but will be *expected* to act (subject to the other requirements of the provision) simply when an emergency situation presents itself.

G. New Zealand

Review of regulatory Framework for the Sale and Supply of Liquor: Part 1: Alcohol Legislation and the Conscience Vote

NZLC R106

May 2009

<http://www.lawcom.govt.nz/Publications.aspx>

This Report is one of the many recent publications by the New Zealand Law Commission in their examination of the framework for the sale and supply of liquor. This Report examines the use of the conscience vote in the New Zealand House of Representatives.

In this Report the Commission wishes to draw attention to the use of the conscience vote to determine laws relating to the sale and supply of alcohol. The Commission believes that the conscience vote, where Members of Parliament cast their votes free from the usual expectation of party discipline, can reduce the quality and effectiveness of the alcohol laws that Parliament enacts. Thus there are compelling grounds for dispensing with the historical practice of applying the conscience vote to alcohol Bills.

Alcohol is an important societal issue, and while the consumption of alcohol can bring considerable enjoyment, the harmful use of alcohol contributes to a wide variety of serious social harms. According to the Commission continuing to treat alcohol bills on the basis of the conscience vote may produce legislation that fails to deal with these issues effectively. The Commission suggests that it is preferable that the House of

Representatives vote on alcohol bills using standard party based voting rather than the conscience vote.

In advocating this approach, the Commission recognised that the issue is a contentious one, but nevertheless felt this reform should be introduced. For the Commission, the primary concern is for the quality of future laws regulating the sale and supply of alcohol.

Chapter 1 provides a summary of the area, while Chapter 2 examines parliamentary law making in New Zealand. In Chapters 3 and 4, the Commission examine the conscience vote in detail, with particular emphasis on the role the conscience vote has played in alcohol laws. Chapter 5 provides a review of the quality and coherence of alcohol laws, while Chapter 6 reflects on the impact of party-based voting for alcohol laws. In Chapter 7, the Commission sets out its conclusions and final recommendations.

In summary, the Commission recommends that it is preferable for alcohol bills to be voted on the basis of the standard party-based voting, rather than using the conscience vote. If conscience voting is to be retained for alcohol bills, the Commission suggests that the two-stage process used in 1999 for the Sale of Liquor Amendment Bill (No.2) provides a useful precedent. The Commission also recommended that the use of party-based voting or the conscience vote in relation to alcohol Bills should be decided before the bills that are currently before the House are voted upon.

The conscience vote is not a matter for the Executive Government and therefore the Law Commission makes no recommendations to it.

Review of the Statutes Drafting and Compilation Act 1920

NZLC R107

May 2009

<http://www.lawcom.govt.nz/Publications.aspx>

This Report recommends a review of the Statutes Drafting and Compilation Act, 1920.

Since colonial times, New Zealand has had a centralised office for the drafting of legislation; an independent office and not part of the core public service. This understanding was translated into the Statutes and Drafting Act, 1920. That Act established what is now called the Parliamentary Counsel Office, under the leadership of the Chief Parliamentary Counsel, and conferred on it is the functions of drafting bills and supervising their printing.

Over the years there have been changes of terminology and the functions of the office have expanded, but there has been no fundamental review of the legislation since 1920, and as a result much of the Act is outdated. It does not recognise the publication of statutes in electronic form, for example. The Act also provides that the office is to be divided into two departments, Drafting and Compilation, whereas in fact, it has operated as a unified office for decades.

During the research process carried out by the Commission in this area many questions were raised such as: What should the legal status of the office be? Under whose control should it be? What should its statutory functions be? Is there a case for returning the drafting of tax bills (currently drafted in the Inland Revenue Department) to the Parliamentary Counsel office? And finally: Whether the office is appropriately named?

The Report contains nine chapters. In Chapter 1, the Commission provides an introduction. In chapter 2, the functions of the Parliamentary Counsel Office (PCO) are set out while Chapter 3 asks the question “under whose control should PCO be?”. In Chapter 4, the Commission examines the legal status of the office, and in Chapter 5 the issue of independence is explored. The issue of appointment is explored in Chapter 6, and tax drafting in Chapter 7. Finally in Chapter 8, the Commission

examines statutory functions while in Chapter 9 miscellaneous matters are set out.

Following its review in this area, the Commission recommends that the office should continue to be an independent office, and it should remain under the control of the Attorney-General. As regards legal status, the Commission recommends that the office remain outside the core public service. On this basis, the Commission recommends that the PCO should no longer be described as an “office of Parliament”. As regards appointments to the office, the Commission recommends that the legislation should provide that the Chief Parliamentary Counsel is the Chief Executive of the office, and that he or she appoints all other staff, including Parliamentary Counsel, fixes their remuneration, and is the employer of all such staff. There should be express provision that staff are subject to the Employment Relations Act, 2000.

On the issue of tax drafting, the Commission recommended that all drafting should be done in the one office, and thus recommends moving tax drafting back to the PCO. As regards a name change, the Commission makes the point that the PCO may not be the most appropriate name; “Parliamentary” indicates that the office’s role has links with Parliament as well as government; and the word “Counsel” emphasises the advisory function which we have said is so important. However, the Commission did not recommend any name change at this time, but recommended debate on the issue.

Alcohol in our Lives: An Issues Paper on the Reform of New Zealand’s Liquor Laws

NZLC IP 15

July 2009

<http://www.lawcom.govt.nz/Publications.aspx>

This Issues Paper intends to help define the nature and extent of alcohol-related harm in New Zealand, and to provide a springboard for public debate. As with the Commission’s Report on *Review of Regulatory Framework for the Sale and Supply of Liquor: Part 1: Alcohol Legislation and the Conscience Vote*,

this Issues Paper forms part of the Commission's overall research in reviewing the law on sale and supply of liquor.

In the words of the president of the Commission, this Issues Paper is designed to paint a picture of how liquor is used in New Zealand. It is important to point out that much of the research for this paper was carried out by means of participant observation. In 17 locations throughout New Zealand, members of the law Commission were out at night to observe the scenes that the police deal with in response to alcohol abuse.

The aim of this Paper is to outline the problems that the Commission have found and observed as a result of their research. This Paper also outlines the range of options that appear to be available to deal with the problems disclosed and give some idea of the Commission's preliminary recommendations for reform. The Commission stresses that the views of the Commission as set out in this Paper are tentative at this juncture, due to the need to receive submissions and carry out further consultation.

The terms of reference for this Paper were extensive, and as a result the Paper contains 13 chapters in total and is divided into two parts. Part I provides an overview of New Zealand drinking habits, the risks associated with them and a preliminary view of the major impacts harmful drinking is having on crime, injury and health in New Zealand.

Part II on the other hand considers ways in which alcohol related harm might be addressed. Under the three areas of supply control, demand reduction and problem limitation, the current legislation provisions and some of the measures used internationally are considered.

In Chapter 12, the Commission discusses moving towards a new framework for regulating liquor while in Chapter 13, the Commission sets out a list of tentative options for reform. Such options include the following:

- Introduce a minimum age at which it is lawful to drink (rather than purchase) alcohol, for example 18 years, and make it an infringement offence to drink alcohol unless a person has reached this age.
- Make it an offence for an adult to supply liquor to a young person, other than to that adult's child or ward.

- In terms of licensing, increase the education, age and training requirements for managers and door staff working in all licensed premises.
- Retain the Licensing Authority as the specialist regulator, but give it enhanced powers and functions, for example to: monitor and report on trends and adjust aspects of sale policy like promotions; award costs; impose fines on licensees, managers and staff of licensed premises for breaches of any of the provisions of the Act; enhance the flow of data from inspectors, police, District Licensing Agencies (DLAs), medical officers of health, and licensees and implement quality control of DLA output and compliance.
- Increase the current levels of excise tax on alcohol.

Private Schools and the Law

NZLC R108

September 2009

<http://www.lawcom.govt.nz/Publications.aspx>

In New Zealand, the legislation pertaining to private schools has remained unchanged for many decades. In 2007, the Government asked the Law Commission of New Zealand to review the law relating to private schools. In 2008, the New Zealand Law Commission published an Issues Paper on the topic. This Report recaps the key issues and principles that have informed the review, and sets out recommendations for the reform of the law relating to private schools in New Zealand. The main areas in which the Commission makes recommendations include registration criteria and process, compliance and enforcement, suspensions and expulsions, distance learning and statutory architecture. The Report is accompanied by a draft bill.

As a guiding principle, the Commission recognised that parents have freedom to decide how and where their children are educated, however the State has a valid interest in expecting minimum educational standards. Therefore, the main issues which were set out in the Issues Paper included language, gaps in the system and enforcement measures. The Commission received

twenty submissions which have helped the Commission to arrive at the recommendations set out in this Report.

The Report consists of five chapters in total. In Chapter 2, the Commission sets out its recommendations with regard to registration and criteria. The Commission recommends that a teaching enterprise has to be registered as a school, and that the Minister of Education should keep an up-to-date list of all registered private schools. Managers applying to register a school should be subject to a “fit and proper person” requirement, analogous to those in the Education (Hostels) Regulations, 2005. Furthermore, if the management structure of the school changes, the new managers should also be assessed against the “fit and proper” requirement. The Commission also recommends that premises and the equipment within that premises should be in a suitable condition for the delivery of education. Furthermore, the teachers of private schools must meet statutory requirements, and the staffing of private schools needs to be age-appropriate. In Chapter 2, the Commission also recommends that the Education Review Office should have the power to review a private school on the same basis as a state school, when that is desirable.

In Chapter 3, the Commission sets out its recommendations with regard to compliance and enforcement. Here, the key recommendation provides that legislation should contain a purpose provision, stating that any action taken in relation to a private school must be proportionate to the problem sought to be resolved. Should a situation arise where a private school may be de-registered, the Commission recommends that a more detailed process must be followed before a private school can be de-registered. The Commission also recommends that where there is a serious threat to student safety and welfare, there should be a power to close a school temporarily, pending an investigation into whether de-registration is appropriate.

Finally, in Chapter 4 the Commission sets out miscellaneous recommendations. The Commission recommends that legislation should set out the procedures to which schools must adhere after suspending and before expelling a student. Furthermore, school’s disciplinary procedures should be required to be available upon request and should be provided to students

and parents. The Commission also recommends that current legislation should be amended, to make it clear that it does not allow registration of a private school that operates as a correspondence school, distance learning or of similar description. The law relating to private schools should be contained in a dedicated part of the Education Act, 1989.

Suppressing Names and Evidence

Report 109

November 2009

<http://www.lawcom.govt.nz/Publications.aspx>

This Report reviews the law relating to the suppression of information in criminal cases, and forms part of the Criminal Procedure (Simplification) Project currently being conducted by the Law Commission and the Ministry of Justice.

In this Report the Commission recommends that ss. 138-141 of the Criminal Justice Act, 1985,² be repealed and replaced with a new statutory framework for the suppression of name and evidence and the closure of the court. The Law Commission of New Zealand is of the opinion that change to the existing framework is needed, to place greater emphasis on the principles of open justice and freedom of expression, and to ensure that the grounds on which they may be departed from are transparent, explicit and consistently applied.

In total, the Commission makes 35 recommendations in this Report, the most significant in the area of name suppression. The courts in New Zealand currently have a broad discretion to prohibit publication of names or identifying particulars of people accused or convicted of crimes. The Law Commission recommends a clearer test for name suppression, with specified grounds set out in legislation. During the research and consultation stages in the course of this review, the Commission discovered that there are many inconsistencies in the application of the law relating to the suppression of names and evidence.

² At present the Criminal Justice Act, 1985, ss. 138-141, set out statutory powers of the courts to close the court and restrict publication of information in criminal cases.

In Chapters 2-4, the Commission examines suppression of evidence, suppression of name and identifying particulars of accused or convicted persons as well as suppression of name and identifying particulars of victims, witnesses and others. The Commission recommends that the court should have the power to make an order for the suppression of evidence or submissions where the court is satisfied that: the interests of the security or defence of New Zealand so require; where there is a real risk to prejudice to a fair trial; where the order is necessary to avoid undue hardship to victims; where publication would endanger the safety of any person; and finally, where publication would be likely to prejudice the interests of maintenance of law.

In terms of publication, the Commission recommends that the courts should have the power to make an order prohibiting publication of the name, address or occupation of a person accused or convicted of an offence on a number of listed grounds. For example where there is a real risk of prejudice to a fair trial. As regards a person accused or convicted of a sexual offence under the Crimes Act, 1961, the Commission recommends that the name and identifying particulars of that person should be automatically suppressed, to prevent the victim being identified.

In Chapter 5, grounds for closing the court are discussed. Amongst the recommendations made, the Commission recommends that the court should have the power to make an order excluding from a criminal proceeding any persons other than the informant, any police employee, the defendant, any counsel engaged in the proceedings and any officer of the court where the court is satisfied that the order is necessary to prevent undue disruption to the proceedings and where the court is satisfied that an order for suppression of name or evidence alone is not sufficient to offset the risk identified.

In Chapter 6-8, a number of other issues that arise with suppression are discussed, including national register of orders, the impact of the internet, and offences for breach of suppression orders. As regards the impact of internet, the Commission recommends that where an Internet service provider or content host becomes aware that they are carrying or hosting information that they know is in breach of a suppression order, it should be an

offence for them to fail to remove the information or to fail to block access to it, as soon as reasonably practicable.

Finally, in relation to offences and penalties, the Commission recommends that breaches of suppression orders should continue to be strict liability offences. The Commission also recommends that the penalties for breaches of suppression orders be increased to the level proposed in clause 171 of the Search and Surveillance Bill, 2009. The maximum penalty for breaches would be 6 months imprisonment or (in the case of a body corporate) \$100,000.

The Report acknowledges that if the penalties for breaches of suppression orders are increased, the case for a reliable and up-to-date registrar of suppression orders to allow journalists to confirm the terms and duration of the order becomes even more compelling.

H. Queensland

Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General

Report No 65

April 2009

<http://www.qlrc.qld.gov.au/Publications.htm>

This Report concludes the fourth and final stage of the Uniform Succession Laws Project. The first three stages of the project to be completed were the law of wills, family provision and intestacy. The Uniform Succession Laws Project is an initiative of the Standing Committee of Attorneys-General, and has been undertaken by the National Committee for Uniform Succession Laws. The Queensland Law Reform Commission has had the primary carriage of the National Committee's work on wills and family provision and on this final Report, dealing with estates.

The lengthy Report (four volumes in total) contains the National Committee's recommendations in relation to three distinct aspects of the administration of estates of deceased

persons. The first area to include general issues of administration law and is considered in Chapters 3-29, 36 and 40, and includes issues such as the court's jurisdiction to make a grant; the appointment of personal representatives; the vesting of property; and the partition of land.

The second area considered by the National Committee is the re-sealing of intestate and foreign grants, and is discussed in Chapters 31-36; while automatic recognition of certain Australian grants without the need to be re-sealed is the third area to be considered. The background to these issues, the Committee's proposed scheme and the effect of the proposed scheme on other areas of succession law are considered in Chapters 37-39.

Finally a summary of all recommendations made in Volumes 1-3 is included in Volume 4 of the Report. Volume 4 also includes draft legislation (the Administration of Estates Bill, 2009) which implements the National Committee's recommendations in this Report. In the development of recommendations in this Report, the National Committee was guided by four objectives; simplification of the law; simplification of processes; the protection of persons with an interest in the estate of a deceased person and recognition of the extent of informal administration.

A Review of Jury Directions: Discussion Paper

WP No 67

September 2009

<http://www.qlrc.qld.gov.au/wpapers/WP67.PDF>

This Discussion Paper is the second publication in the Queensland Law Reform Commission's enquiry into jury directions in criminal trials. The Commission intends to publish a Report in this area at the end of 2009. This Paper follows on from the Issues Paper *A Review of Jury Directions*, published in March 2009.

The principal purpose for this Discussion Paper is firstly to set out the nature and content of the submissions received by the Commission to date; and secondly, to outline some proposals and options for reform which are under consideration by the

Commission, and with a view to generating further submissions in relation to these proposals.

The Commission points out that, this Paper refers to but does not repeat much of the background commentary found in the Commission's Issues Paper. Consequently, this Discussion Paper should be read in conjunction with the Issues Paper.

Chapters 2-5 consider what the Commission describes as the principal thrusts of the Commission's proposed approach to the reform of jury directions. In Chapter 2, the Commission discusses three of the key bases of reform to jury directions in Queensland. Firstly, that all reform in this area is predicated upon the need to ensure that the parties receive a fair trial; that codification of the law in the area is not appropriate in Queensland; and that the drafting of jury directions should continue to be based on the Queensland Bench book.

Chapter 3 examines reforms directed to the pre-trial identification issues that identify the questions that will need to be put to the jury, and examine various options for improving the timing and means of delivery of directions and other information to juries during trials. Chapter 4 explores the possibilities of giving information to juries by means of written material and aids while Chapter 5 looks at possible reforms in relation to the trial judge's and the parties' obligations with respect to jury directions given in the summing up and at other times during a trial.

In Chapters 6-8, the Commission considers a range of specific directions in relation to which reform should be considered. Chapter 6 discusses directions about limiting the use of evidence by judges; Chapter 7 discusses directions in sexual offence cases and unreliable witnesses; and Chapter 8 discusses a number of other directions such as those on standard of proof and in relation to some particular defences.

A Review of Queensland's Guardianship Laws: Discussion Paper

WP No 68

October 2009

<http://www.qlrc.qld.gov.au/Publications.htm>

This Paper forms part of the Commission's overall study of guardianship. This study has resulted as a result of a request by the Attorney-General, in 2005, to review aspects of the Guardianship and Administration Act, 2000 (Qld), and the Powers of Attorney Act, 1998 (Qld). These two Acts regulate decision-making by and for adults with impaired decision-making capacity. The terms of reference for this study require the Commission to conduct this review in two stages.

The Commission completed stage one of the review, where the confidentiality provisions of guardianship were examined with the production of its Final Report on confidentiality in the guardianship system in 2007. Within this Report, the Commission recommended a number of legislative changes to create greater openness in the guardianship system, to promote accountability and transparency, and to promote and safeguard the rights and interests of adults with impaired decision-making capacity.

The second stage of the review involves a more general consideration of the balance of the legislation. This Discussion Paper is the second consultation paper published for stage two of the review. It examines all the substantive legal issues under the terms of reference as well as addressing a number of procedural and other issues that have been raised with the Commission during the course of this review.

In examining the scope of the current Queensland provisions, the Commission has included information about comparative legislative provisions that operate in other Australian states and territories. The Paper also refers to comparative provisions and legislation outside Australia where those practices are innovative, unique or may represent best practice. It is an extensive report containing 24 chapters in total.

Chapters 1 to 4 provide an introduction, scope of review and an overview of the guardianship system and matters arising for discussion. In Chapters 5 and 6, the Commission examines the

appointment and powers and duties of guardians and administrators. Chapter 7 looks at restrictive practices, while Chapter 8 reflects on the binding direction by a parent for the appointment of a guardian or an administrator. In Chapter 9, the Commission reflects on the law on enduring powers of attorney. Chapter 10 reviews the law regarding statutory health attorneys, with Chapter 11 looking at the law of advance health directives.

Chapters 12 to 14 respectively examine the withholding and withdrawal of life-sustaining measures, consent to participation in medical research, and the effect of an adult's objection to health care.

Volume two of the Discussion Paper (containing Chapters 15 to 24) reviews the law relating to the tribunal's powers, functions, proceedings and appeals structure, as well as the law regarding whistleblower protection, legal proceedings involving adults with impaired capacity, and finally any other miscellaneous issues.

I. Scotland

Report on Succession

Scot Law Com no. 215

April 2009

<http://www.scotlawcom.gov.uk/downloads/reps/rep215.pdf>

This is a wide-ranging report which aims to update the law of succession. Two main topics are addressed: the rules governing intestate succession, and the rules governing the protection of close relatives from disinheritance.

These two topics are addressed because of the substantial changes in living arrangements in Scotland in the recent past. A few examples are illustrative: the introduction of same-sex civil partnership in 2004; the increased prevalence of cohabitation and step-families; and the fact that people are living longer, so that many children are middle-aged when their parents die. Unless it keeps pace with these changes, the law of succession risks becoming anachronistic.

Part 2 of the report looks at intestate succession. It is recommended that where a person dies intestate, leaving a spouse or civil partner but no issue (children), the spouse or civil partner should receive all of the estate. Where there are issue, but no spouse or civil partner, the issue should share the estate. Where there are both spouses (or civil partners) and issue, the spouse should take the first £300,000 of the estate, and the issue should share the balance. Where there is no spouse, civil partner or issue, the current rules should be retained.

Part 3 of the report looks at the rules protecting against disinheritance. It is recommended that disinherited spouses or civil partners be entitled to 25% of the estate they would have been entitled to if the deceased had died intestate. This rule would be non-discretionary. The situation with respect to disinherited children is more complex. Two possible reforms are mooted. The first would give the children a share of 25% of the estate. The second would make special provisions available for dependent children.

Part 4 of the report looks at cohabitation. Currently, cohabitees only have rights in the event of intestacy. It is recommended that a discretionary scheme be introduced, that would give cohabitees a right to apply to the court for an entitlement in both testate and intestate succession. The amount of any such entitlement would be dependent on the length of the cohabitation, the degree of financial interdependence, and the contribution (financial or otherwise) made by the surviving cohabitee to their joint lives.

Part 5 of the report looks at private international law issues. Part 6 repeats recommendations for reform that were previously made by the Commission in a 1990 report. And Part 7 looks at miscellaneous matters including recommended reforms to the law of caution and the appointments process for executors-dative.

Sexual Offences: Adult Prostitution

Discussion Paper, Project 107

May 2009

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

The primary purpose of this Discussion Paper is to consider the need for law reform in relation to adult prostitution in South Africa, and identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. The secondary aim of this Discussion Paper is to review the fragmented legislative framework which currently regulates adult prostitution. Under South African legislation voluntary selling of adult prostitution, buying of voluntary adult sex as well as all prostitution-related acts are criminal offences.

For the purposes of this Paper, the Commission defines prostitution as the exchange of any financial or other reward, favour or compensation for the purpose of engaging in a sexual act. Furthermore, given the marked distinction between the conditions, environment and demographic profile of prostitutes, the Commission makes a further distinction between indoor and outdoor prostitution.

The Paper contains eight chapters, and has three main parts. Firstly, the Commission discusses the social and legal context of prostitution in Chapters 2-4, including a discussion of the range of legal, social and economic factors that are relevant to the question of whether to reform the law relating to adult prostitution. In Chapter 5, the Commission explores international law in relation to prostitution and suggests that the current law might fail to comply with South Africa's international obligations.

Secondly, the Commission engages in an extensive comparative analysis in Chapters 6 and 7 to look at how other countries have addressed prostitution in their laws.

Finally, in Chapter 8 the Commission poses four alternative legal models that might be employed in South Africa. To give effect to the general proposals, the Commission proposes that the legislature repeals the Sexual Offences Act, repeals s. 11 of the Sexual Offences Amendment Act, and enacts a new Adult

Prostitution Reform Act which may include or exclude provisions of the Sexual Offences and Sexual Offences Amendment Acts.

In addition, the Commission proposes the following four law reform options

- Total criminalisation of adult prostitution;
- Partial criminalisation of some forms of adult prostitution and related acts;
- Non-criminalisation of adult prostitution;
- Regulation of adult prostitution and prostitution related acts.

In order to identify which model is most appropriate to South Africa, the Commission requests that the public comment on these models by responding to questions which are set out in the Discussion Paper.

Privacy and Data Protection

Report, Project 124

August 2009

<http://www.doj.gov.za/salrc/reports.htm>

This Report arises out of a request to the Minister for Justice and Constitutional Development by the Committee on the Open Democracy Bill (in 2000) to introduce privacy and data protection legislation in Parliament. The Minister in turn approached the Commission to consider the inclusion of such an investigation in its programme.

The terms of reference for this investigation can be stated as follows:

- To investigate all aspects regarding the protection of the right to privacy of a person in relation to the processing (collection, storage, use and communication) of his, her or its personal information by the State or another person.
- To recommend any legislative or other steps which should be taken in this regard.

As a result of this request, the African Law Reform Commission has investigated all aspects regarding the protection of the right to privacy of a person with specific reference to the proceeding of his or her personal information by the State or other persons.

The Report on discussion here follows the publication of an Issues Paper for information and comment in 2003, and a Discussion Paper with draft legislation published in October 2005. In this Paper, the preliminary proposals of the Commission were set out and options for reform identified. Furthermore, prior to the publication of this Report, the Commission held regional workshops countrywide where members of the Project Committee were present to explain and discuss the proposed options for law reform and to note any comments. In total, the Commission received a total of 63 written submissions. Of those, the overwhelmingly majority were in favour of the proposed legislation.

In this Final Report, the Commission sets out its final recommendations and conclusions as well as a Draft Bill on the Protection of Personal Information. As regards its recommendations, the Commission recommends that privacy and information protection should be regulated by a general information protection statute, with or without sector specific statutes, which will be supplemented by codes of conduct for the various sectors and will be applicable to both the public and private sector.

The proposed Bill gives effect to eight core information protection principles, namely accountability, processing limitation, purpose specification, further processing limitation, information equality, openness, security safeguards and data subject participation. The Commission makes special provision for the protection of special (sensitive) personal information.

The Commission also recommends the introduction of an independent Information Protection Regulator (Regulator). Enforcement of the Bill will be through the Regulator using as a first step, a system of notices where conciliation or mediation has not been successful. Failure to comply with these notices will result in a criminal offence. The Regulator may also assist a data subject in claiming compensation from a responsible party for any damage

The Bill has also made specific provision for the protection of data subjects' rights in so far as unsolicited electronic communications (spam) and automated decision making are concerned. Further still, the Commission also sought

to ensure that the proposed legislation provided as adequate level of information protection in terms of the EU Data Protection Directive. In this regard, a provision has been included that prohibits the transfer of personal information to countries that do not, themselves, ensure an adequate level of information.

K. Victoria

Jury Directions: Final Report

Final Report (VLRC 17-2009)

July 2009

<http://www.lawreform.vic.gov.au/>

This Report is the final part in the Victorian Law Reform Commission's review of the law and practice concerning the directions which judges give to juries in criminal trials. The Report recommends significant legislative reform of the law concerning jury directions, and also recommends procedural and administrative changes that would improve jury directions.

The overall aim of the Report is to assist judges in giving jury directions so that fair and just verdicts are reached, and to reduce the possibility of error in giving directions which in turn would reduce retrials.

In total, the Report contains seven chapters. Chapter 1 provides an introduction; Chapter 2 contains an overview of the law concerning jury directions, and discusses problems with its application. In Chapter 3, the Commission sets out a detailed account of particular problem areas. Chapters 4 and 5 provide an overview of recommended legislation, and how such legislation would deal with problem areas. In Chapter 6, the Commission reflects on new ways of directing the jury about issues on dispute in the trial, and makes recommendations designed to promote early identification of those issues. Finally, in Chapter 7, current training requirements for judges and barristers are examined. The Commission makes recommendations concerning the further development of their skills.

The Commission makes 52 recommendations in this Report. Firstly, the Commission recommends that the law of jury

directions should be placed in a single statute. Initially, the legislation would address particular directions known as cause problems and would address other directions more generally by setting out guiding principles. The Commission recommends that over time the statute would replace all of the common law rules concerning jury directions, and include all existing legislation dealing with directions. The statute would also provide trial judges with guidance about when to give directions and would require that all directions be as clear, brief and simple as possible. As regards summing up, the Commission recommends that the extent of the obligation to sum up should be set out in legislation. More specifically, the Commission recommends that the judge is only required to direct the jury about the elements of the offences and defences that are in dispute, and to refer to the evidence relevant to those issues. Furthermore, it is recommended that judges should be encouraged to provide an edited copy of the transcript to the jury, and to use the transcript in summing up.

The Commission also recommends that the trial judge should also be permitted to give the jury a Jury Guide when summing up the case. In terms of training, the Commission recommended that the Attorney-General should consider establishing a Public Defender's Office, as a way of developing skills among criminal trial counsel and providing training for newly-appointed judges.