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A. Alberta

Wills and the Legal Effects of Changed Circumstances
Final Report No. 98
August 2010
http://www.law.ualberta.ca/alri/docs/fr098.pdf

The Alberta Law Reform Institute was established in 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta to conduct legal research and propose recommendations for the reform of the law. This *Final Report on Wills and the Legal Effects of Changed Circumstances* follows on from the *Final Report on the Creation of Wills* (No. 96 – 2009).

The current Alberta Wills Act, 2000 (like those of most Canadian jurisdictions) is based on the Uniform Wills Act originally proposed by the Uniform Law Conference of Canada in 1929, and revised in 1953. This uniform model incorporated the most important reform aspects introduced into succession law by the (English) Wills Act, 1837 but also went further by incorporating some important Canadian reforms. Alberta adopted the uniform model in 1960, replacing its existing wills legislation.

In the last 50 years, the Alberta Wills Act has not been frequently amended. The most important amendments added anti-lapse provisions, lowered the age of testamentary capacity from 21 years to 18 years, clarified the rules concerning power of sale and signature on behalf of a testator, added uniform provisions

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concerning international wills, and extended the statute's application beyond married spouses to include unmarried opposite-sex and same-sex adult interdependent partners. While these amendments have updated the act, there has not been a systematic or comprehensive policy review of the whole statute since 1960.

This Report addresses many disparate topics and issues in the law of wills. However, the underlying theme regards what is or should be the legal effect of changed circumstances? All kinds of factors can change between the date a will is created and the date it takes effect on the testator's death. The testator may make some alterations to the will or perhaps revoke it or revive it after revocation. Beneficiaries may predecease the testator. Property may be disposed of and added to the estate. The testator may marry, divorce or have children who are born during the testator's lifetime or after the testator's death.

Within the theme of intervening change, the Report also addresses two recurring reform issues. First, what evidence can a court look at in order to determine the meaning of the will or the testator's intention? Second, what role should be played by various common law presumptions or rules of construction? Is it time to modernise these aspects, rationalise their application or displace them by statute?

The Report is divided into nine chapters. Chapter 1 is introductory, and discusses the methodology and consultation process. Chapter 2 addresses changes that alter or revoke a will. Chapter 3 explores revocation by law when testators marry or divorce. Chapter 4 discusses revival of a revoked will. The admission of extrinsic evidence is considered in Chapter 5, while a court's ability to rectify accidental drafting mistakes in a will is addressed in Chapter 6. Chapters 7 and 8 examine gifts that fail by action of a beneficiary or by disposition of property during the testator's lifetime, respectively. Finally, Chapter 9 reiterates the Alberta Law Reform Institute's previous call for legislation on the status of children and explores the discriminatory effects against illegitimate children of certain common law constructions in the law of wills.

B. Australia

Secrecy Laws and Open Government in Australia
Final Report (ALRC 112)
December 2009
http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC 112.pdf

This Report focuses on possible options for ensuring that Commonwealth information is protected in a consistent manner across government while also recognising the importance of transparent and accountable government by providing suitable access to information. As such, this Report focuses on secrecy offences. In establishing the current law in this area it was noted that there are 506 provisions relating to secrecy in 176 pieces of legislation. This includes 358 distinct criminal offences. The ALRC recognises that a number of the provisions are excessively broad and that criminal sanctions are relied on a disproportionate amount. In addition to this, it was noted that there is inconsistency in structure, terminology and penalties across the provisions. This report is divided into sixteen chapters and five appendixes.

Chapters 1-4 establishes the conceptual framework for secrecy laws as well as outlining the existing law on secrecy. In particular, Chapter 1 provides an introduction to this area of law and provides an outline of the Report. Chapter 2 considers the relationship between secrecy and transparency in government. Chapter 2 also examines the balance between secrecy and people's freedom of expression. Chapter 4 recommends that in the criminal context the burden of proof that a disclosure occurred should be on the prosecution. It must also be shown by the prosecution that the disclosure was reasonably likely to cause harm or there was an intention to cause harm to specific public interests. The ALRC suggest that in the absence of any form of harm an administrative penalty or contractual remedy may be most appropriate.

Chapters 5-7 focus on the structure and contents of a new general secrecy offence. Chapter 5 concentrates on the exceptions contained in the Freedom of Information Act 1982 (Cth). Chapter

6 focuses on the type of conduct as well as which categories of people should be regulated for in a general secrecy offence. In this regard, the ALRC identify two categories of offence. The first offence is related to where the initial disclosure of information was in breach of the general secrecy offence. The second category of offence relates to a breach of a duty of confidence. The focus of Chapter 7 is on possible exceptions and defences to the general secrecy offence. This also involves considering the relationship between public interest disclosure legislation and the general secrecy offence.

Chapters 8-11 examine specific secrecy offences. Chapter 8 concentrates on the role of such offences. Chapter 9 examines the elements of specific secrecy offences and Chapter 10 focuses on authorised disclosure provisions. Chapter 11 reviews the recommendations contained in Chapters 8-10. In this Chapter, the ALRC examine how the principles contained in previous recommendations could be applied to existing specific secrecy offences.

Chapters 12-15 focus on the administrative secrecy framework of the Australian government. Chapter 12 sets out the administrative secrecy obligations for those working in the Australian Public Service and examines what form of disclosure is the secrecy offence to be concerned with. Chapter 13 considers secrecy provisions for employees of the Commonwealth who are outside the Australian Public Service. The ALRC concentrates on ensuring consistency in secrecy offences between these different types of employee. Chapters 14 and 15 discuss methods available to Government agencies for the promotion of information-handling practices and the development of a culture of effective information handling.

Chapter 16 focuses on the interaction of laws. This considers the relationship between secrecy offences and freedom of information, archives, privacy and parliamentary privilege.

Family Violence – A National Legal Response
Final Report (ALRC 114)
October 2010
http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf

This Report focuses on recommendations aimed at reducing levels of family violence. Although the recommendations are applicable to all victims of family violence, emphasis is placed on violence towards women and children. The Report was conducted by both the ALRC and the New South Wales Law Reform Commission and is divided into two volumes. In this Report, the limits of law are recognised while also recognising that the Report only addresses a relatively small number of issues due to the breadth of family law. Nevertheless, this Report makes recommendations beyond legislation including recommendations on education, provision of information and methods of improving the work of police and prosecution services. This Report takes four principles into account when making recommendations including seamlessness, accessibility, fairness and effectiveness. This Report is split into eight sections.

Part A serves as an introduction to the Report and is divided into three chapters. Chapter 1 sets out the background, scope and an overview to this Report. Chapter 2 sets out the context for reform and Chapter 3 establishes the framework for reform.

Part B considers a common interpretative framework in relation to family violence. This section contains four chapters. Chapter 4 sets out the function of the existing legislation on this topic. Chapter 5 and 6 focus on the relevant terminology and how it is defined. Chapter 7 focuses on another method of developing a common interpretative framework. This involves the enactment of provisions which would complement a consistent understanding of terms relating to family violence.

Part C contains seven chapters and focuses on the relationship between family violence and criminal law. Chapters 8-10 focus on procedural elements such as police investigations and bail. The law relating to protection orders is discussed in Chapters 11 and 12. Sentencing is the focus of Chapter 13 and the

family relationship, as well as defences to murder are considered in Chapter 14.

Part D focuses on the interaction between family law and family violence. Chapter 15 serves as an introduction to this area. Chapters 16 and 17 examine the jurisdiction and practice of state and territory courts as well as federal family courts. Chapter 16 addresses inconsistencies and case management. Chapter 17 considers protection orders and injunctions for personal protection. A discussion of evidence in family violence cases is contained in Chapter 18.

Part E centres on the protection of the child. Chapter 19 examines the relationship between family law and child protection whereas Chapter 20 examines child protection in relation to the criminal law.

Part F considers alternative dispute resolution. Chapter 21 sets out family dispute resolution and Chapter 22 examines issues of confidentiality and admissibility. Inconsistencies and areas of overlap are the subject of Chapter 23.

Part G of this report contains five chapters and focuses on sexual assault in relation to family violence. Chapter 24 sets out the background of sexual assault including issues such as terminology and the historical approach to this area. Chapter 25 examines the existing legislation and highlights inconsistencies in the law, particularly in relation to consent. Chapter 26 examines the attrition of sexual assault cases at different stages including reporting, prosecution and pre-trial processes. In essence, this chapter considers difficulties in establishing a sexual assault case. Chapter 27 and Chapter 28 focus on issues relevant for court proceedings. Chapter 27 focuses on evidence in sexual assault proceedings, while Chapter 28 discusses jury warnings and cross-examination.

The final part of this Report is made up of four chapters and considers the overarching issues discussed in the Report. Chapter 29 examines integrated responses. Chapter 30 discusses information sharing. Chapter 31 considers issues relating to education and the collection of data. Chapter 32 focuses on specialisation including the specialisation of courts and police services.

Overall, this Report recommends increased consistency in interpretation, the identification of clear principles and objectives, harmonisation between territories, improved rules on evidence, use of specialised court and police services, the provision of relevant education and training, increased integration and information sharing. This Report also recommends the creation of a national family violence bench book and the creation of a national register of relevant court orders and other relevant information.

C. British Columbia

Report on Proposals for a New Commercial Tenancy Act
BCLI Report No. 55
October 2009
http://www.bcli.org/sites/default/files/2009-10-30_BCLI_Report_on_Proposals_for_a_New_Commercial_Tenancy_Act.pdf

The Commercial Tenancy Act, British Columbia's main statute addressing commercial leasing, first appeared in British Columbia law in the late 19th century, as a compilation of a disparate set of legislative provisions enacted in England in the 18th and 19th centuries. A few provisions have been added over the years, but apart from these additions, the act has remained the same. Commercial leasing, in contrast, has not. It has grown and diversified along with British Columbia's economy. As a result, a split between the issues addressed by the Commercial Tenancy Act, 1996 and the concerns of participants in the commercial leasing sector has appeared and grown very wide.

This Report is split into two Parts, with Part One providing the background, and Part Two setting out a draft of a new Commercial Tenancy Act. The Report is focussed on the Commercial Tenancy Act and allied legislation, such as selected provisions of the Property Law Act, 1996, the Law and Equity Act, 1996, the Land Title Act, 1996, and the Land Transfer Form Act, 1996. The Report does not address residential leases covered by the Residential Tenancies Act, 2002. In this way, it follows a

division that has been present in British Columbia leasing law since the 1970s, which has separate statutes for commercial and residential leases.

Part One of the Report contains background material and context to the current Commercial Tenancy Act. It opens by providing general information on commercial leasing, introducing the project and the project committee, and describing the consultation paper that preceded the Report and the structure of the Report. Part One then moves on to give a historical introduction to key terms in leasing law, including the protection of the tenant's right to occupy the leased premises, the landlord's right to financial compensation, and enforcement of the landlord's rights. Part One then describes the current legislative framework for commercial leasing in British Columbia, and sets out the reasons for reform of the law at this time.

Part Two contains the recommendations for reform, which have been cast in the form of draft legislation and commentary on that draft legislation. The draft legislation is not intended as a complete code of commercial leasing law. Instead, it is designed as a remedial statute that addresses specific problems but also leaves part of the legal framework for commercial leasing to the common law. Six major themes are pursued in the draft legislation: (1) implied provisions for commercial leases; (2) the landlord's consent to an assignment or a sublease; (3) the application of contractual principles to leases; (4) the creation of a summary dispute resolution procedure, which is set out in a draft regulation; (5) the bankruptcy of the tenant; and (6) the repeal of obsolete provisions of the current act.

The draft legislation also contains a series of implied provisions addressing topics such as the tenant's right to quiet enjoyment of the premises, the landlord's obligation not to derogate from a grant contained in the lease, payment of rent, re-entry by the landlord, and repairs. These implied provisions are default provisions; in that they apply to leases only to the extent that the landlord and the tenant have not agreed to modify, vary, or exclude them.

Report on New Probate Rules
BCLI Report No. 57
October 2010
http://www.bcli.org/sites/default/files/probate_rules_report.pdf

Two recent developments in the legal system of British Columbia form the background to this Report on probate rules. One was the reform of the law of succession on death initiated by the Succession Law Reform Project, which culminated in the enactment of the Wills, Estates and Succession Act, 2009. The Succession Law Reform Project focused on legislation and common law. Review of Rules 61 and 62 of the former Rules of Court, commonly referred to as the "probate rules," was not possible within its limited timeframe.

The second recent development was the general reform of the rules of court in British Columbia that flowed from the 2006 report *Effective and Affordable Civil Justice* from the Civil Justice Reform Working Group, part of the Justice Review Task Force established by the Attorney General of British Columbia. That initiative culminated in the new Supreme Court Civil Rules ("Civil Rules") that were released in July 2009 and came into force on 1st July 2010.

The former probate Rules 61 and 62 have been largely preserved, with only minor changes in the Civil Rules as Rules 21-5 and 21-4, respectively. The size and complexity of the task of overhauling the rules of court did not permit a review of the probate rules in depth by the Civil Rules Drafting Group or the permanent Supreme Court Rules Revision Committee. Instead, that task was left to the Probate Rules Reform Project which, like the Succession Law Reform Project that preceded it, was carried out by the British Columbia Law Institute with support from the Ministry of Attorney General.

The approach taken by the Report to reform of the probate rules is fourfold. First, it attempts to design an optimal procedure instead of simply improving on the existing one. Second, aspects of probate procedure that have outlived their usefulness should no longer be retained simply for historical reasons. Third, in recognition of the fact that unrepresented persons initiate much probate business, procedures should be simplified where possible.

The revised probate rules would provide more explicit guidance than Rules 61 and 62 now do. Fourth, differences between procedures in probate matters and general civil procedure as remodelled under the new Civil Rules should be harmonised to the extent possible.

Part One of the Report explains the background to the procedural reforms that the new probate rules intended to replace Rules 21-4 and 21-5 would introduce. Part One is divided into three chapters: Chapter 1 is a general introduction explaining the background to the Probate Rules Reform Project; Chapter 2 explains the reasons why reform of the probate rules is needed; and Chapter 3 describes the approach taken by the Project Committee in carrying out the task of reforming the probate rules and the key elements of a new probate procedure.

Part Two contains the recommended new draft probate rules intended to replace the present Rules 21-4 and 21-5 and commentary on them. Following the general format of the Civil Rules, the new probate rules take the form of sub-rules grouped under one principal rule. The numbering of that principal rule is left to the decision of the Supreme Court Rules Revision Committee. As the new rules abandon the present contentious/non-contentious classification of probate business, division of the sub-rules between two principal rules of court was not seen as necessary.

The new probate rules in Part Two are intended to accommodate a system in which a single court file for the estate would be opened when the first filing (typically an application for a common form grant) is made. Subsequent proceedings that currently must be pursued in separate actions with different court files and file numbers, such as probate in solemn form and revocation, would be initiated instead by interlocutory application within the same estate file. The relatively rare cases in which a proceeding for probate in solemn form is begun before any other step has been taken in the estate, such as an application for a common form grant, would be exceptions. In those cases, the proceeding would commence by petition.

The procedure in contested matters would be only as elaborate as necessary to resolve the particular matter, ranging from an ordinary chambers argument to summary trial on

affidavits to a regular civil trial with oral evidence. This is seen as serving the principle of proportionality embraced by the Civil Rules.

D. England and Wales

Criminal Liability in Regulatory Contexts
Consultation Paper No. 195
August 2010
http://www.lawcom.gov.uk/docs/cp195_web.pdf

This Consultation Paper focuses on the possibility of reducing the role of criminal law in areas which already attract much regulation such as farming, food safety, banking and retail sales. The reason for minimising the scope of the criminal law in these areas is that criminal law should be reserved for relatively serious offences. In addition to this, it is recognised by the Law Commission that there has been a significant increase in the amount of criminal law offences which have been enacted since the late 1980s. The alternative to relying on the criminal law to control risky behaviour is to utilise civil sanctions which would have the effect of reducing legal costs and delay as well as increasing certainty for individuals and businesses who are the subject of such actions. This Consultation Paper is divided into eight parts and four appendixes.

Part 1 of this Consultation Paper serves to outline the scope and background of this Paper as well as establishing a number of provisional proposals and questions. These proposals relate to the limits of criminalisation, the avoidance of overlapping offences, structure and process, the element of fault in criminal offences, criminal liability of businesses, the doctrine of identification, the due diligence defence, the doctrine of consent and connivance and delegation.

Part 2 of this Consultation Paper focuses on public interest offences. This part draws on the different approach of the law to driving and car ownership compared with cycling and bicycle ownership. The purpose of this is to contrast a criminal offence led area with driving and car ownership where a mixed criminal

and regulatory approach is taken. This part also considers the approach to knife crime. However no proposal is made in relation to public interest offences as it suggested that they merge too rapidly with controversial topics which are not the subject of this paper.

Part 3 examines criminal wrongdoing and regulation. In order to examine the overuse of criminal law in regulatory contexts this section focuses on truancy, the illegal use of migrant workers and its role in the promotion of product safety. This section proposes that only primary legislation should be used to create and amend criminal offences. In addition to this, it is proposed that where there is a civil penalty or equivalent measure in a regulatory context provision should be made for a court appeal on a point of law or a re-hearing.

Part 4 considers the element of fault as well as moral wrongdoing. As a result of identifying certain principles of the fault element it will facilitate consistent application of these elements in a regulatory context. It is also proposed that there be proportionality of fault elements in criminal offences which are designed to support regulation.

Part 5 focuses on the identification doctrine which provides for the attribution to a corporation of the acts and state of mind of its employees. This section considers the development of the identification doctrine and outlines a number of cases relevant to this area. It is proposed that this area be legislated for where possible, however in situations where no relevant legislation exists it is suggested that statutory interpretation be used by the courts in order to establish corporate criminal liability but there should not be a presumption that the identification doctrine is applicable.

Part 6 considers the possibility of allowing the courts to apply the due diligence defence to a statutory provision which imposes criminal liability without a proof of fault requirement. This section sets out the presumption of fault, defences to due diligence, as well as considering the approach in Australia and Canada. Furthermore, this section applies the due diligence defence to cases which have already been decided.

Part 7 examines whether in relation to companies and partnerships should the doctrine of delegation be abolished and

should the consent and contrivance doctrine be limited. In relation to the consent and contrivance doctrine it is proposed that it not be broadened to include situations where the offence of the company can be attributed to an individual director or corresponding person's negligence. An alternative offence is suggested to replace the doctrine of delegation. This would involve failing to prevent the commission of an offence by a person who was delegated to run the business.

Part 8 contains a summary of the proposals and the questions posed by the Law Commission in this Paper. The appendices to this Report contain a number of reports. Appendix A contains "A Review of Enforcement Techniques" by Professor Julia Black. Appendix B contains a report on "Corporate Criminal Liability: Models of Intervention and Liability in Consumer Law" by Professor Peter Cartwright. Appendix C contains a report by Professor Celia Wells on "Corporate Criminal Liability: Exploring Some Models". An impact assessment is set out by Appendix D.

Public Service Ombudsmen
Consultation Paper No. 196
September 2010
http://www.lawcom.gov.uk/docs/cp196.pdf

This Consultation Paper focuses on the workings of public service ombudsmen with the aim of demonstrating ways to ensure consistency and facilitate public complaints. The ombudsmen which are the focus of this Consultation Paper include the Parliamentary Commissioner, the Local Government Ombudsman, the Health Service Ombudsman, the Public Service Ombudsman and the Housing Ombudsman. This Paper does not propose large scale institutional change but concentrates on potential reform of the current framework. The Consultation Paper is divided into eight parts and an appendix.

Part 1 establishes the origins and scope of this consultation paper. This section also sets out a number of characteristics of the ombudsman process such as the investigatory nature of the process, the necessary independence of an ombudsman and the

fact that an ombudsman makes recommendations which differs from the role of a court or tribunal.

Part 2 considers the basic functions of the public services ombudsmen by examining the role of each ombudsman individually. The purpose of this section is to provide context for later discussion on possible reforms. This section also highlights three important issues to be considered which include investigations, maladministration and injustice.

Part 3 examines the system for the appointment of ombudsmen. In relation to the appointment of the Parliamentary Commissioner it is proposed that the role of Parliament should be strengthened. This section also serves to highlight the absence of the Housing Ombudsman from the list of appointments which is subject to pre-appointment hearings by select committees.

Part 4 focuses on the opening of an ombudsman investigation. This section concentrates of five main issues which include statutory bars, stay of proceedings for ombudsmen, alternatives to investigation, written complaints and the MP filter.

Part 5 discusses the investigation by an ombudsman. In doing so, this section examines the closed nature of ombudsman investigations as well as references on a point of law. In relation to the closed nature of ombudsman investigations the Law Commission propose that the ombudsman should have the discretion to conduct the investigation publicly where appropriate rather than being limited to conducting investigations in private. A significant number of proposals are also made by the Law Commission in relation to references on a point of law.

Part 6 considers the reporting of the findings from an ombudsman investigation. This section examines the current legislation on reporting, early developments, as well as current practice and relevant case law. Proposals in this area aim to increase transparency as well as providing increased certainty in the type of report to be issued.

Part 7 of this Consultation Paper discusses the relationship between public services ombudsmen and elected bodies. This section sets out the current position as well as highlighting recent developments in this area. It is shown that only the Housing Ombudsman does not submit an annual report to an elected body and a proposal for this to be altered is included in

this Paper. Furthermore, the Law Commission makes proposals with the aim of ensuring consistency in the relationship between public service ombudsmen and elected bodies. A summary of the specific points for consultation is contained in Part 8 of this Paper.

Unfitness to Plead
Consultation Paper No. 197
October 2010
http://www.lawcom.gov.uk/docs/cp197_web.pdf

The subject of this Consultation Paper is an examination of the "unfitness to plead" procedure. This is to decide whether a person is mentally fit for a criminal trial and the consequences if they are judged not to be mentally fit. The Law Commission suggest that the definition of "unfitness" is out of date and that the court does not adequately deal with people judged to be unfit to plead. This Consultation Paper is divided into nine parts and four appendixes.

Part 1 of this Consultation Paper introduces the topic of "unfitness to plead". This section sets out the current law which relies on a test from 1836. This questions whether the accused can understand the proceedings, and evidence as well as direct a lawyer, challenge a juror and the ability to plead to the charge. This section also establishes the scope of the Paper and sets out terminology as well as containing the provisional proposals and questions of this Consultation Paper.

Part 2 focuses on the existing law in this area. This section highlights how the legal test for capacity, which is known as the Pritchard test, is not contained in legislation as it was developed through case law. In addition to this, the Law Commission highlights a number of failings of the Pritchard test. This section also examines the relationship between capacity and participation.

Part 3 concentrates on the creation of a new legal test. On this basis, the Law Commission propose the introduction of a new test of capacity which follows the test for capacity as set out in the Mental Capacity Act, 2005. As such, a person would lack capacity were they unable to comprehend information necessary for decisions taken in the course of the trial, retain such

information, to draw on this information for making decisions or to communicate a decision. It is also proposed that a decision made by the accused does not have to be rational.

Part 4 considers the role of special measures for a vulnerable person accused of a crime. A special measure is a measure intended to aid the participation of a vulnerable defendant in the proceedings. The continued development and implementation of these measures is supported by the Law Commission and it is proposed that special measures should be taken into account when considering the decision-making capacity of an individual.

Part 5 examines the way in which the capacity of the accused is assessed. This section considers the advantage of establishing a standardised psychiatric test for determining decision-making capacity. The Law Commission also favour retaining the current requirements of medical evidence under the proposed new system.

Part 6 discusses the section 4A hearing. The Law Commission highlight the difficulties with the section 4A hearing and considers case law relevant to the topic. Options for reform are also set out in part 6. The approach adopted in several Australian territories and the approach taken in Scotland are considered for guiding reform.

Part 7 considers miscellaneous issues including the courts power of disposal, power of the Secretary of State to remit the accused for trial, joint trials and the powers of the Court of Appeal to remit a case for re-hearing.

Part 8 of this Paper relates to unfitness to plead and the Magistrates' Courts and Youth Courts. This sets out both the advantages and disadvantages of the current system in this regard.

Part 9 contains a summary of the proposals and the questions posed by the Law Commission in this Paper. There are four appendixes to this Paper. Appendix A contains a summary of relevant mental health legislation. Appendix B sets out a case study of the section 4A hearing in *The Queen v. Patrick Sureda*. Appendix C sets out data on findings of unfitness to plead. Appendix D contains an impact assessment for the proposals made by the Law Commission in this Paper.

E. Hong Kong

Hearsay in Criminal Proceedings
HKLRC Report
November 2009
http://www.hkreform.gov.hk/en/publications/rcrimhearsay.htm

This Report follows a request to the Law Reform Commission from the Chief Justice and the Secretary for Justice in 2001 to review the law in Hong Kong governing hearsay evidence in criminal proceedings. A Consultation Paper on *Hearsay in Criminal Proceedings* was published in 2005.

Chapter 1 provides a brief history of the hearsay rule from its origins in England in the 13th century. Chapter 2 then sets out the main justifications of the hearsay rule, while Chapter 3 examines the current law on hearsay evidence, covering common law exceptions such as admissions and confessions of an accused, the co-conspirator's rule and statements made by persons now deceased. Chapter 3 also examines the current statutory exceptions under the law in Hong Kong, including statements made in depositions, business records, computer records and public documents. Chapter 4 then reviews the various shortcomings of the hearsay rule and its exceptions, and notes that there has been widespread and longstanding criticism of the rule in other jurisdictions, from judges, academic writers and law reform bodies.

In considering whether the existing hearsay law should be changed, and if so to what extent, the Report identifies a number of cardinal principles which should be reflected in any rule of evidence. These cardinal principles are:

i. Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues.
ii. Conviction of the innocent is always to be avoided. All accused have a fundamental right to make full answer and defence to a criminal charge.
iii. Evidentiary rules should be clear, simple, accessible, and easily understood.

iv. Evidentiary rules should be logical, consistent, and based on principled reasons.
v. Questions of admissibility should be determinable with a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome.
vi. Evidence law should keep up with the times and try to reflect the increasing global mobility of persons and modern advancements in electronic communications.

Chapter 5 reviews the different approaches adopted in other jurisdictions to reform of the hearsay law by reference not only to enacted legislation, but also to proposals for reform, and concludes that rather than completely abolishing the exclusionary rule and rendering hearsay generally admissible, most jurisdictions which have reformed their law have favoured a relaxation of the hearsay rule to make it more flexible and more equitable. Chapters 6 and 7 set out the need for reform of the hearsay law in Hong Kong, as well as the safeguards that are required as a prerequisite to reform, including: guarding against the admissibility of evidence that may cause injustice to the accused; which is unnecessary in the context of the issue to be decided; and the reliability of which cannot be tested.

The Report concludes with the series of recommendations encapsulated in a Core Scheme whereby courts should be given a discretion to admit hearsay evidence where satisfied that the admission of that evidence is "necessary and reliable". The Report recommends that, as a general rule, the present rule against the admission of hearsay evidence should be retained but there should be greater scope to admit hearsay evidence in specific circumstances. Hearsay evidence should be admissible:

a. if it falls within an existing statutory exception;
b. if it falls within one of several common law exceptions to be preserved;
c. if the parties agree; or
d. if the court is satisfied that it is "necessary" to admit the hearsay evidence and that it is "reliable".

The admission of hearsay will be "necessary" only in certain specified circumstances, including where the declarant is dead, or cannot be found, or refuses to testify on the ground of

self-incrimination. The party applying to admit hearsay evidence under the discretionary power must prove the condition of necessity to the required standard of proof, which will be "beyond reasonable doubt" if the party applying is the prosecution, and "on a balance of probabilities" if the party applying is the defence.

In determining whether the evidence is "reliable" for the purposes of admission, the court must have regard to all circumstances relevant to the apparent reliability of the statement, including the nature and contents of the statement, the circumstances in which it was made, and factors that relate to the truthfulness of the declarant. Hearsay evidence will not be admitted unless its probative value exceeds its prejudicial effect.

Sexual Offences Records Checks for Child-Related Work: Interim Proposals
HKLRC Report
February 2010
http://www.hkreform.gov.hk/en/publications/rsexoff.htm

This Report considers the creation of a sex offender register for employees and volunteers engaged in child-related work or work related to mentally incapacitated persons in Hong Kong. The Report is the first in a series to be issued as part of the Hong Kong Law Reform Commission's overall review of the law governing sexual offences, as per the terms of reference given to the Commission by the Secretary for Justice and the Chief Justice in 2006.

The consultation paper issued in 2008 was entitled *Interim Proposals on a Sex Offender Register* and highlighted that a review of the literature on "sex offender registers" established that the term is often used to refer to three different mechanisms devised to protect the public, particularly children and vulnerable persons, from sex offenders.

In some of the literature, the term refers to a US-style "Megan's Law". The US federal Justice Department's National Sex Offender Registry, for example, maintains a database in which the names, pictures and addresses of convicted sex

offenders are revealed to members of the public who conduct searches on the Registry's website.

The term "sex offender register" can also refer to the imposition of notification obligations on sex offenders after their release from prison. Sex offenders are required to report to the local police with details of their whereabouts after serving their prison term. This obligation continues either indefinitely or for a number of years, depending on the nature of the crime committed or the length of imprisonment.

Additionally, the term "sex offender register" can be used to refer to a system by which criminal records are utilised for the purposes of screening job applicants for positions that give them access to children and mentally incapacitated persons.

Although the consultation paper proposed a scheme for screening job applicants, the Commission received numerous objections which were essentially criticisms of the US-style Megan's Law or of the notification mechanisms in other jurisdictions. In view of the confusion and controversy regarding the term "sex offender register", the Commission decided that the title of this Report should be made more precise. Hence, the title *Sexual Offences Records Checks for Child-Related Work: Interim Proposals* was adopted.

The Report commences with a description of the current lacuna in Hong Kong, whereby there are currently no mechanisms to prevent a person who has been convicted of a serious sex crime from applying for a position at a school (other than as a registered teacher) or other place or organisation where he would have access to children. Even if the school or organisation concerned wishes to verify whether a job applicant has any sexual conviction record, there is no means by which it can do so. It can request an applicant to declare any previous convictions for sexual offences but there is no way in which it can verify the accuracy of the applicant's self-declaration. This is so even if the applicant consents to a criminal record check being conducted on him. The problem applies with equal force where parents hire private tutors or coaches for their children. Parents have no means available to them to determine whether or not the prospective tutor or coach has a criminal record.

Chapter 2 then examines the interests at stake in the possible introduction of a sexual conviction record check for child-related work in Hong Kong. These include human rights based arguments including: the right to privacy; the right to equality before, and equal treatment by, the law; and the freedom of choice of occupation and rehabilitation. These rights are counter balanced by the Government's constitutional duty to protect children from sexual exploitation.

Chapter 3 sets out the legislation and form of sex offenders registers in various common law jurisdictions, including the United States of America, Canada, Australia and England and Wales.

Chapter 4 then proceeds with a series of recommendations, noting that the measures proposed are interim administrative measures pending the introduction of comprehensive legislation on a range of issues relating to sexual offences, in line with the Commission's on-going review of the laws relating to sexual offences in Hong Kong. The key recommendations made by the Report are:

i. Not to recommend the introduction of a US-style "Megan's Law" whereby the names and other personal information of sex offenders are made available for inspection by the general public.
ii. That, as an interim measure, there is established an administrative scheme to enable the criminal conviction records for sexual offences of persons who undertake child-related work and work relating to mentally incapacitated persons to be checked, and that proper measures should be built into the system to address human rights and rehabilitation concerns.
iii. That for the purposes of these recommendations "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child (*i.e.* a person aged under 18). Further, "work relating to mentally incapacitated persons" should include work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Employees, volunteers, trainees and self-employed persons undertaking such work should be equally covered by the proposed system.

iv. That employers of persons engaged in child-related work or work relating to mentally incapacitated persons, voluntary or paid, full-time or otherwise, should be able to check whether an employee has any previous convictions for sexual offences. However, that for the purpose of the interim measure such a check should not be mandatory.

Criteria for Service as Jurors
HKLRC Report
June 2010
http://www.hkreform.gov.hk/en/publications/rjurors.htm

The existing legislative rules and administrative practices that apply to the appointment of jurors in Hong Kong require that, *inter alia*, a juror must be a resident of Hong Kong, between 21 and 65 years of age, not afflicted by blindness, deafness or other disability preventing him from serving as a juror, be of good character, and have "a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings." The legislation is silent as to how that linguistic competence is to be measured, but the administrative practice has been to exclude from the jury pool those with an educational attainment below Form 7, or its equivalent. The legislation also provides no guidance as to what constitutes "good character" or "residence" for jury purposes.

In 2003, the Hong Kong Law Reform Commission was asked to consider whether the existing criteria for jury service are appropriate, and whether they should be set out with greater clarity and precision; however the consultation process did not commence until 2008. This Final Report, published in 2010, is split into six chapters. Chapter 1 examines the existing law and practice of the jury system in Hong Kong, and the development of the system from its mid-19th century colonial origins to the current incarnation. Chapter 2 examines specific eligibility requirements and categories of persons excluded, disqualified, ineligible or excusable from jury service, of jury systems in other common law jurisdictions, including Ireland. Chapter 3 sets out the eligibility requirements under the common law relating to age, residency, good character, language competence and educational

standards, disability, and ineligibility and excusals. Chapter 4 then examines the issues and reforms undertaken regarding such eligibility requirements in other jurisdictions.

Chapter 5 sets out a range of recommendations for reform of the qualifications and exemptions from jury system in Hong Kong, including that the minimum age for jury service should be maintained at 21, but that the upper age limit should be raised from 65 to 70. An individual who has attained 65 years of age should, however, be entitled as of right to exemption from jury service if he makes such an application.

The Report also proposes that, to be eligible for jury service, a person must have been issued with a Hong Kong identity card three years or more prior to being issued with a notice of jury service and be resident in Hong Kong at the time the notice is issued. The Report rejects the idea of excluding undischarged bankrupts from jury service and considers it would be wrong to automatically characterise undischarged bankrupts as not of "good character." The Report additionally proposes that the existing administrative practice of requiring jurors to have attained an education standard of at least Form 7 or its equivalent should be maintained, but that this should be stipulated in legislation. This is to ensure that jurors have the ability to understand and comprehend the evidence and to discharge their duties as jurors properly.

The Common Law Presumption that a Boy Under 14 is Incapable of Sexual Intercourse
HKLRC Report
December 2010
http://www.hkreform.gov.hk/en/publications/boy_14.htm

This brief Report considers the existing common law presumption in Hong Kong that a boy under 14 years of age is incapable of sexual intercourse. The Report is the second in a series to be issued as part of the Hong Kong Law Reform Commission's overall review of the law governing sexual offences, as per the terms of reference given to the Commission by the Secretary for Justice and the Chief Justice in 2006, and

follows the *Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals*, published in February 2010.

The existing common law presumption that a boy under 14 is incapable of sexual intercourse cannot be rebutted in Hong Kong, even where there is clear evidence that the boy was physically capable of, and had had, sexual intercourse. The result is that, regardless of the circumstances, a boy under 14 years of age cannot be convicted of rape, even though he had unlawful sexual intercourse with a non-consenting victim, although he can be convicted of aiding and abetting another to commit rape, or of indecent assault.

The common law presumption has been abolished in a number of other jurisdictions, including England and Wales, Canada, New Zealand, South Africa and the Australian jurisdictions of the Australian Capital Territory, New South Wales, South Australia and Victoria. The presumption has never applied in Scotland and applies in Tasmania only in respect of a boy under 7.

The Report argues that whatever the historical rationale for the presumption may have been, it is difficult to see what purpose the rule now serves. It is contrary to common sense that the law in Hong Kong should refuse to accept that a boy under 14 may be capable of sexual intercourse, regardless of the evidence to the contrary. The application of the presumption is at odds with reality and means that on occasion the true criminality of the defendant's conduct cannot be reflected in the charge.

If the presumption were to be abolished, the separate rebuttable presumption of *doli incapax* would continue to apply to a boy between the ages of 10 and 14. That presumption means that the prosecution must prove beyond reasonable doubt that the boy knew his actions were seriously wrong, rather than merely naughty or mischievous.

F. India

Report on the Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy
No. 228
August 2009
http://lawcommissionofindia.nic.in/reports/report228.pdf

This Report from the Law Commission of India examines Assisted Reproductive Technology (ART) clinics and the rights and responsibilities surrounding surrogate pregnancies. The world's second and India's first IVF (in vitro fertilisation) baby, was born in Kolkata in October 1978 soon after the world's first IVF baby was born in Great Britain in July 1978. Since then the field of assisted reproductive technology has developed rapidly. The growth in ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall well-being of couples, especially in a patriarchal society like India. The predominant view within society remains that a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. A problem however arises when the parents are unable to conceive a child through conventional biological means. Infertility is seen as a major problem as kinship and family ties are dependent on progeny.

In addition to the issues around assisted reproductive technology for Indian parents, India is one of the key destinations for reproductive tourism. In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return for her agreement to carry the term of the pregnancy, she is paid by the commissioning agent. The usual fee is around US$25,000 to US$30,000 in India, which is around ⅓ of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice.

The Report briefly examines the legal status of surrogacy arrangements in various jurisdictions, including Australia, the UK and the USA. In UK, the surrogate mother is the legal mother, through section 27(1) of the Human Fertilisation and Embryology Act, 1990. Section 30 of the Act at the same time provides that if the surrogate mother consents to the child to be treated as the child of the commissioning parents the court may make a parental order to that effect. The section also prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of the order or handing over of the child.

In India, according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics 2005 from the Indian Council of Medical Research and the National Academy of Medical Sciences, the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act, 2004 is similar to that of India.

In 2008, the Indian Council of Medical Research drew up a draft Assisted Reproductive Technology (Regulation) Bill and Rules. The draft Bill contains 50 clauses under nine chapters. Chapter I of the Bill contains definitions. Chapter II provides for the constitution of a National Advisory Board for ART and State Boards for ART for establishing policies, regulations and guidelines, and Registration Authorities for registering ART clinics. Chapter III lays down procedure for registration of ART clinics. Chapter IV prescribes duties of ART clinics. One of the duties is to make couples and individuals aware of the rights of a child born through the use of ART. The duties also include the obligation not to offer to provide a couple with a child of a pre-determined sex. Chapter V provides for sourcing, storage, handling and record-keeping for gametes, embryos and surrogates. Chapter VI regulates research on embryos. Chapter VII discusses rights and duties of patients, donors, surrogates and children. Chapter VIII deals with offences and penalties. Chapter IX is titled "Miscellaneous" and includes power to search and seize records and the power to make rules and regulations. This legislation was intended to be in addition to, and not in derogation of, other relevant laws in force.

The Law Commission of India concludes that the draft Bill proposed by the Indian Council of Medical Research contains a number of fundamental lacunae, so proposes that any legislation regulating this area needs to include a range of rights and responsibilities:

i. Surrogacy arrangements should continue to be governed by contract amongst parties, which contain all the terms requiring the consent of the surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying the child to full-term, and willingness to hand over the child born to the commissioning parent(s). However, such arrangements should not be for commercial purposes.

ii. A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before the delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

iii. A surrogacy contract should provide life insurance cover for the surrogate mother.

iv. One of the intended parents should be a donor, as the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she must be a donor to be able to have a surrogate child. Otherwise, adoption of a child should be considered.

v. Legislation should recognise that a surrogate child is the legitimate child of the commissioning parent(s) without there being any need for adoption or declaration of guardianship.

vi. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

vii. The right to privacy of the donor(s) as well as surrogate mother should be protected.

viii. Sex-selective surrogacy should be prohibited.
ix. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

G. Ireland

Consolidation and Reform of the Courts Acts
Final Report (LRC 97-2010)
November 2010
http://www.lawreform.ie/_fileupload/Reports/r97Courts.pdf

This Report focuses on the potential consolidation of the role and jurisdiction of the courts in Ireland into a Courts (Consolidation and Reform) Bill. At present, this is a fragmented area with the law contained in 240 Acts of which 146 Acts are pre-1922. This Report was a collaborative undertaking between the Law Reform Commission and the Courts Service and the Department of Justice and Law Reform. The Report is divided into three chapters and contains two appendixes.

Chapter 1 describes the structure of the draft Courts (Consolidation and Reform) Bill as contained in Appendix A. In doing this it examines what has been included as well as what has been excluded from the draft Bill. This chapter concentrates on the most significant Acts including both post and pre-1922 Acts. The Acts are referred to as core Courts Acts and form the basis of the draft Bill. Chapter 1 also lists the current courts in existence and identifies the root title of their jurisdiction through reference to pre-1922 courts and the corresponding legislation which conferred jurisdiction. The purpose of this was to ensure that the draft Bill incorporated the pre-1922 Acts which are relevant to the jurisdiction of the current courts. This chapter then concludes with a general overview of the draft Courts (Consolidation and Reform) Bill based on the issues already addressed.

Chapter 2 concentrates on specific reforms contained in the draft Courts (Consolidation and Reform) Bill. In total, the chapter concentrates on 27 specific issues of relevance for the drafting of the Bill. In discussing these issues the Law Reform Commission draws on the aims of the report, the Consultation Paper on the

Consolidation and Reform of the Courts Acts, submissions received subsequent to the publication of the Consultation Paper and other applicable developments. The areas discussed include: (1) a simplification of terms in court proceedings; (2) judicial control of proceedings, judicial case management and case conduct principles in civil proceedings; (3) a rise in the monetary limits for civil proceedings in the District Court and Circuit Court; (4) a streamlined summons process for initiating criminal cases in the District Court; (5) appeals against fixed charge penalties: (6) enhancing judges knowledge of the Irish language in Irish-speaking circuits and districts; (7) altering the circumstances in civil proceedings where courts can protect the identity of a vulnerable party; (8) the importance of simple language in the statutory Rules of Court; (9) the introduction of a single procedure for consultative cases stated from the District Court and Circuit Court; (10) adjusting the time and number of High Court sittings outside Dublin based on case volume for each venue. The main recommendations of this Report are summarised in chapter 3.

Appendix A of the Report contains the draft Courts (Consolidation and Reform) Bill. This draft Bill draws on the text of many existing Acts relating to the jurisdiction of the current courts in Ireland. In addition to this the draft Bill incorporates suggestions for reform as contained in this Report. The draft Bill also provides for the full repeal of 192 Acts including 135 Acts which are pre-1922. Appendix B is the Explanatory Memorandum to the draft Courts (Consolidation and Reform) Bill. This provides an outline of the Bill and summarises each section of the Bill.

Alternative Dispute Resolution: Conciliation and Mediation
Final Report (LRC 98-2010)
November 2010
http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf

This Report focuses on the alternative dispute resolution (ADR) processes of mediation and conciliation. It is recommended in this Report that a Mediation and Conciliation Act be enacted and a draft Mediation and Conciliation Bill is

contained in the appendix. This Report emphasises the voluntary nature of ADR, the importance of confidentiality as well as the efficient and transparent nature of ADR. The Report has three main areas of concern including the terminology of ADR, the specific application of mediation and conciliation and the training and regulation of ADR professionals. This Report is divided into twelve chapters and an appendix.

Chapter 1 of this Report describes the role of ADR as well as the link between ADR and the principle of access to justice. Chapter 1 also discusses the suitability and limitations of mediation and conciliation.

Chapter 2 examines the terminology of ADR and the extent of ADR processes. This chapter also recommends possible statutory definitions for mediation and conciliation.

Chapter 3 considers the primary aims and principles of mediation and conciliation. The aims and principles include the voluntary character of ADR, confidentiality, party empowerment and objectives of efficiency, adaptability, and impartiality of the mediator or conciliator.

Chapter 4 focuses on the merger of mediation and conciliation into the civil justice system. In this context, the Law Reform Commission considers issues of enforceability, situations where there is no referral clause, limitation periods, and issues of costs such as sanctions and recovery.

Chapter 5 addresses the role of ADR processes in employment disputes and industrial relations where a statutory body has not been involved.

Chapter 6 analyses the function of ADR in the resolution of family disputes. This chapter discusses information meetings for couples who are separating or divorcing, parenting plans and family probate disputes. It also discusses the role of collaborative practice and elder mediation in family law.

Chapter 7 focuses on personal injuries and ADR. In this chapter the Law Reform Commission considered the roles of mediation and early neutral evaluation in relation to personal injury disputes including medical negligence disputes. The Law Reform Commission also considers the function of early neutral evaluation in resolving personal injury claims as well as claims stemming from medical treatment. This chapter also discusses

open disclosure and the use of apologies in resolving personal injury disputes especially where the dispute is due to medical treatment.

Chapter 8 considers the role of ADR in resolving commercial disputes. Shareholder and construction disputes are discussed with particular attention given to commercial disputes and the role of the Commercial Court in promoting mediation. The Law Reform Commission also discusses whether certain unique approaches developed by the Commercial Court could be extended to a broader commercial setting.

Chapter 9 centres on the role of ADR in addressing consumer disputes while paying particular attention to relevant European developments. This chapter also considers online dispute resolution and the possible expansion of the Small Claims Court procedure.

Chapter 10 examines the role of ADR in resolving property disputes especially in disputes between neighbours. In addition to this the Law Reform Commission discussed the role of ADR in planning application disputes.

Chapter 11 focuses on the accreditation, training and regulation of mediators and conciliators. The Law Reform Commission also sets out the importance of a statutory code of conduct for both mediators and conciliators.

Chapter 12 contains a summary of the recommendations contained in this Report. The Appendix of this Report contains a draft Mediation and Conciliation Bill. This contains recommendations of the Law Reform Commission as contained in this Report.

Inchoate Offences
Final Report (LRC 99-2010)
November 2010
http://www.lawreform.ie/_fileupload/Reports/r99InchoateOffences.pdf

This Report focuses on the substantive law on the inchoate offences of attempt, conspiracy and incitement. These offences have developed mainly through case law rather than legislation. A consequence of this is that certain aspects of inchoate liability are

particularly vague. In drafting this Report the Law Reform Commission paid attention to the plan of the Criminal Law Codification Advisory Committee to include inchoate offence in its Draft Criminal Code Bill. This Report is divided into five chapters and an appendix.

Chapter 1 introduces the inchoate offences of attempt, conspiracy and incitement as well as setting the scope of the Report. This chapter considers the punishment of inchoate offences and how it is treated in practice and in the literature. The Law Reform Commission also recommends an exemption to inchoate liability. Although this report is primarily concerned with substantive law, this chapter also focuses on the procedural issues relating to inchoate offenses.

Chapter 2 concentrates on criminal attempt. The Law Reform Commission examines the objective and fault elements of criminal attempt. It recommends that attempt be placed on a statutory footing and clarify the current position of the objective elements of attempt. In relation to fault elements, it is recommended that the culpability necessary for an attempt offence should follow the culpability necessary for the target substantive offence. This chapter also recommends legislating for the current position which sets out that impossibility and abandonment are not defences to attempt.

Chapter 3 focuses on conspiracy. This chapter considers agreement in conspiracy and recommends that conspiracy should only apply to agreements for the commission of a crime. This chapter also discusses the culpability for conspiracy and recommends that this should follow the culpability requirements of the substantive offence(s) to which the agreement relates. This chapter also recommends that the current position in law on impossibility and abandonment be placed on a statutory basis.

Chapter 4 examines the law on incitement with a focus on the act of incitement, incitement culpability and the target of an incitement. The Law Reform Commission recommends that the main parts of the current law on incitement be placed on a statutory basis, although, there is a need to alter certain parts of the culpability requirements. This chapter also discusses incitement and impossibility and withdrawal of incitement. In

relation to these issues the Law Reform Commission recommends that the current position should stand.

The recommendations in this Report are summarised in Chapter 5. A draft Criminal Law (Inchoate Offences) Bill is contained in the Appendix to this Report.

Personal Debt Management and Debt Enforcement
Final Report (LRC 100-2010)
December 2010
http://www.lawreform.ie/_fileupload/Reports/rDebtManagementsFinal.pdf

This Report addresses personal debt management and debt enforcement. In preparing this Report the Law Reform Commission paid particular attention to the role that they could best fulfil. The result of this was that this Report concentrated on personal insolvency law and legal debt enforcement proceedings. The Law Reform Commission were also aware of the importance of distinguishing between those who cannot pay their debts, those who could pay their debts and people who are not willing to pay their debts. The main recommendations of this Report include, the creation of a Debt Enforcement Office, the subsequent introduction of a Debt Settlement Office to manage and licence Personal Insolvency Trustees, the adoption of a holistic approach to debt, reform of bankruptcy proceedings, regulation of debt collection undertakings, and the provision of legal aid and advice for defendants in debt proceedings. This Report is divided into seven chapters and three appendixes.

Chapter 1 focuses on personal insolvency law and recommends the creation of a Debt Settlement Arrangement. This is a non-judicial procedure for insolvent debtors to repay money owed over a long period of time. Provided the money is repaid this procedure allows for the avoidance of bankruptcy proceedings.

In Chapter 2 the Law Reform Commission recommends the creation of a Debt Relief Order. The aim of this is to allow for the discharge of debt in cases where the debtor lacks income or assets. If the debtors meets the entry requirements and complies

with the procedure the debtor can have their obligations discharged after a year.

Chapter 3 considers reform of the Bankruptcy Act, 1988. This chapter emphasises certain parts of the Bankruptcy Acts 1988 which are in need of reform but does not contain detailed recommendations for reform.

Chapter 4 focuses on institutional and structural reform of debt enforcement. This considers proposals for the creation of new institutions and structures as well as developing on existing systems.

Chapter 5 centres on reform of individual enforcement mechanisms. In this chapter the Law Reform Commission discuss instalment orders, garnishee orders, attachment of earnings, execution against goods and the role of imprisonment.

Chapter 6 discusses the regulation of debt collection undertakings. In this chapter, the Law Reform Commission set out the recommendations of the Consultation Paper on Personal Debt Management and Debt Enforcement. In addition to this, the approach to the regulation of debt collection undertakings in the UK, USA, and Canada is considered.

Chapter 7 contains a summary of the recommendations contained in this Report.

Appendix A contains a comparative overview of debt settlement/repayment plan procedures. The purpose of this Appendix is to aid in demonstrating the Irish position in contrast to other jurisdictions.

Appendix B contains a draft Personal Insolvency Bill 2010. This contains recommendations of the Law Reform Commission in relation to the development of a non-judicial personal insolvency process and proposes reform of the current debt enforcement system.

Appendix C sets out an outline scheme of amendments to judicial bankruptcy legislation. This has been kept separate from the draft Personal Insolvency Bill 2010 due to another legislative framework currently being considered.

Legal Aspects of Family Relationships
Final Report (LRC 101-2010)
December 2010
http://lawreform.ie/_fileupload/Reports/r101Family%281%29.pdf

This Report is concerned with the role the law has in the relationship between children and their parents, as well as in the relationship between children and adults who have accepted parental responsibility for the child. The main focus of this Report is on the best interest of the child and the Law Reform Commission has benchmarked their recommendations against the Irish Constitution and the UN 1989 Convention on the Rights of the Child. This Report aims to establish a modern legislative framework which acknowledges changes in the traditional family structure. In doing so, the Report has two main concerns, namely, the impact of the law on the relationship between non-marital fathers and their children and its application to the extended family. This Report is divided into four chapters and an appendix.

Chapter 1 focuses on the relevant terminology, in particular, the need to update and define the relevant terminology. The Law Reform Commission reaffirms suggestions made in the Consultation Paper on Legal Aspects of Family Relationships that the terms "guardianship," "custody" and "access" be replaced by "parental responsibility," "day-to-day care" and "contact". It is also recommended that these terms be defined in legislation.

Chapter 2 considers the responsibilities and rights of non-marital fathers. On this point, the Law Reform Commission suggested that parents of a child should automatically have parental responsibility and should be tied to compulsory joint registration of the birth of the child.

Chapter 3 examines the responsibilities and rights of members of the extended family. In doing so, the Law Reform Commission had regard to the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010. Among the recommendations made in this chapter was that in cases where the parents of a child are either unable or unwilling to exercise parental responsibility, custody of the child can be applied for by relatives, persons in loco parentis as well as persons with a bona fide interest in the child. In this chapter the

Law Reform Commission also recommends the removal of the leave stage in applications for access as provided for by s. 11B(2) of the Guardianship of Infants Act, 1964 and inserted by section 9 of the Children Act 1997. The recommendations set out in this Report are summarised in Chapter 4.

The Appendix contains a draft Children and Parental Responsibility Bill. This reflects the recommendations of the Law Reform Commission contained in this Report while also providing for consolidation and reform of the legislation currently enacted in this area.

H. New South Wales

Young people with cognitive and mental health impairments in the criminal justice system
Consultation Paper 11
December 2010
http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/CP11.pdf/$file/CP11.pdf

This Consultation Paper is the fifth paper which addresses an aspect of people with cognitive and mental health impairments in the criminal justice system. The focus of this Paper is on young people with cognitive and mental health impairment. Issues such as bail, apprehended violence orders, diversion, fitness and defence of mental illness as well as sentencing are all considered in this Paper. However these are issues which also overlap with previous consultation papers of the New South Wales Law Reform Commission. Consequently, this Consultation Paper is to be read in light of these preceding papers. The questions raised during this Consultation Paper are summarised before the preface. The Paper refrains from making recommendations on the topic. The Consultation Paper is divided into six chapters and an appendix.

Chapter 1 provides an overview of this topic. This includes a focus on international instruments and policy relevant to young people, the relationship between young people and courts, sources of law relevant to young people and the services, treatment and

programs which are available to young people with cognitive and mental health impairments. The purpose of this is to highlight the difference between adults and young people who have cognitive and mental health impairments.

Chapter 2 concentrates on the Bail Act, 1978 (NSW). This involves examining the provisions of the Bail Act, 1978 (NSW) as well as its application to young people with cognitive and mental health impairments. This Paper discusses bail conditions, monitoring and non-compliance with bail conditions as they relate to young people with cognitive and mental health impairments. In addition to this accommodation and services are also considered.

Chapter 3 considers apprehended violence orders. These are a form of order issued against a person to refrain from behaving in a certain manner against another person. The chapter sets out the application procedure, relevant conditions as well as breach of this order and how it relates to young people with cognitive and mental health impairment.

Chapter 4 examines schemes which seek to divert young people with cognitive and mental impairment from the criminal justice system. This includes the provision of a support person to vulnerable people during an investigation; youth conduct orders and the use of Youth Drug and Alcohol Court as well as other programmes.

Chapter 5 focuses on the fitness to be tried as well as discussing the defence of mental illness. An issue on which the New South Wales Law Reform Commission invited submissions was in relation to whether the present test for the defence of mental illness was appropriate for young people. The suitability of the test was an issue due to the differing maturity of young people.

Chapter 6 considered the sentencing of young people with cognitive and mental health impairments. This chapter discussed sentencing principles, options and provisional sentencing.

I. New Zealand

Mental Impairment Decision-Making and the Insanity Defence
NZLC R120
December 2010
http://www.lawcom.govt.nz/sites/default/files/publications/2010/12/mental-impairment-decision-making-and-the-insanity-defence-report120-150dpi.pdf

This Report focuses on the criminal defence of insanity as well as release arrangement for patients who have been detained on the basis of insanity or unfitness to stand trial. In relation to the current defence of insanity, the Law Commission consider whether the defence is appropriate, whether it should be reformed or possibly abolished. The Law Commission also examine how should such a defence be raised and how should the court consider it. In addition to this, the burden and standard of proof are also discussed. This Report contains fifteen chapters and is divided into two parts.

Part 1 of this Report concentrates on the insanity defence under section 23 of the Crimes Act, 1961. Chapter 3 considers the possible abolition of the defence of insanity. This chapter discusses the argument for abolition as well as the consequences of abolishing the defence. Overall, the Law Commission recommend retaining the defence in its current form. Chapter 4 demonstrates that there are to be no changes made to the terminology in this area and Chapter 5 considers alternatives to the current approach but does not recommend any change. Chapter 7 focuses on procedural issues including the burden and standard of proof, the correct verdict and prosecuting insanity. The Law Commission do not make any recommendation in relation to the first two areas but do recommend the amendment of legislation to allow the prosecution to adduce evidence of insanity in instances where the defence of insanity has not been raised.

Part 2 of this Report considers the possibility of removing ministerial responsibility for mental health and intellectual disability decision-making. Chapter 10 examines problems in the

current system and recommends that the function of the Minister in decision making under section 33 of the Criminal Procedure (Mentally Impaired Persons) Act, 2003 be removed. This chapter also recommends reducing the role of the Attorney-General in parts of this process. Chapter 11 considers possible alternatives to the Minister's current decision-making role and suggest the use of a tribunal. It is also recommended that this tribunal should take the form of a Special Patient's Review Tribunal with members having diverse skills and knowledge. Chapters 13 and 14 further define the role of the tribunal by setting out issues of jurisdiction and procedural issues.

Compensating Crime Victims
NZLC R121
December 2010
http://www.lawcom.govt.nz/sites/default/files/publications/2010/12/lc2649-compensating-crime-victims-150dpi.pdf

This focus of this Report is on compensating victims of crime. The Report considers whether current mechanisms are effective and whether reform of the system is needed. The Report has regard to previous discussion of this area such as the Justice and Electoral Committee's Report, Inquiry into Victims' Rights. Overall, the Law Commission do not recommend that any change be made to the current mechanism.

It is recognised by the Law Commission that victims are not often fully compensated for injury, loss or damage suffered. The reasons for this being that the offender has not been identified or that the offender does not have the resources to compensate the victim. Consequently, the role of the state in compensating victims of crime in such a situation was of concern for the Law Commission. Chapter 2 of this report sets out the underlying principles in this area. The Law Commission conclude that neither social contract theory or social utility can be used to justify spreading the losses of a victim of crime to the wider community. Chapter 3 considers whether there should be increased entitlements for victims of crime. Among the options considered by the Law Commission were the accident

compensation scheme and a State-funded reparation scheme. However no changes from the current system were recommended.

Chapter 4 examined possible options for improving mechanisms for victims of crime to recover compensation from offenders. In this respect, the Law Commission focuses on the use of restraining orders. It is recommended that the relevant legislation be amended to provide for restraining orders prior to determination of criminal proceedings in order to stop an accused person's assets being dissipated before a reparation order is made. The restraining order would be subject to a number of criteria also set out by the Law Commission including level of loss suffered by victim and likelihood of accused being charged. Issues of notification and corporate identity are also considered by the Law Commission who recommends that it should be possible to look behind the corporate veil in such circumstances.

J. Manitoba

Improving Administrative Justice in Manitoba: Starting with the Appointments Process
Report No. 121
November 2009
http://www.gov.mb.ca/justice/mlrc/reports/121.pdf

The first administrative boards and statutory delegates were appointed by the Manitoba government in 1871. Manitoba now has about 160 administrative agencies, boards and commissions that operate outside the line departments of government, and around 1,500 people have been have been appointed by the government to these boards as full or part-time decision-makers. The government relies on administrative boards to regulate and adjudicate, to give advice, to administer substantial financial and other assets, and to provide goods and services. Some of the decisions being made by administrative boards were formerly made by courts; others were made by departmental staff or by politicians and some by private actors, such as hospital boards. Other administrative boards are appointed to take on roles that emerge as governments assume regulatory functions.

Administrative boards are used not only because they can make some decisions more efficiently and more openly by tailoring their processes to the decision at hand but, more importantly, because they are experts in the subject matter of the decisions with which they have been charged. Yet, the current legislation setting up most administrative boards does not, in fact, set out specific qualifications for many positions nor does it mandate that a competency or merit-based approach be taken to appointments.

Canadian courts have shown a reluctance to engage in review of administrative board appointments on the ground that appointees, by virtue of their political connections, might be reasonably apprehended to be biased or that the processes used and implicit expectations of the appointers and the appointees leads to a lack of institutional independence. Some cases have succeeded in a challenge based on an appointee's failure to meet the minimum statutory requirements for appointment but, given that most statutes set out minimal qualifications, such challenges are not likely to succeed very often.

In the last decade most Canadian provinces and the federal government have reviewed their board appointments processes and most have implemented changes to ensure that the processes are more open, transparent and accountable and less partisan and more merit-based. Manitoba is one of the few provinces not to have made some change to its appointments process.

This Report discusses the difficult issue of what role, if any, partisanship (in the sense of appointees' known sympathies with the government's political leanings) should play in the appointments process. Chapter 3 of the Report outlines the formal mechanisms for making board appointments in Canadian common law jurisdictions and outlines the issues that arise with the less formal mechanisms, and describes publicly available information on the current appointments process in Manitoba. In Chapter 4 the Report then examines how concerns with appointments have emerged in other Canadian jurisdictions and how governments have changed their appointments processes in response to those concerns. Chapter 5 of the Report examines the elements of good appointments policies, including openness and transparency, merit-based criteria, the minimising of partisan

influences and accountability mechanisms. Chapter 6 makes recommendations on a new appointments policy for Manitoba.

The Parol Evidence Rule
Report No. 122
May 2010
http://www.gov.mb.ca/justice/mlrc/reports/122.pdf

The parol evidence rule relates to written contracts and the extrinsic evidence associated with the contract, which a party to the contract wishes to adduce in a trial concerning the contract. This brief Report from the Manitoba Law Reform Commission considers the parol evidence rule in connection with written contracts that are not governed by The Consumer Protection Act and in connection with consumer transactions that fall within the scope of The Consumer Protection Act.

The Report observes that the parol evidence rule has caused much difficulty within the law of contracts and notes that essentially two different versions of the rule exist: (1) the "traditional" version holds that where a written contract appears to be a complete agreement, parol evidence may not be introduced and only if it is determined that the written agreement appears to be incomplete will evidence of prior communication be considered; (2) the "modern" version of the rule holds that for the rule to apply it must first be determined that the parties intended to reduce their agreement into writing and all relevant evidence of prior communication is admissible to that determination. The traditional version of the rule has provoked criticism, been the subject of lists of exceptions and generated recommendations for its abolition, largely because this version of the rule can preclude relevant evidence concerning prior communication between the parties, and is more likely to result in a possible injustice.

While both versions of the rule can be found in Canadian case law, recent lower court decisions indicate movement towards the modern version. The Report considers possible legislative reform to prevent misunderstanding about the rule; however, the Report concludes that any legislative action could be more confusing than clarifying. In regard to contracts not governed by The Consumer Protection Act, the Report recommends no

legislative action to abolish or to try to clarify the parol evidence rule.

Various Canadian law reform agencies have recommended legislation abolishing the parol evidence rule in regard to consumer transactions. Saskatchewan, New Brunswick, Manitoba and British Columbia have enacted some such provisions in their consumer protection legislation, although Saskatchewan and New Brunswick have provided more fully for the abolition of the parol evidence rule. The Report recommends that section 58(8) of The Consumer Protection Act dealing with express warranties could be improved upon by expanding upon the abolition of the parol evidence rule and by making this section inviolate.

Limitations
Report No. 123
July 2010
http://www.gov.mb.ca/justice/mlrc/reports/123.pdf

The law of limitations prevents a litigant with an otherwise viable claim from pursuing that claim in the courts after a certain period of time has passed. This area of the law has always been purely statutory, from its origins in England in the 16th century. Canada inherited the English statutes of limitations, but different provinces have adapted them in different ways over the years.

The Manitoba Limitation of Actions Act was originally enacted in 1931. Although amended three times since then (in 1967, 1980 and 2002) it is fundamentally based on an amalgam of limitations provisions that originated in England centuries ago. There have been efforts over the years to modernise and to impose some uniformity on these various provincial limitations regimes, but none have been conspicuously successful. In recent years, however, limitations legislation based on some radically different principles has been adopted by the Legislatures of Alberta, Ontario, Saskatchewan and New Brunswick. The proposed amendments to the legislation, based ultimately on work done by the Alberta Law Reform Institute in the late 1980s, are intended to bring more clarity and fairness to this area of the law.

This Report identifies the primary areas of Manitoba limitations law requiring modernisation, as well as the best ways of accomplishing that goal. The Report describes the structure of the "modern" limitations regimes found in other jurisdictions, and analyses whether they are suitable for Manitoba and how, if at all, they ought to be adapted for Manitoba's conditions.

The most important change the Report recommends is the abolition of the various categories of claims set out in the current Act, and their replacement with a single, basic two year limitation applicable to all claims unless they are otherwise dealt with. This two year limitation would begin running when the existence of a claim was "discovered" or "discoverable", instead of when the cause of action arose. This would provide ample time for a claimant to investigate the option of litigation. In order to serve the repose goal of limitations legislation, the new Act would also provide for a 15-year ultimate limitation, running from the date on which the act or omission on which the claim is based took place. After this, no claim could be brought, regardless of discoverability.

In Chapter 3, the Report also sets out the exceptions to these basic rules. Examples include: claims arising out of sexual assaults or assaults in intimate or dependent relationships; claims of aboriginal title; proceedings for a declaration of existing rights if no consequential relief is sought; and proceedings to recover fines or taxes owing to the Crown. Limitations would be suspended where the claimant is a minor or incapable of bringing a claim, or where the defendant wilfully conceals the claim. Provision is also made for specific circumstances such as demand obligations and continuous acts or omissions. Parties would be permitted to lengthen, but not to shorten, limitations by agreement.

Another significant change recommended by the Report is the repeal of the current limitations applying to claims related to real property. The Report recommends that no limitation apply to a proceeding to recover possession of real property, but that otherwise, claims related to real property should be subject to the overall limitations regime.

Finally, the Report recommends that the limitations provisions in all Manitoba statutes be examined, and abolished or

amended where appropriate. The new Limitations Act should then provide that if there is a conflict between it and any other Act, the other Act would prevail.

In Appendix A, the Report includes a draft Limitations Act, based on the Uniform Act proposed by the Uniform Law Conference of Canada, which in turn is based on the Alberta and Ontario legislation. The draft Act incorporates the modifications adopted in other jurisdictions, as well as other improvements identified by the Commission.

K. Queensland

A Review of Queensland's Guardianship Laws
Report No. 67
September 2010
http://www.qlrc.qld.gov.au/Publications.htm

This Report focuses on the guardianship laws of Queensland. In particular, this Report considers the law as set out by the Guardianship and Administration Act, 2000 as well as the Powers of Attorney Act, 1998. It is a wide ranging report and is made up of thirty chapters contained in four volumes.

Chapters 1-8 are contained in the first volume of this Report, and can be considered introductory chapters. Chapter 2 outlines the guardianship system while Chapter 3 discusses the UN Convention on the Rights of Persons with Disabilities. The first recommendations are contained in Chapter 4 which establishes the general principles of guardianship legislation. The chapter recommends that the general principles should be redrafted to bring it more in line with the UN Convention on the Rights of Persons with Disabilities. Chapter 5 suggests that the health care principle should also be redrafted to bring it more in line with the UN Convention on the Rights of Persons with Disabilities. The issue of capacity is considered by both Chapter 7 and 8 with recommendations for introducing guidelines for the assessment of a person's capacity.

Volume 2 focuses on issues of health care and guardianship. This section considers advance health directives,

statutory health attorneys and withholding and withdrawing life-sustaining measures. Additionally, the refusal of treatment by an adult and consent to participation is medical research are examined.

Volume 3 includes Chapters 14-20. The focus of these chapters is on the law relating to guardians and administrators. This addresses an aspect of the terms of reference which sets out the importance of ensuring that guardians, administrators and other relevant bodies and officers have sufficient powers so as to protect a person with impaired capacity. This section also considers the binding direction by a parent for the appointment of a guardian or administrator. In this regard, it is recommended that the relevant legislation should not be amended to provide for this.

Volume 4 concentrates on procedures for reviewing decisions made under the Guardianship and Administration Act, 2000 and the Powers of Attorney Act, 1998. Chapters 20 and 21 examine the functions, power and proceedings of tribunal's. Chapter 22 considers tribunal decisions which are appealed, reopened and reviewed. This section also discusses public trustees, community visitors as well as protection for whistleblowers. Whistleblower protection focuses on protecting the person making the complaint from liability for making the disclosure as well as protection from a possible reprisal. This section recommends an amendment to the legislation to protect whistleblowers.