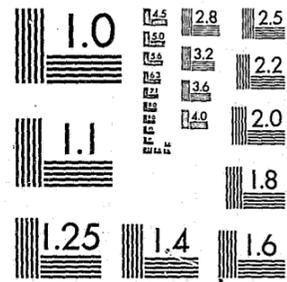


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ANNUAL REPORT

1 July 1980 - 30 June 1981

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THE LAW REFORM
COMMISSION
WESTERN AUSTRALIA



THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

ANNUAL REPORT

1 July 1980 - 30 June 1981

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ACQUISITIONS

Law Reform Commission
City Centre Tower
44 St George's Terrace
PERTH WA 6000

The Law Reform Commission of Western Australia was established by the Law Reform Commission Act 1972-1978.

The Commissioners are -

Mr D K Malcolm, QC, Chairman
Mr E G Freeman
Mr H H Jackson
Mr C W Ogilvie
Mr L L Proksch.

The Executive Officer and Director of Research is Mr P H Clarke. The Commission's offices are on the 16th floor, City Centre Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

To: THE HON I G MEDCALF, QC, MLC
ATTORNEY GENERAL

In accordance with the provisions of section 13 of the Law Reform Commission Act 1972-1978, I am pleased to present the annual report on the activities and proceedings of the Law Reform Commission of Western Australia for the year 1 July 1980 to 30 June 1981.

David K Malcolm, QC
Chairman

28 July 1981

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PART 1 - THE COMMISSION

1. THE STRUCTURE AND MEMBERSHIP OF THE COMMISSION

1.1 The Commission comprises three part-time and two full-time members.¹ On 30 June 1981 the part-time members of the Commission were Mr D K Malcolm, QC, LLB, BCL, a barrister in private practice, Mr E G Freeman, LLB, a senior assistant Crown Solicitor and Mr L L Proksch, BA, LLM, a senior lecturer in the Law School in the University of Western Australia. The full time members were Mr H H Jackson, BA, LLM and Mr C W Ogilvie, MA, LLB.

1.2 In January 1981 Mr Malcolm's second term as a member of the Commission came to an end. Mr Malcolm was re-appointed to the Commission but, at his request, only for a period of one year.²

1.3 Between August and December 1980 Mr Proksch was on leave from the Commission whilst he took university study leave in England and Canada. During his leave, Mr Proksch visited the Law Reform Commission of Nova Scotia and continued to comment on matters concerning the Commission's work programme.

2. CHAIRMANSHIP OF THE COMMISSION

1.4 Mr Malcolm, whose third term as Chairman of the Commission expired during the year, was re-elected Chairman until 18 January 1982.

3. THE STAFF OF THE COMMISSION

1.5 The Commission is supported by a full-time research and clerical staff. The Executive Officer and Director of Research is Mr P H Clarke, LLM. The Senior Research Officer is Ms P P Eldred, MA, JD, LLB. Mrs Eldred was formerly counsel to the Judiciary Committee of the Senate of the United States of America and joined

1. When first established the Commission comprised three part-time members. The circumstances surrounding the expansion of the Commission to its present membership are discussed in the Annual Reports of the Commission for 1977-1978 and 1978-1979.
2. Members of the Commission are normally appointed for a term of three years.

the Commission in November 1980. The Research Officers are Messrs M G Boylson, LLB, R W Broertjes, LLB and A A Head, LLB. Mr J J Campbell, BA, is the administrative officer and librarian and Mrs S C Hughes is the administrative clerk. Mrs J S Carter and Miss D Mutavdzic are secretary-stenographers and Miss W M Kiernan is a typist.

1.6 In December 1980 Mr T J Bickley, LLM, the Commission's Senior Research Officer since 1977, left the Commission to take up a position as a Senior Lecturer in Law in the Victoria University of Wellington. The Commission is grateful to Mr Bickley for the thorough and conscientious manner in which he carried out his responsibilities.

PART 2 - THE WORK OF THE COMMISSION

1. PUBLICATIONS

(a) Introduction

2.1 During the year the Commission submitted four reports and issued four working papers. The Commission also published the record and minutes of the Fourth and Fifth Australian Law Reform Agencies Conferences.¹

The reports submitted were -

- * Admissibility in Evidence of Computer Records and Other Documentary Statements (Project No 27 Part 1);
- * Unclaimed Money (Project No 51);
- * Liability of Highway Authorities for Non-Feasance (Project No 62);
- * Liability for Stock Straying on to the Highway (Project No 11).

The working papers issued were -

- * Liability for Stock Straying on to the Highway (Project No 11);
- * Absconding Debtors (Project No 73);
- * Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration (Project No 34 Part IV);
- * Judicial Review of Administrative Decisions (Project No 26 Part II).

(b) The Reports Submitted

(i) *Admissibility in Evidence of Computer Records and Other Documentary Statements*

2.2 In this report, submitted in July 1980, the Commission made recommendations concerning the admissibility in court proceedings of

1. The Commission hosted the Fifth Australian Law Reform Agencies Conference in June 1979. The Conference was discussed in the Commission's Annual Report for 1978-1979 in paras 2.20 to 2.27.

documentary statements, including statements in records produced by computers.

2.3 Generally speaking, under the present law all evidence relevant to a matter in dispute between the parties to court proceedings is admissible in evidence. However, as a result of the hearsay rule, out of court oral and documentary statements made by a person, whether or not that person is a witness in the proceeding, are inadmissible as evidence of the truth of the matters asserted in them. Although this rule may in certain cases have merit it could lead to injustice, particularly where a potential witness is dead, or cannot be called for some other reason, and the facts cannot be proved except by tendering in evidence a prior statement made by that person. To avoid this situation, a number of common law and statutory exceptions to the hearsay rule have been developed. The main statutory exceptions to the rule relating to documentary statements are contained in sections 79B-79D (which apply to civil proceedings) and section 79E (which applies to criminal proceedings) of the Evidence Act 1906-1979.

2.4 In its report, the Commission refers to a number of problems with these provisions. Of these problems, perhaps the most significant is that there is some doubt as to whether statements in records produced by computers are admissible in civil proceedings under section 79E of the Evidence Act. Although it appears that statements in records produced by computers are admissible in criminal proceedings, there are also difficulties with section 79E. One such difficulty is that the section applies only to a statement in a document which is or forms part of a record compiled in the course of a trade or business. It could be argued therefore that a computer print-out made especially for the proceedings would not be admissible under the section. A second difficulty arises from the fact that section 79E applies only to a "record relating to any trade or business". Although "business" is defined widely in the Act it has been held in England that a similar definition of business does not include a public hospital. If this interpretation were adopted in WA it could lead to a distinction being drawn between the medical record of a patient in a public hospital, which would not be admissible under section 79E, and a similar record kept by a doctor in private practice, which may be admissible under the section. Other difficulties with the existing legislation both in respect of civil and criminal proceedings are also outlined in the report.

2.5 The Commission concluded that the most satisfactory way of overcoming these difficulties would be to reform the law governing the admissibility of documentary statements so as to ensure that computer records are readily admissible in court proceedings, that certain matters are treated as merely affecting the weight to be accorded such statements rather than their admissibility, as at present, and that as far as possible, the rules of evidence relating to the admissibility of such statements are the same in civil and criminal proceedings.

2.6 The Commission accordingly recommended that sections 79B to 79E be replaced by new provisions designed to simplify and clarify the law on the admissibility of documentary statements. The Commission's principal recommendation was that a documentary statement should be admissible in civil and criminal proceedings if it was made by, or directly or indirectly reproduces or is derived from, statements made by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with by the statement. However, where the statement is admissible in evidence if made by an expert on the subject of the statement it would be sufficient to show that the maker was such an expert. The Commission recommended retention of the existing requirement that the maker of a statement be called as a witness (so that he can be cross-examined) unless he is unavailable or need not be called for one of a number of specified reasons, but that these reasons be expanded to include situations in which the maker cannot be expected to have any recollection of the subject matter of his statement or where calling him would cause undue expense, delay or inconvenience.

2.7 The Commission also recommended that express provision be made for the admission of what is called "machine information", that is, statements in documents which reproduce or are derived from information automatically counted, measured, recorded or identified by a machine. At present there is doubt as to whether or not machine information is subject to the hearsay rule and therefore generally inadmissible, or whether that rule has no application to it, in which case it would appear to be admissible. At present there is also some doubt as to whether or not a record in a system designed to keep a record of the happening of all events of a particular description, for example, periodic rent payments, is admissible to prove that a particular event of that description did not happen. Such a record may not be admissible because it is hearsay evidence. The Commission

considered that it was desirable to clarify the law on this matter and recommended that specific provision be made for the admissibility of such records.

2.8 In providing for the admissibility of documentary statements in civil and criminal proceedings, the Commission recommended that certain safeguards and ancillary provisions be enacted, including provisions relating to the discovery, inspection and production of documents produced by computers.

2.9 The report also considers the provisions in the Evidence Act relating to bankers' books. At present, a copy of an entry in a banker's book may be tendered in evidence of the entry and of the matters, transactions and accounts recorded therein. It is not clear, however, whether such a copy may be tendered merely to overcome the inconvenience which would occur if books in current use had to be brought to the court, or whether it goes further and provides that a copy is admissible as evidence of the facts contained in it.

2.10 The Commission recommended that the law on this matter be clarified and that a copy of an entry in a banker's book should only be tendered in court to avoid the inconvenience of having to tender books in current use. Whether or not a particular statement in a book is admissible as evidence of the facts contained in it should be determined in accordance with the conditions of admissibility of documentary statements.

2.11 The Commission also recommended that the definition of "bankers' books" be amended to ensure that modern methods of recording information by banks, such as computers, are not excluded from the provisions relating to bankers' books.

2.12 The Government has not yet announced its attitude to these recommendations.

(ii) *Unclaimed Money*

2.13 The Commission submitted its report on unclaimed money in January 1981. In this report, the Commission reviewed -

- (a) the application of the Unclaimed Moneys Act 1912-1947;
- (b) the law relating to unclaimed trust money held by a trustee including the special provisions relating to the Public Trustee, Perpetual Trustees Ltd and West Australian Trustees Ltd;

- (c) a number of statutory provisions dealing with specific instances of unclaimed money, including the provisions in the Aboriginal Affairs Planning Authority Act 1972-1973 relating to money owing to Aborigines;

- (d) the law relating to money which has been lost, and found by someone other than its owner; and

- (e) the relevant provisions of the Audit Act 1904-1978.

2.14 The Commission found the present law in Western Australia relating to unclaimed money to be unsatisfactory because -

- (a) no suitable procedure exists for disposing of unclaimed trust money (the present law applies only to the Public Trustee and the private trustee companies and contains several anomalies);

- (b) the Public Trustee has a reservoir of unclaimed trust money totalling approximately \$270,000 which has been paid into the Supreme Court under the Trustees Act. This money cannot be used by the Government for public purposes and is invested indefinitely in the Public Trustee's "Common Fund";

- (c) the application of the Unclaimed Moneys Act needs to be rationalised and the procedure prescribed by the Act for the disposal of unclaimed money needs revision; and

- (d) the provisions relating to unclaimed money owed to Aborigines create considerable administrative difficulties for persons owing the money, and there are problems in enforcing these provisions.

2.15 In the report, the Commission recommended that the Unclaimed Moneys Act be replaced by a new Act which provided for the payment of both unclaimed trust money and unclaimed non-trust money to the Treasurer, and which replaced the unclaimed money provisions presently contained in the Public Trustee Act 1941-1979, the Acts relating to the two private trustee companies and the Audit Act. The Commission recommended that certain persons be compelled to pay unclaimed money to the Treasurer and that provision be made to enable other persons to do so voluntarily in respect of unclaimed money held by them for at least two years.

2.16 The persons or bodies the Commission considers should be compelled to pay unclaimed moneys to the Treasurer are -

- (a) trustees in respect of money held by them on trust;
- (b) company liquidators, receivers, accountants, legal practitioners, settlement agents, finance brokers, insurance brokers, business agents, auctioneers, real estate agents, travel agents, sharebrokers, motor vehicle dealers and any other person, company or body carrying on a trade, business or profession in the ordinary course of which money is held on behalf of others, in respect of that money;
- (c) any statutory authority nominated by the Governor in Council for this purpose, which holds money on behalf of others in the ordinary course of its business;
- (d) persons, other than trading banks, savings banks and building societies, whose business is comprised wholly or in part of the borrowing of money, in respect of money so borrowed;
- (e) companies carrying on business in Western Australia for gain, in respect of unclaimed wages, superannuation and pensions.

2.17 The Commission recommended, however, that the compulsory procedure for paying unclaimed money to the Treasurer should only apply where liability for payment is undisputed, where the amount of money owed is certain in quantum and where the money is owing in Western Australia and has been unclaimed for six years or more. The Commission also recommended that the compulsory procedure should not apply to -

- (a) money deposited with trading banks, savings banks and building societies;
- (b) travellers' cheques;
- (c) sums not exceeding \$50.

2.18 The Commission also made a number of recommendations designed to safeguard the position of the persons to whom unclaimed money is owed. Thus it recommended that -

- (a) once a year the Treasurer place a consolidated advertisement of unclaimed money in a newspaper with a wide circulation;
- (b) a person be able to recover unclaimed money owed to him and held by the Treasurer together with interest thereon in the case of money exceeding \$100 which was, or should have been, earning interest at the time it was paid to the Treasurer;
- (c) it be possible to obtain a judicial review of a decision made by the Treasurer regarding a person's claim to money held by him.

2.19 Finally, the Commission recommended that the separate provisions in the Aboriginal Affairs Planning Authority Act relating to unclaimed money owing to Aborigines should be limited to trust money. Such money should be advertised as if it were money payable to the Treasurer under the revised Unclaimed Moneys Act. Otherwise there should be no alteration to specific legislation dealing with particular instances of unclaimed money or to the law relating to money which has been lost and found by someone other than the owner.

2.20 The Commission also made two incidental recommendations to simplify administration procedures for a person who is administering the estate of a deceased person where there are no beneficiaries or where beneficiaries are missing.

2.21 The Government has not yet announced its attitude to these recommendations.

(iii) *Liability of Highway Authorities for Non-Feasance*

2.22 In this report, submitted in May 1981, the Commission examined whether any change should be made to the law governing the liability of highway authorities for non-feasance, that is, for failing to take steps to safeguard persons using their highways against dangers which make them unsafe for normal use and which have arisen independently of any act on the part of the authority. This required the Commission to decide whether an old common law rule known as "the non-feasance rule" should continue to apply in Western Australia. According to this rule, except in respect of

dangers they have created or where there is a statutory provision to the contrary, highway authorities such as the Commissioner of Main Roads and Local Government Councils are under no duty to undertake active measures to safeguard persons using their highways against dangers which make them unsafe for normal use. As a result, highway authorities in Western Australia possess, at common law, a special immunity from civil liability not enjoyed by other public authorities.

2.23 The origins of the non-feasance rule can be traced to medieval England. It developed in the context of the social and administrative conditions prevailing in England before the system of local government in that country was reformed in the nineteenth century. Although these conditions never existed in Western Australia, the rule was introduced into this State, as part of the English common law, when the colony was founded. It was abolished in England in 1961.

2.24 After considering the nature and extent of the special immunity conferred on highway authorities by the non-feasance rule, and reviewing the operation of the rule in practice, the Commission concluded that the existing law governing the liability of highway authorities for non-feasance was in need of reform for two main reasons. The first and most important reason is that the immunity created by the non-feasance rule prevents damages being recovered by accident victims or their families in a number of cases in which, if general principles were applied, damages would be recoverable for the personal injury or loss suffered as a result of the unsafe condition of the highway. The second is that the non-feasance rule is unsatisfactory in practice as the distinctions drawn in connection with it are exceedingly difficult to apply or justify.

2.25 To overcome these defects the Commission recommended that the non-feasance rule be abolished and highway authorities required to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use. Although reform of the law in this manner would require highway authorities to take reasonable care to safeguard persons using their highways, it would leave each authority with the responsibility of determining the precise manner in which that duty was to be performed having regard to the circumstances of the particular case. As long as the method adopted was appropriate to fulfil the duty of care, the authority would be able to choose between, for example, erecting warning signs or safety barriers, repairing or maintaining the highway or temporarily closing dangerous sections thereof.

2.26 In the report, the Commission acknowledged that severe demands are already being placed upon the financial resources of highway authorities and therefore, wherever possible, the Commission formulated its detailed recommendations so as to minimise the cost to them of reform. Thus, the following recommendations in particular were formulated with this consideration in mind, namely that -

- * when determining whether a highway authority has fulfilled the duty of care, a court should be entitled to consider, among other matters, a number of specified criteria;
- * the burden of proving that a highway authority failed to fulfil the duty of care be upon the person claiming damages for breach of that duty;
- * breach of the duty of care be made the only ground upon which highway authorities can be liable for non-feasance;
- * the Act of Parliament creating the duty of care not come into force until a complete financial year had elapsed after it was passed.

2.27 The Commission also identified and examined the areas in which highway authorities might incur new or additional expense as a result of the abolition of the non-feasance rule.¹ It concluded that although the reforms recommended would be likely to involve highway authorities in certain additional costs, these should not be of a magnitude that would prejudicially affect the execution of their primary functions and responsibilities or be too high a price to pay for the benefits that would result from reform.

(iv) *Liability for Stock Straying on to the Highway*

2.28 The Commission was asked to consider and report on the law relating to liability for injury or damage caused by livestock straying on to the highway. The principal issue raised by these terms of reference was whether the rule in *Searle v Wallbank* ("the Rule") should apply in Western Australia. According to the Rule, the owners and occupiers of land adjoining a highway are under no

1. These areas were (i) the payment of compensation to successful claimants; (ii) the payment of insurance premiums where the authority considered it expedient to insure against liability; (iii) expenditure associated with efforts to reduce the number of accidents; and (iv) administrative costs associated with processing claims made against the authority.

duty to take reasonable care to prevent their animals straying on to the highway and thereby causing persons using it foreseeable loss. Whether the Rule now applies in Western Australia is uncertain because although the Full Court of the Supreme Court of Western Australia said in Thomson v Nix¹ that it did not apply, subsequent decisions in other Courts, in particular the decision of the High Court of Australia in State Government Insurance Commission v Trigwell,² have cast doubt upon the correctness of the Full Court's decision. The Attorney General asked the Commission to give priority to this project. As a result, in the year under review, the Commission both issued a working paper to obtain comments from members of the public and submitted its report.

2.29 The Commission issued a working paper on this subject in August 1980 and circulated it widely in Western Australia and elsewhere. Advertisements drawing attention to the paper's availability were placed in a number of newspapers³ and it received wide publicity.⁴

2.30 In the working paper the Commission described the law in Western Australia relating to the liability for animals generally, the operation of the Rule and the uncertainty surrounding it, the position relating to the liability for stock straying on to the highway in a number of other jurisdictions and the recommendations for reforming this area of the law that have been made elsewhere. The Commission also discussed the main arguments that have been advanced in favour of retaining the Rule, especially the argument that its abolition would impose an unfair cost burden upon persons who keep animals. The Commission carefully considered this argument, especially as it applied to farmers and graziers, and isolated the new and additional items of expenditure that abolition might create.

2.31 The Commission submitted its report on this subject in June 1981 after considering the comments received in response to the

1. [1976] WAR 141

2. (1979) 26 ALR 67

3. The West Australian (6 September 1980); The Western Farmer and Grazier (4 September 1980); and The Countryman (4 September 1980).

4. See generally, The West Australian (1 September 1980, 33); The Western Farmer and Grazier (4 September 1980); and The Australian Law News (November 1980, 35-36).

working paper. Its principal recommendation was that the Rule be abolished so that liability for loss caused by an animal straying on to the highway would henceforth be determined according to the ordinary law of negligence. In this connection, however, the Commission recommended that the Court should be entitled to consider, amongst other matters, a number of criteria designed to ensure that when the law of negligence is being applied a proper balance is struck between the interests of persons keeping animals and the interests of persons using the highway.

2.32 The Commission also recommended that an upper limit be placed on the amount of damages recoverable from the person keeping an animal in respect of any one accident caused by the animal straying on to the highway. The Commission made this recommendation to overcome the difficulty facing animal owners of being unable to anticipate how much insurance cover will be required to guarantee a complete indemnity should they be held liable for loss suffered as a result of an animal straying on to the highway. If the maximum amount of damages recoverable is fixed, however, animal owners could, by insuring up this amount, be confident of not having to meet personally any claim for damages made against them. The Commission recommended that the maximum amount recoverable be increased at regular intervals and that provision be made for this amount to be divided where an accident causes more than one person loss.

2.33 In framing these recommendations, the Commission took care to avoid suggesting reforms which might unfairly burden farmers and graziers. As a result, insofar as Thomson v Nix is apparently being followed in Western Australia and the Rule therefore not applied, implementation of these reforms would reduce rather than increase the current potential civil liability of persons keeping animals.

(c) The Working Papers Issued

(i) *Liability for Stock Straying on to the Highway.*

2.34 The working paper issued on this subject is discussed in paras 2.28 to 2.33 above.

(ii) *Absconding Debtors Act.*

2.35 In December 1980 the Commission issued a working paper reviewing the operation of the Absconding Debtors Act 1877-1965.

Broadly speaking, the purpose of this Act is to enable a person ("the claimant") to prevent another person against whom he alleges he has a good and valid claim ("the respondent"), leaving the State without first settling the claim or making adequate provision for its settlement.

2.36 One reason for the enactment of the Absconding Debtors Act in 1877 was to prevent assisted immigrants, who had contracted to remain in Western Australia for three years or to refund the whole of their passage money, leaving the State without first paying that sum of money to the Government. However, the Act is now mainly used by commercial creditors to prevent people who allegedly owe them money, from leaving the State. Despite the short title of the Act, it is not limited to claims for the payment of debts but applies to claims made in respect of any cause of action. However, the Act only applies to debts or claims for sums in excess of \$40 and because of a technicality, it does not apply to married women.

2.37 The main issue discussed in the working paper is whether, as a matter of principle, claimants should be able to prevent respondents leaving the State without first paying the sum of money claimed from them or making a provision for the payment of that sum. In preliminary submissions received by the Commission it was argued that it was desirable for such a power to exist because it is not always possible for claimants to institute normal court proceedings against respondents before they leave the State. Once respondents have left the State it will usually be more difficult for claimants to trace, and then take proceedings against them, and even where this is possible in most cases it will be more cumbersome and costly than taking proceedings in Western Australia. However, the Commission recognises that being arrested can be a very distressing experience and that a last minute restriction on a person's movement may prove very costly and inconvenient. In the working paper the Commission also expressed concern about the Act's potential for abuse as in three preliminary submissions received it was said that proceedings are sometimes taken under the Act in circumstances in which they are not justified. Accordingly, therefore, the working paper reviewed a number of safeguards which could be adopted so as to prevent the powers in the Act being used oppressively or unnecessarily.

2.38 In the working paper, the Commission discussed whether or not the power to prevent a respondent leaving the State should be available -

- (i) only in respect of disputes involving a substantial sum of money, for example, only for sums in excess of \$250 or some greater sum;
- (ii) for unliquidated as well as for liquidated claims;
- (iii) to recover unsatisfied judgment debts;
- (iv) to enforce contracts by employees and others to remain in Western Australia for a certain period.

2.39 Consideration was also given to whether or not the power to prevent a person leaving the State should be limited to a person who was about to leave the State permanently, which appears to be the present law, or whether it should be extended to persons who intend to leave the State only temporarily. The Commission noted that whether a respondent intends to leave the State permanently or not is not of paramount importance because even a temporary departure may prejudice the position of a claimant. The Commission suggested therefore that the Act should apply where a respondent's departure would "defeat, endanger or materially prejudice" a claimant's prospect of enforcing his claim.

2.40 The Commission also suggested that the Absconding Debtors Act should apply equally to married women.

2.41 At present it is possible, in certain circumstances, to obtain an injunction from the Supreme Court preventing a debtor transferring assets from Western Australia. In the working paper, the Commission considered whether or not it was desirable for further provision to be made to enable claimants to prevent respondents transferring or removing their assets from Western Australia in order to avoid their financial obligations.

2.42 The Commission expects that it will submit its report to the Attorney General shortly.

(iii) *Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration*

2.43 The Commission issued a working paper on the recognition of foreign and interstate grants of probate and letters of administration in December 1980 as part of its reference to review the law of trusts and the administration of estates. There is considerable

variation in the rules and practice of the States and Territories concerning the recognition of foreign and interstate grants of probate and letters of administration. Uniform provisions would save the executors and administrators of estates time and expense. Therefore, at the suggestion of the Attorney General, the Standing Committee of Commonwealth and State Attorneys General agreed to the Commission conducting this part of its reference with a view to making recommendations that are suitable for adoption on a uniform basis throughout Australia.

2.44 As a result of the Standing Committee's decision, during the preparation of the working paper, the Commission studied the relevant law in all Australian jurisdictions and consulted the appropriate officers in the various State and Territorial Supreme Courts. The Commission also corresponded with officers in the various trustee companies, academics and legal practitioners specialising in probate matters, and with the Commonwealth Secretariat in London which has in the past proposed that a uniform system of re-sealing grants of probate and letters of administration be adopted throughout the Commonwealth of Nations. In the working paper the Commission suggested that there should be uniformity throughout Australia as to the countries whose grants of probate and letters of administration were recognised. The Commission also recommended that the procedures and requirements necessary for recognition should be the same in each State and Territory. In this connection, the Commission proposed certain guidelines for determining which foreign grants of probate and letters of administration should be recognised in Australia and certain uniform principles and procedure to govern this process.

2.45 In relation to grants of probate and letters of administration in other Australian States and Territories, the Commission made tentative recommendations which it believes will save the executors and administrators of estates both time and expense. These recommendations are that each Australian State and Territory automatically recognise original grants of probate and letters of administration made by the appropriate court of the State or Territory in which the deceased person was domiciled before death. In the working paper, the Commission discussed the possible consequences of implementing such a recommendation and found that the disadvantages which might, at first, appear to flow therefrom can be overcome without undue difficulty. The Commission estimated that approximately \$200,000 per annum could be saved for deceased estates if its recommendations were adopted.

2.46 Late in June and early in July 1981 the Commissioner in charge of this project, whilst in the Eastern States on other Commission business, visited Sydney and Melbourne for further discussions concerning the proposals contained in the working paper.

(iv) Judicial Review of Administrative Decisions

2.47 The working paper on this subject is devoted to Part II of the Commission's project to examine and report on the principles and procedures which should apply in Western Australia to the review of administrative decisions.¹ This part of the project is concerned with the review of administrative decisions by way of the supervisory jurisdiction of the Supreme Court. This means of review, called "judicial review", involves an administrative decision (which includes for this purpose the failure to make a decision) being challenged on the ground that the decision was unlawful because the decision-making body exceeded the powers conferred upon it when making the decision. The procedure at present for challenging a decision on this ground is by way of the ancient prerogative writs of certiorari, prohibition and mandamus or by way of the remedies of injunction or declaratory judgment.

2.48 In the working paper, the scope and purpose of these remedies and the grounds upon which they may be obtained are described and evaluated. This examination shows that although the existing remedies conjointly cover a substantial area, the existing law is unnecessarily complex because the remedies were largely developed before the increase in the regulatory control over individuals and organisations exercised by government.

2.49 The complexity of the existing law is exacerbated because the existing remedies must be sought by two wholly distinct forms of proceedings, one applicable to certiorari, prohibition and mandamus and the other applicable to injunction and declaration. This means

1. Part I of the project deals with the law relating to existing statutory rights of appeal from administrative decisions. A survey of those statutes in Western Australia which make provision for an appeal from an administrative decision was issued in November 1978 accompanied by a working paper in which the issues raised by this part of the project were discussed. See further para 3.4 below.

that certiorari, prohibition and mandamus on the one hand, and declaration and injunction on the other, cannot be sought in the alternative. Therefore if an applicant for judicial review chooses a remedy which is not the most appropriate in the circumstances that person's otherwise justifiable claim will be defeated on this technical ground. Because of such difficulties with the existing law, the Commission tentatively concluded in the working paper that it is necessary to reform both the principles and procedures for the judicial review of administrative decisions.

2.50 In the working paper the Commission discussed the advantages and disadvantages of three means of reforming the law which have been adopted in other jurisdictions. All three reforms involve the creation of a single procedure for reviewing administrative decisions.

2.51 One approach to reform involves the procedure for ordinary civil actions, which already applies to an application for a declaration or an injunction, being applied to proceedings for certiorari, prohibition and mandamus. This approach has been adopted in New South Wales and Victoria. A second approach involves the creation of a new remedy under which an individual is able to obtain relief of the same kind that can be obtained in proceedings for certiorari, prohibition, mandamus, injunction and declaration. This is the approach adopted in England and New Zealand. Although these reforms overcome the difficulties associated with having two wholly distinct procedures for reviewing administrative decisions, they do little to overcome the other difficulties experienced with the existing law. The third approach, however, endeavours to do this both by the creation of a new remedy and the rationalisation and codification of the circumstances in which administrative decisions may be reviewed. This is the approach adopted by the Australian Parliament in the Commonwealth Administrative Decisions (Judicial Review) Act 1977-1980. The advantages and disadvantages of these approaches are discussed and evaluated in the working paper and a number of issues for consideration are posed. These include the possible grounds upon which judicial review can be sought, who should be entitled to seek judicial review and which decisions or administrative bodies should be subject to such review.

2.52 Reform of the law relating to the judicial review of administrative decisions was one of the topics considered at the 1981

Australian Legal Convention¹ which was attended by the two full-time members of the Commission in conjunction with the Sixth Australian Law Reform Agencies Conference. During the year under review, arrangements were also made for Professor H W R Wade, the author of a number of standard texts on Administrative Law, to visit the Commission to discuss aspects of the Commission's project whilst he was in Perth to lead an Administrative Law Seminar organised by the Law Society of Western Australia.

(d) Other Publication

The Record and Minutes of the Fourth and Fifth Australian Law Reform Agencies Conferences.

2.53 The Commission was the host of the Fifth Australian Law Reform Agencies Conference which was held in Perth in June 1979. As the host the Commission was asked to publish the record and minutes of the Conference and also of the Fourth Conference which at that stage had not been published.

2.54 The record and minutes of both conferences contain a precis of a number of valuable papers and commentaries on law reform which it is desirable to keep on record in a permanent form. Copies will be made available to law libraries and researchers.

2. THE VISIT OF LORD SCARMAN

2.55 On 5 September 1980 the Commission jointly hosted with the Law Society a luncheon for Lord Scarman who visited Perth on his way to deliver the seventh Wilfred Fullagar Lecture in Melbourne. The luncheon was attended by the Attorney General, the Hon I G Medcalf QC, MLC, the Chief Secretary, the Hon W R B Hassell MLA, the Shadow Attorney General, the Hon J M Berinson MLC, and members of the Judiciary, Magistracy, and the legal profession.

2.56 Lord Scarman was the Chairman of the Law Commission for England and Wales between 1965 and 1973 and in his luncheon address he spoke of his experiences as a member of that Commission and of the problems and challenges facing law reform agencies generally.

1. The Convention was held between 6 and 10 July 1981.

2.57 According to his Lordship, the work of law reform agencies was growing in importance because of the tendency of judges nowadays to abdicate the field of law reform. Increasingly, he said, judges took the view that the development of the law was for the legislature and law reform bodies, and that their function was only to say what the law was and apply it in the cases before them.

2.58 To carry out their work successfully, his Lordship said, law reform agencies required the assistance of both the legislative and executive branches of government. His Lordship stressed the importance of freedom of information legislation and noted that such legislation existed in North America and that a beginning had been made in this respect in Australia.¹

2.59 Lord Scarman said that it was also important for legislators to give proper consideration to proposals for law reform. Progress was made, he said, even when a proposal was properly considered and rejected. If certain law reform proposals are accepted and the others rejected after proper consideration, no one could complain. However, if proposals are not accepted because they are not properly considered, then law reform bodies became dispirited and the process became discredited. It was imperative that governments announce promptly their intentions in relation to the proposals for law reform made by law reform commissions and that parliamentary committees be established with the power to call their own evidence and properly consider such proposals.²

3. PRIVACY: HEARINGS AND RESPONSE

(a) The Commission's Privacy Reference

2.60 The Commission's reference on privacy is parallel³ to that which has been given to the Australian Law Reform Commission. It

1. The (Cth) Freedom of Information Bill was passed by the Senate in June 1981.
2. See also the Commission's Annual Report for 1979-1980 paras 2.25 and 2.26.
3. This Commission's terms of reference were extended in March 1978 to include a consideration of the question whether a person's criminal record should be expunged after a certain time. Although not specifically required to in its terms of reference the Commission understands that the ALRC intends to deal with this issue in its report.

was sought by the Commission to enable the two Commissions to work on this subject in conjunction with each other and to avoid a duplication of effort. The manner in which this project is being approached and the research carried out in previous years has been described before.¹ During the year under review, the two Commissions have continued to have both formal and informal discussions on various privacy issues with a view to formulating proposals for reform that will be suitable for adoption on a uniform basis throughout Australia. Mr Freeman, the Commissioner in charge of the project, has on several occasions whilst in the Eastern States on other business had discussions with members and staff of the Australian Commission. The Chairman of that Commission, Mr Justice Kirby, has met members and staff of the Western Australian Commission when he has been in Perth.

(b) The Joint Privacy Hearings

2.61 A significant development in co-operative law reform took place on 10 November 1980 when the two Commissions held joint public hearings in Perth to obtain comments on the issues raised by the Australian Commission's Discussion Papers 13 and 14, entitled respectively Privacy and Intrusions and Privacy and Personal Information. This joint sitting of Commonwealth and State law reform bodies was the first of its kind in Australia. The Western Australian Commission was represented by Mr Malcolm, who chaired the hearing, and by Messrs Freeman, Jackson and Ogilvie. The Australian Commission was represented by Commissioner James Mazza. The Chairman of the Australian Commission planned to participate in the hearings but was prevented from doing so by an industrial dispute.

2.62 Public participation in the hearing was actively sought by the Commission. It placed newspaper advertisements inviting members of the public to make oral or written submissions and issued invitations to all government departments and instrumentalities in Western Australia and to many other interested groups and organisations. In an interview on a local radio programme on the day preceding the hearings, Mr Malcolm discussed the privacy project and again invited public attendance and participation. As a result, a large number of individuals and organisations took the opportunity to

1. Annual Report 1977-1978 paras 4.38 to 4.41; Annual Report 1978-1979 paras 3.41 to 3.45; Annual Report 1979-1980 paras 3.28 to 3.36.

make submissions and the Commissioners were required to sit in two divisions during part of the day to accommodate them. Those making submissions included the Australian Medical Association (WA), the Australian Association of Private Psychiatrists (WA), the Royal Australian and New Zealand College of Psychiatrists (WA), the Law Council of Australia, the Law Society of Western Australia, the Western Australian Bar Association, the University of Western Australia, the Western Australian Institute of Technology, a number of government departments and instrumentalities and the Council for Civil Liberties. In total, 29 oral submissions were made covering a wide range of issues including, for example, the seizure of medical records by the police, the rights of individuals to have access to their credit, employment and education records and the privacy of welfare claimants.¹

(c) The Australian Computer Society's Privacy Seminar

2.63 To facilitate further discussion of the issues raised by the Commission's privacy reference, a privacy seminar was organised under the auspices of the Australian Computer Society to coincide with the joint privacy hearings. This seminar was held on 11 November and was attended by a large number of people connected with the use and management of computer-based information storage and retrieval systems. Mr Freeman delivered one of the key-note addresses at the seminar and other members and staff of the Commission also participated as group discussion leaders.

(d) Privacy Hearings in Sydney

2.64 In recognition of the Commission's role in the formulation of uniform privacy law reform proposals, Mr Freeman was invited by the Chairman of the Australian Law Reform Commission, Mr Justice Kirby, to sit with him and participate in the privacy hearings held in Sydney on 27 November. This allowed the Commission to gain a first-hand impression of the views held by individuals and organisations in New South Wales about the issues raised by its privacy reference. It has also put the Commission in a better position to evaluate the submission made to those hearings by the New South Wales Privacy Committee.

1. See also para 2.65 below.

(e) The Public's Response

2.65 In addition to the submissions made at the public hearings, the Commission received over 150 written submissions on various aspects of privacy protection. These include submissions from a number of government departments and instrumentalities, Murdoch University, the Murdoch University Academic Staff Association, the Associated Banks of Western Australia and the Royal Perth Hospital. These submissions have been analysed and reviewed by the Commission in conjunction with a review it has carried out of submissions received by the Australian Law Reform Commission from persons and organisations in other parts of Australia.

2.66 The contributions made to the Commission's work by individuals, private organisations and government bodies has been invaluable. These will greatly assist the Commission to appraise the need for reform generally and to frame its recommendations in particular areas.

(f) The Commission's Research and Timetable

2.67 The broad scope of the privacy reference has meant that the Commission has been engaged in research throughout the year on a variety of subjects falling within the ambit of that project. This has included a detailed survey of statutory provisions in Western Australia which authorise police and administrative officers to enter and inspect premises, to search persons or premises, and to summon the attendance of persons to answer questions or produce documents. The results of the survey will be used by the Commission to decide whether these statutory powers permit undue intrusions into or interference with personal privacy.

2.68 The Australian Commission expects to submit its report on privacy to the Commonwealth Attorney General before the end of 1981. The Western Australian Commission will then submit its report to the Western Australian Attorney General as soon as practicable. The expunction of criminal records and certain questions arising out of confidential relationships such as that between doctor and patient will be dealt with separately, and will be the subject of working papers and reports after the general privacy report has been submitted.

4. PROCESSING LAW REFORM PROPOSALS

2.69 In its last Annual Report¹ the Commission endorsed the view expressed by the Chairman, Mr Malcolm, in a paper delivered at the Fifth Law Reform Agencies Conference,² that it would be desirable for the Government of the day to adopt the practice of announcing, within six months of a Commission report being tabled, its attitude to the recommendations made in the report. The Commission agreed with this view. It understands that no formal or discrete mechanism exists for the examination of its reports in order to facilitate the making of decisions by Government concerning the adoption or otherwise of the recommendations made therein. During the year under review, similar concerns were expressed by a number of people closely associated with law reform. For example Lord Scarman spoke about this matter in his luncheon address,³ and in a recent article⁴ Sir Michael Kerr, the Chairman of the English Law Commission, made a plea for new administrative and legislative solutions to be found in England to deal with the recommendations made by that Commission. This plea was later echoed by Mr Justice Kirby in the 1980 Investigator Lecture.⁵

5. CONFERENCES, MEETINGS AND SEMINARS

2.70 During the year, members and staff spoke about the Commission's programme and about particular current projects, to various groups interested in its work. For example, in October Mr Ogilvie addressed the Annual Conference of the Magistrates' Institute concerning the Commission's project to review the Justices Act 1902-1980 and in November Mr Clarke spoke to a meeting of the Myola Club about certain issues raised by the Commission's privacy reference. In December Mr Malcolm presented a paper entitled "Human Rights and Privacy Protection" to the United Nations Association as part of Human Rights Day 1980 and in January he spoke about the work of the Commission to a meeting of the Mirrabooka Rotary Club.

1. Paras 2.25 and 2.26.
2. Institutional Arrangements For Law Reform In Australia - Road Block or Diversions.
3. Discussed in paras 2.55 to 2.59 above, esp para 2.59.
4. Law Reform in Changing Times (1980) 96 LQR 515, esp 530-533.
5. Entitled Law Reform: Filling the Institutional Vacuum, delivered at Flinders University in July 1980.

2.71 Members and staff of the Commission also attended a number of conferences where the topics programmed for discussion were relevant to Commission projects. Messrs Jackson, Ogilvie and Head participated in seminars conducted at the University of Western Australia and all members of the Commission attended various sessions of the 1981 Law Summer School. In July 1980, at his own expense, Mr Malcolm attended the Law Society's Legal Convention in Penang and delivered a paper on aspects of the Commission's privacy reference.

2.72 The Commission also met and consulted with a number of persons and organisations in connection with particular projects or its programme generally. Thus, in May members and staff met Mr L A Stein, a Senior Lecturer in Law in the University of Western Australia, to discuss aspects of Project No 26 Part II - The Judicial Review of Administrative Decisions¹ and Dr A Bradbrook, a Reader in Law in the University of Melbourne to discuss tenancy bonds and aspects of landlord and tenant law.

2.73 On two occasions during the year when the Chairman of the Australian Law Reform Commission, Mr Justice Kirby, was visiting Perth, the opportunity was taken to discuss the parallel references given to the Commissions on privacy² and the other projects in respect of which they are exchanging research information.³ Similarly, when Mr B Debelle, the Commissioner responsible for the Australian Law Reform Commission's reference on Access to the Courts visited Perth in October and March discussions were held with him concerning the aspects of this project that related to Project 26 Part II.

1. These discussions were held during the preparation of the working paper issued as part of this project; see generally, paras 2.47 to 2.52 above.
2. See generally, paras 2.60 to 2.68 above. The meetings Mr Freeman had with members and officers of the ALRC to discuss aspects of the Commission's privacy reference, are mentioned in para 2.60 above. Mr Freeman has also had helpful discussions in connection with this reference with the Executive Member of the New South Wales Privacy Committee, Mr Orme.
3. They are Project No 27 Part II - Admissibility of Reproductions and Project No 16 - Amendment to the Local Courts Act and Rules (in relation to aspects of the project concerning debt recovery).

6. CO-OPERATIVE LAW REFORM

2.74 In its last Annual Report¹ the Commission noted that it was co-operating with the ALRC as part of several projects and that through the Attorney General it had been asked by the Standing Committee of Commonwealth and State Attorneys General to undertake two projects with a view to recommending reforms suitable for adoption throughout Australia. Both these forms of co-operative law reform have continued in the year under review. Thus the Commission has worked closely with the ALRC as part of its project on privacy² and has exchanged research information with that Commission as part of its project to review the Local Courts Act and Rules. In addition, it has been asked by the Attorney General, on behalf of the Standing Committee, to undertake an important new reference on the provision of medical treatment for minors. This reference is discussed further in paragraphs 2.77 and 2.78 below.

2.75 In their references on defamation the ALRC and the Western Australian Commission co-operated closely with each other with the object of assisting the development of a uniform law of defamation in Australia.³ The process of developing such a law continued during the year under review with the consideration, by the Standing Committee, of the report on defamation submitted by each Commission. This led to a statement by the Commonwealth Attorney General in March that there was agreement amongst the Attorneys concerning the need for uniformity. This statement was later confirmed by the Attorney General for Western Australia.

7. NEW REFERENCES

2.76 During the year the Commission received two new references from the Attorney General. The first was to review the law relating to joint tenancies and tenancies in common of real and personal property.⁴ This reference was sought by the Commission after an approach had been made to it by Perpetual Trustees WA Ltd.⁵

1. Paras 2.36 to 2.39.
2. This is discussed further in paras 2.60 to 2.68 above.
3. The defamation reports of both Commissions are discussed in paras 2.1 to 2.6 of the Commission's Annual Report for 1979-1980.
4. The precise terms of reference are set out in Appendix V.
5. This was discussed further in para 2.31 of the Commission's Annual Report for 1979-1980.

2.77 The second reference, entitled "Uniform Law for the Provision of Medical Treatment For Minors", was given to the Commission as a result of a decision taken by the Standing Committee of Commonwealth and State Attorneys General to have the law relating to the provision of medical services for minors reviewed in a manner that would form the basis for uniform legislation on this subject throughout Australia. This reference arose out of a call for reform by the National Health and Medical Research Council to the Commonwealth Minister for Health. The matter was referred to the Commonwealth Attorney General who discussed it with the other members of the Standing Committee. In July 1980, at the suggestion of the Attorney General for Western Australia, the Commission was asked to draft suitable terms of reference for a project on the subject. These terms of reference were sent to the Attorney on 30 July 1980 and then circulated by him to the other Attorneys for comment. The terms of reference as finally settled were given to the Commission in June 1981 by the Attorney General for Western Australia.

2.78 During the course of the year under review preliminary research has been carried out by the Commission in anticipation of its terms of reference being settled.¹

8. ACKNOWLEDGEMENTS

2.79 During the year, by arrangement with the Legislative Review and Advisory Committee and the Attorney General, the Commission has been assisted in its research on a number of projects by Mr M J Hardy, the Committee's Executive Officer. This assistance is continuing and is gratefully acknowledged.

2.80 The Commission also wishes to express its gratitude for the co-operation and assistance it has received during the year from members of the judiciary, the magistracy, the legal profession, government departments and instrumentalities, local authorities and members of the public.

1. The precise terms of reference are set out in Appendix V.

PART 3 - THE COMMISSION'S CURRENT PROGRAMME

1. INTRODUCTION

3.1 Below is an outline of the projects the Commission had under active consideration on 30 June 1981 and the progress that had been made on them prior to that date.

3.2 On 30 June 1981 the Commission's programme consisted of twenty eight projects on a wide range of matters. In accordance with section 11(5) of the Law Reform Commission Act, at the request of the Attorney General, the Commission gave priority to a number of these projects. Consequently, progress on certain reports has been greater than it has on others.

2. THE PROJECTS

(a) Amendments to the Local Courts Act and Rules (Project No 16)

3.3 The Commission has been asked to review the Local Courts Act and Rules. During the year, research proceeded steadily and consideration was given to preliminary submissions and discussions with a number of interested persons. Information was also exchanged with the Australian Law Reform Commission. Arrangements were made for Mr Jackson to visit similar Courts and other tribunals in Sydney and Melbourne and to hold discussions in Sydney and Melbourne with officers of those Courts and tribunals and with officers and members of the Australian and New South Wales Law Reform Commissions, both of which are conducting research on debt recovery and insolvency. The Commission decided to divide the project into two parts. Part I will deal with all matters up to the point of judgment and Part II will deal with the execution of judgments. A working paper will soon be issued on Part I. The issuing of a working paper on Part II has been deferred, however, pending the result of statistical surveys and other work being carried out by the Australian and New South Wales Law Reform Commissions and further research by this Commission.

(b) Review of Administrative Decisions (Project No 26)

3.4 During the year under review the working paper dealing with the judicial review of administrative decisions was prepared. This paper is discussed in paragraphs 2.47 to 2.52 above. In

addition, by 30 June 1981 a draft report had been completed, on Part I of the project, dealing with existing rights of appeal against administrative decisions. It is expected that this report will be submitted shortly.

(c) The Admissibility of Reproductions (Project No 27 Part II)

3.5 A report on the first part of Project No 27, which dealt with the admissibility in evidence of computer records and other documentary statements, was submitted during the year under review and is discussed in paragraphs 2.2 to 2.12 above.

3.6 The second part of this project deals with the admissibility of reproductions of existing documents. Where documentary evidence is admissible it is usually necessary to tender the original document in evidence. At common law, a copy is generally not admissible unless the original document is proved to have been lost or destroyed. However, a copy may be tendered under one of three exceptions in the Evidence Act 1906. The first exception, section 73B of the Act, provides that reproductions of certain public documents, such as those in the custody of the Registrar General or the Registrar of Titles, are admissible in evidence without further proof if the reproduction bears a certificate to the effect that it is a reproduction of the document. The second exception, section 73C of the Act, allows a reproduction of a document made or used in the course of a business to be admitted in evidence if the reproduction was made in good faith and the document has been destroyed or lost or it is not reasonably practicable to produce the document or to secure its reproduction. The third exception, section 73D of the Act, allows a reproduction made from a negative of a document, produced by an approved machine, to be admitted in evidence. However, no machines have been approved under the section.

3.7 The Australian Law Reform Commission is carrying out a general review of the law of evidence, including a review of the law relating to the admissibility of reproductions. During the year, the Australian Commission and this Commission agreed to co-operate and exchange information about reproductions on an informal basis. As a part of this process, the Australian Commission sent the Commission a draft paper dealing with the admissibility of reproductions and sought its comments. The draft was considered by the Commission and a number of general comments on the existing law and the draft paper were sent to the Australian Commission. The Western Australian Commission will continue to co-operate with the Australian Law Reform Commission in this area in 1981-1982.

(d) Trusts and Administration of Estates: Part IV
Recognition of Interstate and Foreign Grants of
Probate and Letters of Administration (Project No 34)

3.8 As explained above,¹ the Commission issued a working paper as part of this project in December 1980. By June 30 1981 the Commission had received a considerable number of comments on the working paper and arrangements had been made for the Commissioner responsible for the project, Mr Jackson, to discuss these in more detail with court officials, trustee companies and legal practitioners in Sydney and Melbourne. The Commission hopes to submit its report early in 1982.

(e) Trusts and the Administration of Estates: Part V
Trustees Powers of Investment (Project No 34)

3.9 As part of its reference on trusts and administration of estates, the Commission has been asked to review the powers and duties of trustees generally. One of the powers of trustees, namely the power to invest, has caused particular difficulty in recent times and therefore the Commission has been asked to look at this matter separately.

3.10 At present a trustee may invest trust funds in the manner, and upon the securities, authorised by:-

- (i) the trust instrument (if any);
- (ii) the Trustees Act 1962-1978;
- (iii) any other statute giving trustees authority to invest trust funds;
- (iv) the Supreme Court under section 89 of the Trustees Act 1962-1978.

3.11 However, not all these options may be open to a trustee in any particular case. Thus, if the trust has been created by an instrument, a trustee's first duty is to obey the directions contained in the instrument concerning the investments he should make and this may specifically direct, forbid or merely authorise investment in

1. Paras 2.43 to 2.46.

specific classes of securities not otherwise permissible for trustees. On the other hand, it may forbid investments in securities otherwise allowed by law. In these cases, however, the trustee can always apply to the Supreme Court under section 89 of the Trustees Act for broader powers of investment if this is considered desirable.

3.12 In the case of some trusts, however, there may be no instrument at all or it may contain no directions concerning investment. As a result, certain trustees must rely solely for their investment powers on the provisions of the Trustees Act 1962-1978.

3.13 It has been suggested that the powers of investment conferred by this Act are too narrow, particularly having regard to the difficult economic circumstances which exist at present. Inflation has made it more difficult for trustees, in common with other investors, to preserve the real value of the capital of the trust.

3.14 Accordingly, various bodies have made specific proposals for reform with a view to broadening the powers conferred on a trustee to invest in real estate, on security of mortgages and in various other investments.

3.15 At the end of the year under review the working paper to be issued as part of this project was nearing completion.

(f) Chattel Securities and the Bills of Sale Act (Project No 19)
Unauthorised Disposal of Goods Interstate (Project No 35)

3.16 Project No 19 requires the Commission to review the law dealing with the security of title in relation to the merchandising of goods on credit, and advise whether the Bills of Sale Act 1899-1973 should be amended, or new legislation prepared, to meet present day conditions. In a related project, Project No 35, the Commission was asked to consider and report on the law relating to unauthorised disposal of goods by a bailee or hirer under a hire-purchase agreement where the disposal takes place interstate. However, in 1972 the Standing Committee of Commonwealth and State Attorneys General decided that the law on consumer credit and chattel securities should be reviewed on a uniform basis throughout Australia. As a result, the Commission's work on those projects was deferred by the then Attorney General, pending the outcome of this review.

3.17 In 1978 the Standing Committee agreed that Victoria would introduce three Bills dealing with consumer transactions for the

purpose of seeking public comments. These were the Credit Bill, the Goods (Sales and Leases) Bill and the Chattel Securities Bill. It was intended that the Bills, if suitable, would be the basis for uniform legislation. In October 1978 the Commission, with the agreement of the Attorney General, revived its study of the two projects in order to submit comments on those aspects of the Bills dealing with chattel securities. The Bills attracted substantial public comment and criticism and when the Victorian Parliament rose for the State Election in May 1979, they lapsed and the intention to redraft them was announced. Accordingly, the Commission again deferred work on the projects.

3.18 The Bills have now been revised and were re-introduced into the Victorian Parliament at the end of April 1981. At the same time, four Bills having a similar effect were introduced into the New South Wales Parliament. These were the Consumer Credit Bill, the Credit-Sale Agreements (Repeal) Bill, the Hire-Purchase (Repeal) Bill, and the Moneylending (Repeal) Bill.

3.19 It has been agreed with the Attorney General that the Commission will monitor the passage of these Bills and in due course comment upon them.

(g) Unrepresented Defendants in Courts of Petty Sessions
(Project No 42)

3.20 The Commission has been asked to consider whether any procedural alterations are desirable in Courts of Petty Sessions where defendants are not legally represented.

3.21 Certain difficulties have arisen in relation to unrepresented defendants in Courts of Petty Sessions. Some defendants who appear without legal representation plead guilty to charges they do not really understand and in circumstances where they might not be convicted if a lawyer presented all the facts to the Court on their behalf. Moreover, even when defendants properly plead guilty or are found guilty, they are sometimes unable to make a satisfactory plea in mitigation for themselves. Consequently, there is a risk that some unrepresented defendants may be treated unjustly. The problem is not simply that some defendants are unable to afford a lawyer. In some cases, defendants choose not to be represented because they do not appreciate the desirability of representation.

3.22 Although the issue is not merely one of legal aid, it is likely that the problems have diminished in recent years because of developments in this field such as the formation of the Legal Aid Commission of Western Australia and the Aboriginal Legal Service and the operation of the Duty Counsel Scheme.

3.23 In order to determine the effectiveness of these schemes and, if necessary, how they can be improved, the Commission has prepared, in consultation with officers of the Australian Bureau of Statistics, a number of detailed surveys. These will be distributed to the various persons who operate in the Court of Petty Sessions system, including Duty Counsel, Magistrates, Justices of the Peace, the Aboriginal Legal Service, Police Prosecutors and private legal practitioners. When the surveys and the remaining research¹ have been completed, the Commission will issue a working paper.

(h) Compensation for Persons Detained in Custody who are
Ultimately Acquitted or Pardoned (Project No 43)

3.24 In November 1976 the Commission issued a working paper in which it discussed the question whether a scheme should be introduced by legislation to provide compensation for persons who are detained in custody and ultimately acquitted or pardoned. Statutory schemes of compensation exist in countries such as West Germany, France, Holland, Sweden, Denmark, Norway, the United States of America and elsewhere. A number of comments were received on the working paper from a broad cross-section of the community.

3.25 Because of the complex issues which have arisen the Commission has carried out extensive research since the publication of the working paper. This has included studying certain overseas schemes in more detail. The Commission's approach to this project has also been carefully reviewed during the year. The Commission is now in the process of drafting its report which it will submit before the end of 1981.

(i) Review of the Justices Act (Project No 55)

3.26 The Commission has been asked to review the Justices Act 1902-1980 which regulates the procedure for matters heard before

1. As part of its research the Commission has obtained information from the New South Wales Law Foundation. The Foundation's assistance is gratefully acknowledged.

Courts of Petty Sessions and provides for appeals from such courts. Because of its size, the project is being dealt with in a number of parts as follows -

- Part I - Appeals
- Part II - Enforcement of Orders
- Part III - General

3.27 A report on Part I was submitted to the Attorney General in April 1979. The Government has not yet announced whether or not it intends to implement the Commission's recommendations. Part X of the Justices Act, which relates to the retention and destruction of records of Courts of Petty Sessions, was considered separately as Project No 72 - Retention of Court Records. A report on this project was submitted to the Attorney General in June 1980; the Government is yet to announce its attitude to the recommendations made in that report.¹

3.28 Research is continuing in Parts II and III and in due course working papers will be issued calling for comment.

(j) Review of the Strata Titles Act (Project No 56)

3.29 In February 1977, the Commission issued a working paper as part of this project in which over 60 separate issues were raised and discussed and in respect of which public comment was sought. 69 submissions were received in response to the paper and these have been studied by the Commission.

3.30 During the year under review a considerable amount of progress was made towards the preparation of the Commission's report. As part of its research the Commission has examined the recently enacted Queensland Building Units and Group Titles Act. This Act provides not only for strata titles, but also for cluster titles (called group titles in Queensland). A cluster titles system involves the subdivision of land into an area of small lots, on which houses can be erected, and common property. The proprietors of the lots become a statutory company and through that company control the common property which they own as tenants in common. The first

1. The report is described in paras 2.14-2.16 of the Annual Report 1979-1980.

legislation of this type in Australia was the Cluster Titles Act of Victoria, which was enacted in 1974. In its report the Commission will recommend whether a similar system should be adopted in Western Australia.

3.31 With a view to obtaining first hand information about the working of the relevant New South Wales legislation, the Commissioner in charge of the project, Mr Ogilvie, held discussions in Sydney in July 1981 with officials of the New South Wales Titles Office, the Strata Titles Commissioner and Strata Titles Board, and also with solicitors, land agents, proprietors and other persons who have a practical knowledge of strata titles schemes. He also held discussions in Melbourne with the Chairmen of the Victorian Strata Titles Act Review Committee and the Cluster Titles Committee.

3.32 The Commission expects to submit its report before the end of 1981.

(k) Audit Provisions of the Local Government Act (Project No 59)

3.33 The Commission was asked to review the audit provisions of the Local Government Act 1960-1980 following suggestions by accountants that some of the provisions were defective and no longer in accord with modern commercial audit practice. At the Commission's request, the Institute of Chartered Accountants made a detailed submission on the issues involved. The submission was forwarded to the Local Government Department and the Local Government Association of Western Australia Inc. for their comments and views. The Local Government Department subsequently forwarded detailed comments on the various issues. Upon consideration of all the questions involved, it appeared to the Commission that the substance of the project concerned accounting procedures and practice rather than legal problems or difficulties. Accordingly, in August 1980 the Commission suggested to the Attorney General that consideration be given to withdrawing this reference. The Commission understands that this is being done.

(l) Privacy (Project No 65)

3.34 The work carried out and the activities which took place as part of the Commission's privacy reference are described in paragraphs 2.60 to 2.68 above.

(m) Execution Against Land (Project No 67)

3.35 Certain problems arise in the execution of judgments against land owned by the judgment debtor. These judgments may have been obtained in the Supreme Court, the District Court, or in Local Courts throughout Western Australia or even in Courts outside Western Australia. They may be for amounts owing pursuant to orders made in Courts of Petty Sessions. The problems relate to the time within which execution may be effected, the question of priorities as between different judgments and the rights of other persons. Research has continued into these matters during the year. The research is relevant also to Project No 16 - Amendments to the Local Courts Act and Rules. Research is well advanced and it is expected that a working paper will be issued during late 1981.

(n) Illegitimacy (Project No 68)

3.36 The Commission was asked to consider both the removal of the remaining disabilities against illegitimate children and the rights of fathers of illegitimate children. In April 1980 the Attorney General confirmed that problems concerning children conceived by artificial insemination procedures, including the position of semen donors and the parents of such children, should be considered as part of the reference.

3.37 The Commission has divided this project into two parts. Part A will deal with the rights of fathers of illegitimate children and Part B with the remaining difficulties relating to illegitimate children, including the problems that arise from artificial insemination procedures. The Attorney General has asked the Commission to give priority to Part A. During the year under review research progressed towards the preparation of a working paper discussing the issues raised by this part of the project.

(o) Criminal Proceedings and Mental Disorder (Project No 69)

3.38 The Commission has been asked to consider certain aspects of the criminal process relating to persons suffering from mental disorder. This reference followed a proposal to the Attorney General by the Commission. In August 1978 the Attorney General extended the terms of reference to include a review of the law relating to security patients. Among the important issues being considered in this project are the following -

- (i) What should be the criteria for a defence of insanity and upon what criteria should a person be found to be unfit to stand trial?
- (ii) Is there any need to retain the power in section 662 of the Criminal Code to impose an indeterminate sentence on a convicted person on the grounds of his mental disorder?
- (iii) What powers should courts of summary jurisdiction have to deal with an accused person suffering from mental disorder?
- (iv) Would it be desirable to have a judicial investigation as to the guilt or innocence of an accused person notwithstanding that he has been found unfit to stand trial?
- (v) What procedure should be provided to review the situation of persons who are detained in custody because of their mental condition as a result of criminal proceedings?
- (vi) What powers should the courts have to obtain psychiatric reports, and should the prosecution and defence be obliged to exchange such reports before the trial?

3.39 The terms of reference do not include the question whether the ultimate responsibility for the care of mentally disordered persons subject to the criminal law should be with the Department of Corrections or the Mental Health Services. However, some of the Commission's recommendations on the matters within its terms of reference may have a bearing on this question.

3.40 The Commission expects to issue a working paper as part of this project before the end of 1981.

(p) Interest on Claims and Judgments (Project No 70)

3.41 The Commission has been asked to consider and report on whether there should be any change to the law relating to the payment of interest on money owed, or recovered in legal proceedings, taking into account the effects of inflation. These terms of reference require the Commission to consider such matters as -

- (a) whether and in what circumstances interest should be payable on debts and other sums of money where the moneys are paid before legal proceedings are brought;
- (b) the payment of interest on sums of money recovered in legal proceedings in respect of a period prior to judgment ("pre-judgment interest");

- (c) the payment of interest on sums of money awarded in legal proceedings for the period between the time judgment is entered and the time it is satisfied (interest on judgment debts);
- (d) the account to be taken, when an award of damages is made, of fluctuations in currency exchange rates; and
- (e) the effect of inflation on and the earning capacity of an award of damages.

3.42 In May 1981 the Attorney General asked the Commission to give priority to that part of the reference dealing with pre-judgment interest. Currently, pre-judgment interest can be recovered in a limited number of cases only and even where it is recoverable in theory, the complexity and technicality of the rules involved often prevent it being recovered in practice. This can lead to great injustice where a person is kept out of his money for a long period of time. In such cases, the person retaining the money has the benefit of being able to use it between the date payment was due and the date of recovery, and the real value of the amount eventually recovered will have been reduced as a consequence of inflation. Because the power of the courts to award interest is limited there are cases in which debtors withhold the payment of their debts and force their creditors to litigate to recover them simply because it is considered to be good business to do so.

3.43 As it is widely acknowledged that the existing law relating to pre-judgment interest is unsatisfactory and urgently in need of reform, and because the issues involved have been examined in comparable jurisdictions, the Commission decided not to issue a working paper on this subject but instead to make a report to the Attorney General recommending reforms which could be quickly and easily implemented. A draft report on pre-judgment interest was completed by the Commission in June and, on a limited basis, copies were distributed for comment. It is expected that the report will be submitted shortly.

(q) Limited Partnerships Act 1909 (Project No 74)

3.44 The Commission has been asked to review the Limited Partnerships Act 1909. In a limited partnership, there are two classes of partners. There are general partners who have unlimited personal liability in the same way as a partner in an ordinary partnership, and limited partners who provided they do not take any

part in the management of the business, are liable only for the amount of money they have contributed or agreed to contribute to the partnership capital.

3.45 In recent years, certain difficulties have arisen with limited partnerships. Cases have occurred in which the only general partner is a proprietary company without any substantial assets while all the limited partners are natural persons. At present there is no requirement for notification to creditors of the fact that a partnership is a limited partnership. Hence, creditors may be deceived into thinking that a partnership is more financially solid than it really is.

3.46 On the other hand, a limited partnership is not completely satisfactory for the limited partners because if they take part in the management of the partnership business, they lose their limited liability and incur the same liability as general partners. It is not always clear even to the partners whether this has happened or not.

3.47 A further difficulty is that while an ordinary partnership may be wound up by the court by means of an ordinary action, the Limited Partnerships Act 1909 provides for a limited partnership to be wound up by a petition in the same way as a company. There are considerable difficulties in adapting company procedures to these circumstances. The Commission has carried out substantial research into this matter. When the research has been completed, a working paper will be issued.

David K Malcolm, QC
Chairman

Eric Freeman
Member

H H Jackson
Member

Charles Ogilvie
Member

L L Proskch
Member

28 July 1981

APPENDIX I

EXTRACT FROM THE LAW REFORM COMMISSION ACT 1972-1978

Constitution of Commission

4. (1) There shall be a Commission to be known as the Law Reform Commission of Western Australia which, except as provided in section 10,* shall, subject to subsection (1a) of this section, consist of five members, appointed by the Governor.

(1a) Of the five members appointed under subsection (1) of this section -

- (a) three members shall be members who are part-time members; and
- (b) two members shall be members who are full-time members.

(2) So long as there are three members, no act or proceeding of the Commission or of any member shall be vitiated by reason only that, at the time when the act or proceeding was done, taken or commenced, there was a vacancy in the office of any member.

Chairman

5. (1) The Commission shall elect the Chairman from amongst its members.

(2) The member elected as the Chairman shall hold that office for a term not exceeding one year.

(3) The outgoing Chairman shall be eligible for re-election at the next succeeding election, and at each subsequent election, of the Chairman.

(4) Where the Chairman is absent, the Commission shall elect another member to act temporarily as the Chairman during that absence and, while so acting, that other member shall be deemed to be the Chairman.

Qualification of members

6. (1) Of the members who are part-time members -

- (a) one shall be a certificated practitioner within the meaning of section 3 of the Legal Practitioners Act, 1893, who is practising as a practitioner on his own account, whether alone or in partnership, and who has had, in this State or elsewhere, not less than eight years' experience as a legal practitioner;
- (b) one shall be a person who is engaged in the teaching of law at a university in the State with a status not less than that of senior lecturer or the equivalent thereof;
- (c) one shall be a practitioner within the meaning of section 3 of the Legal Practitioners Act, 1893, who is

* Section 10 provides for the appointment of acting members.

an officer of the Crown Law Department of the State and who has had, in this State or elsewhere, not less than eight years' experience as a legal practitioner.

(2) A person shall not be eligible for appointment as a member who is a full-time member unless he -

- (a) is or has been a barrister or solicitor of the High Court of Australia or of the Supreme Court of a State or Territory of the Commonwealth of not less than eight years' standing; or
- (b) is, in the opinion of the Governor, suitable for appointment as a member by reason of his legal qualifications and experience, whether in this State or elsewhere.

Tenure of office

7. (1) Each member who is a part-time member shall hold office for such period, not exceeding three years, as is specified in the instrument of his appointment.

(2) Each member who is a full-time member shall hold office for such period, not exceeding five years, as is specified in the instrument of his appointment.

(3) A member whose term of office has expired shall be eligible for reappointment, but -

- (a) a member who is a part-time member shall not hold office for a period exceeding six consecutive years; or
- (b) a member who is a full-time member shall not hold office for a period exceeding eight consecutive years,

unless, in the opinion of the Governor, there are special circumstances warranting an extension of that period.

APPENDIX II

PROJECTS BEFORE THE COMMISSION AS AT 30 JUNE 1981

<u>Project No</u>	
16	Amendments to the Local Courts Act and Rules
19	Chattel securities and the Bills of Sale Act
25 Pt II	Legal capacity of minors (minors' contracts)
26	Review of administrative decisions
27 Pt II	Admissibility of reproductions
28	Formalities of oaths, declarations and attestation of documents
30	Imposition and enforcement of fines and inadequacy of penalties (1)
34 Pt IV	Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration
Pt V	Trustees Powers of Investment
Pt VI	Charitable Trusts
Pt VII	Administration of Estates and Payment of Debts
35	Unauthorised disposal of goods interstate - right to repossession
36	Limitation Act
42	Unrepresented defendants in Courts of Petty Sessions
43	Compensation for persons detained in custody
44	Alteration of ground levels
47	Jailing of first offenders (1)
55	Review of the Justices Act
56	Review of the Strata Titles Act
59	Audit provisions of the Local Government Act
65	Privacy
67	Execution against land
68	Illegitimacy
69	Criminal proceedings and mental disorder
70	Interest on claims and judgments
73	Absconding Debtors Act
74	Limited Partnerships Act
75	Imperial Statutes in force in Western Australia
76	Wills
77	Uniform Law for the Provision of Medical Treatment for Minors
78	Joint Tenancies

(1) Consideration of this project has been deferred pending the final report of the ALRC on the Sentencing of Federal Offenders. During the year, that Commission submitted an interim report on this subject. The report of the Western Australian Committee of Inquiry into the Rate of Imprisonment was also received.

APPENDIX III

LIST OF WORKING PAPERS ISSUED AND REPORTS SUBMITTED
UP TO 30 JUNE 1981

Working papers issued

<u>Calendar Year</u>	<u>Project No.</u>		
1968	1	Protection for purchasers of land	
	2	Testator's Family Maintenance Act	
	3	Succession rights of illegitimate children	
	4	Committal proceedings	
	5	Interim hearings in personal injury cases	
	6	Summary trial of indictable offences	
	7	Disposal of uncollected goods	
1969	8	Defamation: privileged reports	
1970	11	Liability for stock straying on to the highway	
	17	Motor car manslaughter	
1971	15	Imposition of driving disqualifications	
	18	Commercial arbitration and the trial of commercial causes	
	20	Evidence of criminal convictions in civil proceedings	
	21	Associations Incorporation Act	
	24	Succession rights of adopted children	
1972	1 Pt II	Retention by land agents of trust money	
	1 Pt III	Protection for purchasers of home units	
	10	Motor vehicle insurance	
	12	Payment of costs in criminal cases	
	22	Innocent misrepresentation	
	23	Legal representation of children	
	25 Pt I	Legal capacity of minors (age of majority)	
	34 Pt I	Distribution on intestacy	
	1973	32	Immunity of suit between spouses
		33	Dividing fences
37		Review of the Land Agents Act	
38		Sale of undivided shares in land	
1974		29	Special constables
	31	Competence and compellability of spouses to give evidence in criminal proceedings	
	40	Production of medical and technical reports in court proceedings	
	41	Tenancy bonds	
	45	Mortgage brokers	
	54	Contractors' liens	
	1975	34 Pt II	Administration bonds and sureties
46		Criminal injuries compensation	
49		Suitors' Fund Act	
52		Local body election practices	
60		Alternatives to cautions	

Working papers issued (cont.)

<u>Calendar Year</u>	<u>Project No.</u>	
1976	43	Compensation for persons detained in custody
	51	Unclaimed money
	58	Section 2 of the Gaming Act 1835
1977	28	Official attestation of forms and documents
	34 Pt III	Administration of deceased insolvent estates
	53	Privilege for journalists
	56	Review of the Strata Titles Act
	64	Review of bail procedures
1978	25 Pt II	Legal capacity of minors
	26	Review of administrative decisions Part I : Appeals
	27	Admissibility in court proceedings of computer generated records and other documents
	55 Pt I	Appeals from Courts of Petty Sessions
	62	Liability of highway authorities
	63	Small Debts Court
	66	Fatal accidents
	71	Exemption from jury service
1979	72	Retention of court records
1980	11	Liability For Stock Straying on to the Highway
	34 Pt IV	Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration
	73	Absconding Debtors Act
1981 to 30 June	26 Pt II	Judicial Review of Administrative Decisions

Reports submitted

1969	1	Protection for purchasers of land
	5	Interim hearings in personal injury cases
1970	2	Testator's Family Maintenance Act
	3	Succession rights of illegitimate children
	4	Committal proceedings
	6	Summary trial of indictable offences
	7	Disposal of uncollected goods
	11	Liability for stock straying on to the highway
	13	Affiliation proceedings
	17	Motor car manslaughter
1971	14	Offices of profit under the Crown
	15	Imposition of driving disqualifications
	24	Succession rights of adopted children
1972	8	Defamation: privileged reports
	10	Motor vehicle insurance
	12	Payment of costs in criminal cases
	20	Evidence of criminal convictions in civil proceedings
	21	Associations Incorporation Act
	23	Legal representation of children
	25	Legal capacity of minors (age of majority only)
1973	1 Pt III	Protection for purchasers of home units
	22	Innocent misrepresentation
	32	Immunity of suit between spouses

Reports submitted (cont.)

<u>Calendar Year</u>	<u>Project No.</u>	
1973	34 Pt I	Distribution on intestacy
	38	Sale of undivided shares in land
1974	18	Commercial arbitration and the trial of commercial causes
	37	Report on a review of the Land Agents Act (this also contains the report on Project No. 1 Part II - retention by land agents of trust money)
	45	Mortgage brokers
	54	Contractors' liens
1975	29	Special constables
	33	Dividing fences
	40	Production of medical and technical reports in court proceedings
	41	Tenancy bonds
	46	Criminal injuries compensation
	52	Local body election practices
	60	Alternatives to cautions
1976	34 Pt II	Administration bonds and sureties
	49	Suitors' Fund Act Part A : civil proceedings
	-	Protection of money awarded as damages
1977	31	Competence and compellability of spouses to give evidence in criminal proceedings
	39	Compensation for new street alignments
	49	Suitors' Fund Act Part B : criminal proceedings
	58	Section 2 of the Gaming Act
	61	Enforcement of judgment debts
1978	28	Official attestation of forms and documents
	34 Pt III	Administration of deceased insolvent estates
	66	Fatal accidents
1979	55 Pt I	Appeals from Courts of Petty Sessions
	63	Small Debts Court
	64	Review of bail procedures
	8	Defamation
1980	53	Privilege for journalists
	71	Exemption from jury service
	72	Retention of court records
	51	Unclaimed Money
1981 to 30 June	11	Liability For Stock Straying on to the Highway
	27 Pt I	Admissibility in Evidence of Computer Records and Other Documentary Statements
	62	Liability of Highway Authorities for Non-Feasance

APPENDIX IV
LEGISLATIVE ACTION ON REPORTS

PART A

Reports which have resulted in legislation

There are twenty-one reports of the Commission and its predecessor which have resulted in legislation. They are as follows -

<u>Project No.</u>	
1	<u>Protection for purchasers of land</u> The Sale of Land Act 1970
2	<u>Revision of the Testator's Family Maintenance Act</u> The Inheritance (Family and Dependants Provision) Act 1972
3	<u>Succession rights of illegitimate children</u> The Administration Act Amendment Act 1971 The Property Law Act Amendment Act 1971 The Wills Act Amendment Act 1971
4	<u>Committal proceedings</u> The Justices Act Amendment Act 1976
6	<u>Summary trial of indictable offences</u> The Criminal Code Amendment Act 1972 The Justices Act Amendment Act 1972
7	<u>Disposal of uncollected goods</u> The Disposal of Uncollected Goods Act 1970
8	<u>Defamation</u> Criminal Code Amendment Act 1977, s.2.
12	<u>Payment of costs in criminal cases</u> The Official Prosecutions (Defendants' Costs) Act 1973
23	<u>Legal representation of children</u> Legal Representation of Infants Act 1977 Suitors' Fund Act Amendment Act 1977
24	<u>Succession rights of adopted children</u> The Adoption of Children Act Amendment Act 1971 (ss 13, 14 and 15)

<u>Project No.</u>	
25	<u>Legal capacity of minors</u> The Age of Majority Act 1972
29	<u>Special Constables</u> Police Act 1980
34 Pt.I	<u>Distribution on intestacy</u> The Administration Act Amendment Act 1976
34 Pt.II	<u>Administration bonds and sureties</u> The Administration Act Amendment Act 1976
37	<u>Review of Land Agents Act</u> Real Estate and Business Agents Act 1978
38	<u>Sale of undivided shares in land</u> The Sale of Land Act Amendment Act 1974
40	<u>Production of medical and technical reports in court proceedings</u> The Acts Amendment (Expert Evidence) Act 1976
45	<u>Mortgage brokers</u> The Finance Brokers Control Act 1975
46	<u>Criminal injuries compensation</u> The Criminal Injuries (Compensation) Act Amendment Act 1976
58	<u>Section 2 of the Gaming Act 1835</u> Betting Control Act Amendment Act 1978
60	<u>Alternatives to cautions</u> Criminal Code Amendment Act 1979

PART BReports recommending legislative change which have not,
as yet, been implemented

There are twenty-nine reports of the Commission and its predecessor which have not yet been implemented. They are as follows -

Project
No.

- 1 Protection for purchasers of home units¹ Pt. III
Date submitted - March 1973
- Recommendation: that Part III of the Sale of Land Act 1970 be amended so as to apply to the sale of strata title lots.
- 5 Interim hearings in personal injury cases
Date submitted - May 1969
- Recommendation: that the court be empowered to decide the issue of liability before the issue of damages, and to order interim payments meanwhile.
- 8 Defamation
Date submitted - October 1979
- Recommendation: that a uniform defamation code be enacted which abolishes the distinction between libel and slander and which reforms the law in a number of other respects.
- 10 Motor vehicle insurance
Date submitted - December 1972
- Recommendation: that the law of motor vehicle insurance be amended in the interests of the insured.
- 11 Liability for stock straying on to the highway²
Date submitted
- (a) First report - December 1970
- Recommendation: that legislation be enacted to provide that liability for stock straying on to the highway be in accordance with ordinary principles of negligence.
- (b) Second report - June 1981
- Recommendation: that liability for stock straying on to the highway be determined according to the law of negligence only, but that a maximum limit be imposed on the amount of damages recoverable by a successful claimant.

1. Implementation of this report has been deferred pending completion of the project dealing with a review of the Strata Titles Act (Project No. 56).
2. See paras 2.28 to 2.34 above.

Project
No.

- 13 Affiliation proceedings
Dated submitted - March 1970
- Recommendation: that statutory provision be made for blood tests in affiliation proceedings.
- 14 Offices of profit under the Crown
Date submitted - March 1971
- Recommendation: that the law be modified as to the circumstances in which persons who hold offices of profit under the Crown, or who have contracts with the Government, can be members of Parliament.
- 18 Commercial arbitration¹
Date submitted - January 1974
- Recommendation: that the Arbitration Act be revised.
- 20 Evidence of criminal convictions in civil proceedings
Date submitted - April 1972
- Recommendation: that in defamation actions, conviction after trial be made conclusive evidence that the party committed the offence.
- 21 Associations Incorporation Act
Date submitted - March 1972
- Recommendation: that the Associations Incorporation Act be revised.
- 22 Innocent misrepresentation
Date submitted - October 1973
- Recommendation: that the legal remedies available for an innocent misrepresentation inducing a contract be revised.

1. Reports on arbitration have also been made by the South Australian Law Reform Committee (1969); the Queensland Law Reform Commission (1970); the Chief Justice's Law Reform Committee of Victoria (1974 and 1977); the Law Reform Commission of the Australian Capital Territory (1974) and the New South Wales Law Reform Commission (1976).

The meeting of the Standing Committee of Attorneys General in February 1974 issued a public statement to the effect that the Committee recognised the need for updating on a uniform basis the law of arbitration in Australia. It set up a committee of officers to prepare a model bill and report to a later meeting. It is understood that the work is currently in progress.

Project
No.27
Pt IAdmissibility in Evidence of Computer Records and
Other Documentary Statements

Date submitted - July 1980

Recommendation: that computer records and other documentary statements be admissible in evidence in certain cases.

28

Official attestation of forms and documents

Date submitted - December 1978

Recommendation: that legislation be introduced to provide for an unattested statutory declaration, that s 106 of the Evidence Act 1906 be repealed and that legislation prohibiting the signing of affidavits with rubber stamp be introduced.

29

Special constables

Date submitted - March 1975

Recommendation: that the law and practice as to appointment and control of special constables be revised.¹

31

Competence and compellability of spouses as witnesses

Date submitted - January 1977

Recommendation: that the law in this area be revised.

32

Immunity of suit between spouses²

Date submitted - September 1973

Recommendation: that immunity of action in tort between spouses be abolished.

33

Dividing fences

Date submitted - November 1975

Recommendation: that the Dividing Fences Act 1961 be amended in certain respects.

1. One of the Commission's recommendations was implemented by the Police Act 1980; see page 49 above.
2. Implementation by the State Parliament would now seem to be unnecessary. The (Cwth) Family Law Act 1975 s.119, provides that "either party to a marriage may bring proceedings in contract or tort against the other party".

Project
No.34
Pt.IIIAdministration of deceased insolvent estates

Date submitted - December 1978

Recommendation: that the Administration Act be amended to provide for the administration of deceased insolvent estates.

49

The Suitors' Fund Act¹

This report was submitted in two Parts. Part A, dealing with civil proceedings, was submitted in March 1976. Part B, dealing with criminal proceedings, was submitted in May 1977.

Recommendation: that the Suitors' Fund Act 1964 be revised to extend the classes of civil proceedings for which compensation for costs may be claimed and that provision for compensation for costs in criminal proceedings be removed from that Act and re-enacted, with amendments, in the Official Prosecutions (Defendants' Costs) Act 1973.

51

Unclaimed money

Date submitted - December 1980

Recommendation: that the Unclaimed Moneys Act be revised and consolidated to enable unclaimed money to be used for public purposes.

52

Local body election practices

Date submitted - October 1975

Recommendation: that the law in this area should be tightened in certain respects.

55
Pt.IAppeals from Courts of Petty Sessions

Date submitted - April 1979

Recommendation: that the Justices Act be amended to provide for a single mode of appeal.

62

Liability of Highway Authorities For Non-Feasance

Date submitted - May 1981

Recommendation: that the non-feasance rule be abolished and highway authorities required to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use.

1. Two incidental recommendations in Part A of this report were enacted by the Suitors' Fund Act Amendment Act 1978 and the Suitors' Fund Amendment Act (No 2) 1978.

Project
No.

- 63 Small Debts Court
Date submitted - April 1979
Recommendation: that the Local Courts Act and Rules be amended to create a special Small Debts Division in the Local Court.
- 64 Review of bail procedures¹
Date submitted - March 1979
Recommendation: that a Bail Act be enacted to deal comprehensively with bail.
- 66 Fatal accidents
Date submitted - December 1978
Recommendation: that the Fatal Accidents Act be amended to extend the class of claimants, to provide for an award for loss of assistance and guidance and various other matters.
- Protection of money awarded as damages
Date submitted - August 1976
Recommendation: that the power of the court to make a protection order in respect of money awarded as damages be revised.
- 71 Exemption from jury service
Date submitted - June 1980
Recommendation: that the Juries Act 1957-1976 be amended in a number of respects; in particular so as to replace the notion of exemption from jury service with those of ineligibility and excusal as of right.
- 72 Retention of court records
Date submitted - June 1980
Recommendation: that it be permissible to destroy records of Courts of Petty Sessions and Local Courts after fifteen years.

1. The Government has announced its intention to introduce a bill dealing comprehensively with bail.

PART CReports which recommended against legislative changeProject
No.

- | | |
|----|---|
| 15 | Imposition of driving disqualifications |
| 17 | Motor car manslaughter |
| 41 | Tenancy bonds 1 |
| 54 | Contractors' liens |
| 53 | Privilege for Journalists |

PART DReports made on occasions in which the Commission was asked to comment on the reports of other bodies or on proposals for reformProject
No.

- | | |
|----|--|
| 39 | Compensation for new street alignments |
| 61 | Enforcement of Judgments Debts |

1. The report did recommend a minor change to the Small Claims Tribunals Act 1974 to facilitate the hearing of claims in respect of tenancy bonds. This was implemented by s 2 of the Small Claims Tribunals Amendment Act 1975.

APPENDIX V
NEW REFERENCES

1. JOINT TENANCIES

To review the law relating to joint tenancies and tenancies in common of real and personal property in law and equity in respect to -

- (a) the rules of construction governing the creation of joint tenancies and tenancies in common;
- (b) the severance of joint tenancy by notice; and
- (c) whether the Inheritance (Family and Dependents Provision) Act 1972 should be amended to empower the Court to include a deceased person's interest in a joint tenancy in the property from which provision for an applicant may be made.

2. UNIFORM LAW FOR THE PROVISION OF MEDICAL SERVICES FOR MINORS

To inquire into and report upon the existing law in Australia as it concerns minors in relation to -

- (i) the provision of surgical, medical, contraceptive, psychiatric, dental and other health and related counselling services,
- (ii) participation in experiments and other procedures related to the provision of surgical, medical, contraceptive, psychiatric, dental and other health and related counselling services,
- (iii) the provision to other persons of body organs and tissues;

with the object of recommending uniform legislation suitable for enactment in Australia.

In considering the foregoing and without limiting the generality thereof particular regard should be paid to -

- (a) the special needs of minors, if any, in respect of counselling, treatment and services concerning drug, tobacco and alcohol dependence and abuse, emergency treatment, sexually transmitted diseases, examination for suspected sexual assault, emotional and psychiatric services and the control and termination of pregnancy;
- (b) the age, if any, at which minors should be able to consent, or refuse to consent and the means by which such consent, or the refusal of consent, should be given;
- (c) the extent to which, and the circumstances in which, the parents, guardians or other persons and institutions responsible for the care and control of minors should be informed, and be able to consent, refuse consent, or overrule consent.

- (d) the need to provide legal protection for medical practitioners and other health professionals in respect of the provision of the services referred to above;
- (e) all aspects of the supply to minors of the goods and services which are a necessary adjunct to the provision of surgical, medical, contraceptive, psychiatric, dental and other health and related counselling services;
- (f) the extent to which the claims of minors for privacy and confidentiality should be given legal protection;
- (g) the position in regard to providing the services referred to above if consent is unreasonably withheld or cannot reasonably be obtained;
- (h) the special responsibilities medical practitioners and other health professionals should be expected to exercise in relation to providing the services referred to above to minors.

APPENDIX VI

STATEMENT OF RECEIPTS AND PAYMENTS - LAW REFORM COMMISSION : 1 JULY 1980 to 30 JUNE 1981

<u>FEEs</u>		By balance as at 30.6.80	67,453.18
Part-time members of Commission (the Crown Law Department Member receives no fee)	17,456.78	By annual contribution	376,000.00
<u>SALARIES AND WAGES</u> (including the full-time members of the Commission)	277,579.70		
<u>PAYROLL TAX</u>	13,633.11		
<u>OFFICE EXPENSES</u>			
Advertising	1,441.56		
Travel and removal expenses	4,687.47		
Furniture & fittings	7,859.87		
Rental	26,375.34		
Petty cash	551.21		
Postage and courier charges	2,255.61		
Printing and photo-copying	22,348.00		
Rental of office equipment	7,413.77		
Stationery and stores	3,734.93		
Telephone	3,157.01		
Miscellaneous	4,001.81	83,826.58	
<u>LIBRARY</u>			
Text books, periodicals, statutes, reports	14,548.48		
	407,044.65		
By balance as at 30.6.81	36,408.53		
	<u>\$443,453.18</u>		
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			<u>\$443,453.18</u>
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APPENDIX VI (cont.)ESTIMATED EXPENDITURE - LAW REFORM COMMISSION1 July 1981 to 30 June 1982

<u>COMMISSIONERS' REMUNERATION AND STAFF SALARIES</u>		325,507
<u>PAYROLL TAX</u>		14,500
<u>OFFICE EXPENSES</u>		
Advertising	1,400	
Travel & removal expenses	3,000	
Furniture & fittings	7,500	
Rental	60,000	
Petty cash	600	
Postage & courier charges	3,000	
Printing & photo- copying	24,000	
Rental of office equipment	7,500	
Stationery & Stores	3,500	
Telephone	3,500	
Miscellaneous	<u>2,500</u>	116,500
<u>LIBRARY</u>		
Text books, periodicals, statutes, reports		<u>14,000</u>
		<u>\$470,507</u>
		=====

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