Law Reform

Courts Practice and Procedure

AUSTRALIA - NEW SOUTH WALES

Women as participants in the criminal justice system
The Australian Institute of Criminology has published a summary of a seminar on this subject, held in Canberra in 1975. The seminar discussed the role of women as offender, as victim and as judicial officer.

Juries
The Attorney-General for New South Wales, in connection with his proposal to rationalize the State's selection of jurors so as to make it compulsory for women, unless pregnant, to be available for jury service on the same basis as men, and for those many categories of persons presently exempted from jury service to be reduced in number, has announced that potential jurors with minor criminal records, whose names will be selected from random from the State's electoral rolls and checked against police computer records, will not be excluded from future jury service.

(C.L.B. January 1976 p.53)

Report of the Royal Commission on the Courts
A Royal Commission under the Chairmanship of the Hon. Mr. Justice Beattie was established in 1976 to inquire into the structure and operation of the judicial system of New Zealand. The Commission presented its report in September. There were particular matters which the Commission was asked to examine but in general it was to consider what changes might be necessary or desirable to secure the just, humane, prompt, efficient and economical disposal of the civil, criminal and domestic business of the Courts and to ensure the ready access of the people of New Zealand to the Courts for the determination of their rights and the remedying of their grievances now and in the future.

Foremost amongst the recommendations in the report are the establishment of a Judicial Commission to supervise the day-to-day administration of the Courts; the up-grading of the Magistrates'

Courts to become District Courts with enlarged civil, family and criminal jurisdiction; and the creation of a Family Court as a division of the District Courts with a comprehensive jurisdiction over all matters affecting the family.

A Family Court

The Commission recommended the establishment of a Family Court to be a Division of the District Court: the jurisdiction of such a court would be exclusive. It would take from the High Court (now the Supreme Court) its original jurisdiction under the Matrimonial Proceedings and Matrimonial Property Acts, together with various other Acts –

(i) the Family Court would then have jurisdiction in all family matters including divorce proceedings – separation, maintenance, custody and access, children and young persons' court matters, adoption, mental health, alcoholism and drug addiction applications, aged and infirm persons and minor's contracts matters. The Commission has also recommended that all criminal matters arising within families such as interspousal and parent/child assaults, incest and abduction should fall within the jurisdiction of the Family Court;

(ii) complex and difficult cases may be transferred to the High Court; and

(iii) appeals from the Family Court could be heard either in the High Court, or by a special Appeals Court comprising two High Court Judges and one Family Court Judge.

The extent of public interest in this area of judicial activity is shown by the fact that almost one-third of the submissions made to the Royal Commission concerned the topic of family law. The features necessary for the successful development and operation of a Family Court system are considered to be –

(a) although set apart from the main Court structure, the Family Court should remain part of that system. Its function is to deal with those cases which are in some way concerned with the family situation;

(b) it should have specialist judges who are legally trained and qualified by personality, experience, and interest to decide matters and preside over all activities of a Family Court;

(c) support services, including social workers, counsellors, and conciliators, should be available;

(d) physically separate from other Courts, the family courtroom should have comfortable fittings, intended to put the parties at ease;

(e) strict adversary rules should be relaxed, as should the more traditional forms of dress and address so that, when cases have to be resolved in Court, the hearing can be conducted in an atmosphere of relative informality. The aim of the Court should be to help resolve problems with the co-operation of the parties,

wherever that is possible, and with a minimum of disruption in all cases;

(f) the Family Court requires status, a comprehensive jurisdiction, and a sound judicial philosophy with judges and ancilliary personnel of high calibre;

(g) the Court should be organised so that its responsibilities to the community are clearly delineated; and

(h) proper funding and best use of resources, including those already available in buildings and personnel, should be provided.

(C.L.B. July 1976 pp.265-266)

Criminal Law and Procedure

AUSTRALIA - NEW SOUTH WALES

Criminal liability in relation to a spouse

The Law Reform Commissioner has issued Report No.3 (June 1975), Criminal Liability of Married Persons (Special Rules), with proposals for legislation. The principal recommendations are that—

(a) the presumption that if a wife commits a crime in the presence of her husband she is presumed to have done so under his coercion should be abolished;

(b) a wife's defence of actual coercion by her husband should be defined and limited;

(c) an accused wife should be required to provide evidence of pressure by her husband, and the burden should then be placed on the prosecution of satisfying the jury or court that the action or inaction charged was not due to the coercion of the husband;

(d) a husband should have extended to him the benefit of the present rule that a wife does not become an accessory after the fact by reason merely of receiving or assisting her spouse who has committed a felony (and certain other offences);

(e) provision should be made that a married person does not commit misprision of felony by failing to inform on his or her spouse;

(f) the fact that the person from whom a married person receives stolen property is her husband should not in itself be a defence to a charge of handling the property;

(g) with certain exceptions, a married person should not be criminally responsible for conspiracy with his or her spouse only, nor for incitement of his or her spouse to commit an offence.

(C.L.B. October 1975 pp.44-45)

Rape and Other Sexual Offences

The Criminal Law and Penal Methods Reform Committee has presented its report on the law relating to rape and other sexual offences. The Committee finds substantial dissatisfaction with the present law relating to rape and the administration of the law. Among the specific recommendations are —

(i) that in a charge of rape the prosecution should continue to bear the onus of proving beyond reasonable doubt that the accused had unlawful sexual intercourse with a person without her consent, knowing that she is not consenting or being recklessly indifferent as to whether she is consenting or not;

(ii) that the legislature should not create a statutory offence other than rape of unlawful sexual intercourse without the consent of the person upon whom the act of intercourse was committed;

(iii) that the statutory presumption that a boy under 14 years of age is incapable of committing rape be abolished;

(iv) that a husband be indictable for rape upon his wife when the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof, notwithstanding that it was committed during the marriage;

(v) that sexual intercourse with a child under the age of 12 should continue to be a crime punishable by the same penalty as rape;

(vi) that the offence of rape should not include a forced penetratio per os;

(vii) that there should be no statutory definition of rape;

(viii) except where (ix) and (x) apply, the age at which a person shall, for the purposes of a criminal prosecution, be capable of consenting to sexual intercourse (or to an act constituting an indecent assault) be 16 years;

(ix) that a person aged 14 years or over be capable, for the purpose of a criminal prosecution, of consenting to sexual intercourse (or to an act constituting an indecent assault) with a person who is not more than 5 years older than him or her;

(x) that a person under the age of 18 years be incapable, for the purpose of a criminal prosecution, of consenting to sexual intercourse (or to an act constituting an indecent assault) with his or her guardian or teacher, unless such guardian or teacher is not more than 5 years older than the ward or pupil and the ward or pupil is aged 14 years or more;

(xi) that to have sexual intercourse with a person known to the offender to suffer from a mental defect or disease which renders him or her incapable of appraising the nature of his

or her conduct and incapable of giving a true consent to sexual intercourse be a criminal offence;

(xii) that incest cease to be a separate offence under the Criminal Law Consolidated Act 1935—1975;

(xiii) that a person under the age of 18 years be incapable, for the purpose of criminal prosecution, of consenting to sexual intercourse or an act constituting an indecent assault with his or her parent or brother or sister.

(xiv) that specialist police officers who deal with alleged rape victims undergo a course in practical psychology before appointment as such officers;

(xv) that the alleged victim of a rape be examined by a woman doctor if she so elects;

(xvi) that the courts continue to have the power to prohibit publication by the news media of the name of an alleged rape victim;

(xvii) that the evidence of the prosecutrix in rape cases be taken in camera;

(xviii) that at the committal proceedings the evidence of the alleged victim be given by statement verified by affidavit;

(xix) that the alleged rape victim be not liable to cross examination upon her prior sexual experience, and that evidence of such prior sexual experience be not admissible at the trial unless the fact of such sexual experience is relevant to the defence (but that the general reputation or moral character of the alleged victim be deemed not relevant to the defence);

(xx) that the right of an accused person to make an unsworn statement to the jury be abolished;

(xxi) that rape charges continue to be heard by juries selected in the ordinary manner without any prescribed minimum number of woman jurors, data clearly indicating that there is no statistically significant difference between the verdicts of male and female dominated juries.

(C.L.B. October 1976 pp.420-421)

AUSTRALIA - TASMANIA

Discrimination on ground of sex

The Law Reform Commission of Tasmania has published Report No. 58 on "Discrimination on Ground of Sex". A report to the Commission by a sub-committee is reproduced in an Appendix to the Report. Another Appendix lists the provisions of Tasmanian statutes which discriminate solely on the ground of sex. The survey showed that discrimination occurs in the following areas — conditions of

employment, retirement and pensions; family matters; special protection of women and girls by the criminal law; property; and a number of miscellaneous matters.

The Commission felt that perhaps the most pervasive discrimination was found in legislation which gives to men and women different rights in employment and retirement. There were also discriminatory provisions evident in the awards of State industrial boards, and the common law discriminated in relation to the domicile of married women, loss of consortium, wife's agency of necessity, seduction, the presumption of advancement and in other ways.

After reviewing the alternative ways of combating this form of discrimination, the Commission (by a majority) made the recommendations summarised below —

(i) a number of statutes, as previously mentioned, should be amended so as to place men and women on the same footing as far as is practicable;

(ii) a person alleging that he or she has suffered damage as a result of unjustifiable discrimination on the ground of sex should be able to apply under statute to the appropriate court for one or more of the following remedies —
   (a) a declaration as to his or her rights,
   (b) an injunction,
   (c) specific performance, or
   (d) damages;

(iii) "unjustifiable discrimination" should be defined by statute so as to exclude the following —
   (a) discrimination resulting from biological or physical differences which are relevant to a particular situation,
   (b) discrimination which may reasonably be regarded as resulting from different family responsibilities, and
   (c) discrimination resulting from membership of single sex clubs, sports teams, schools and other voluntary associations;

(iv) jurisdiction should be conferred by statute on the Court of Requests to enable it to make declarations as to rights and grant injunctions and specific performance in cases otherwise within the jurisdiction of such court, without prejudice to the right of a person to go to the Supreme Court for an appropriate remedy:

(v) there should be some machinery to ensure that unjustifiable sex discrimination does not creep into future legislation or government administration: the Cabinet Secretariat and the Ombudsman Committee would probably be suitable examining bodies for this purpose.

(C.L.B. July 1978 pp.598-599)

Prostitution

The Select Committee of Inquiry into prostitution appointed by the House of Assembly in November 1979 has presented its Report to the Assembly.

The Committee identified a number of forms in which prostitution is practised in South Australia—

(a) massage parlours which operated as fronts for acts of prostitution,
(b) escort agencies which catered for businessmen in transit or those living alone after the loss of a companion by death or marital separation,
(c) street prostitution,
(d) the private worker,
(e) homosexual prostitution, and
(f) prostitution in country areas.

The Committee also considered the causes of prostitution, which was seen by those who gave evidence to it first and foremost as a job from which to earn money needed for a variety of reasons. Its practitioners were classified into four general groups—

(a) women who are severely disadvantaged socially and economically,
(b) women who are poor and/or in debt or supporting children, or are unemployed (considered to be the largest group),
(c) women subject to coercion,
(d) women who seek money for a specific purpose and who enter prostitution because there are men willing to pay.

The Committee gave considerable attention to the problems associated with prostitution and arrived at the following conclusions—

(a) venereal disease was the most common problem seen to be associated with prostitution but the evidence seemed to indicate that prostitutes generally had regular medical checks, were knowledgeable about venereal disease and its symptoms, and tended to take precautions to protect themselves. (The Committee however referred the matter of the growing incidence of genital herpes, attributed more to the increased practice of oral sex than to prostitution, to the Minister of Health);
(b) because prostitution was illegal and the social constraints severe, there existed a subculture of outcasts within which drugs were freely available;
(c) there was little evidence of organised crime being involved in prostitution in South Australia and the Commission supported legislation to ensure that the danger of intrusion of criminal elements into the industry did not eventuate;
(d) suburban nuisance was caused to residents by the clientelle of

massage parlours, which were often picketted and foreed to close;

(e) soliciting which caused offence to members of the public has not caused any problem in South Australia;

(f) the moral issues surrounding prostitution were a matter for the individual conscience and so the Committee did not feel able to pronounce upon it.

From all the arguments presented before it the Committee identified four possible courses of action, considered their relative advantages and disadvantages, and made recommendations. The four possible courses of action were—

(a) maintaining the status quo,
(b) strengthening the present law,
(c) legalisation and regulation,
(d) decriminalisation, with appropriate safeguards.

The following is the Committee's summary of its recommendations—

(i) that the present law relating to prostitution be changed;
(ii) that maintenance of existing legislation with increased police powers and penalties be not considered;
(iii) that legalisation and regulation of the industry be not accepted;
(iv) that the law be altered to provide for decriminalisation of prostitution but with appropriate safeguards;
(v) that after sufficient time for evaluation has elapsed the Government should report to Parliament on the effects of these changes and that such report should be tabled within three years of the amendments coming into operation;
(vi) that s. 13 of the Police Offences Act be amended to remove the offence of consorting with reputed prostitutes;
(vii) that the law relating to soliciting be maintained and applied to both men and women;
(viii) that living off the earnings of prostitution should continue to be punishable where the prostitute is under the age of 18 but otherwise be punishable only where it is accompanied by violence, threatened violence or coercion and that the onus of proof in such cases be placed on those charged where a prima facie case is established;
(ix) that it be an offence for persons under the age of 18 to engage in acts of prostitution;
(x) that s. 63 of the Criminal Law Consolidation Act be repealed and that in s. 65 of the Act, the age be raised to 18;
(xi) that amendments be made to local government and planning legislation necessary to prevent places of prostitution operating in residential areas;
(xii) that adequate controls be provided for the advertising of places of prostitution to prevent offence to the public;
(xiii) that the use of the words "massage" and "health" and other words as may be prescribed, be prohibited in connection with operations involving prostitution.

(C.L.B. October 1980 pp.1290-1292)

Committee on the operation of the abortion law

In 1969 the Criminal Code was amended to provide that an abortion could lawfully be performed by a qualified medical practitioner in an accredited or approved hospital if the therapeutic abortion committee of the hospital has issued a certificate stating that in its opinion the continuation of the pregnancy would or would be likely to endanger the woman's life or health. In the period that has elapsed since this change in the law concern was expressed over the way the law was working. In view of the limited amount of factual information available the Government of Canada appointed a sociologist, a physician and a lawyer to conduct a fact-finding study "to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". This group, the Committee on the Operation of the Abortion Law, was under the chairmanship of Professor Robin F. Badgley of the University of Toronto. The Committee was not asked to consider the merits of the abortion law itself or to make recommendations. The terms of Reference, which were intended to assist the Committee in its task, stated that it was to "make findings on the operation of this law rather than recommendations on the underlying policy".

The Committee visited many hospitals, surveyed their operations and staff, conducted a survey of doctors to ascertain their views and the extent of their experience with abortion and surveyed as well nearly 5000 women who had obtained abortions. A Gallup poll was commissioned to establish the knowledge and experience of adults and teenagers with induced abortion, and statistics were obtained from abortion centres in the United States to ascertain the extent to which Canadian women were travelling abroad to obtain terminations.

The Committee made a number of findings on matters within and related to its terms of reference. Some of the major findings were –

(i) no consensus exists for major changes in the law – most Canadians were neither in favour of removing abortion from the Criminal Code nor of refusing therapeutic abortions under any circumstances. Their complaint was with the way the law was working;

(ii) the law is not operating equitably – the procedure provided in the abortion law for obtaining therapeutic abortions is not operating equitably across Canada. There are sharp disparities in the distribution and accessibility of therapeutic abortion services and unreasonable pressure on some physicians and hospitals. The burden of the inequitable operation of the abortion law tends to fall on women who are less well educated, who have lower incomes and who live in smaller centres or rural areas with no direct access to abortion services;

(iii) the abortion law itself is not inequitable – the 1969 amendment to the abortion law resulted in a sharp reduction in illegal abortions. In addition, there was a substantial reduction in deaths resulting from attempted self-induced or other illegal abortions. Provincial regulations and the practices of hospitals and the medical profession rather than the abortion law itself have led to the inequities in its operation. The law is specific in setting out the procedure to be followed to obtain a therapeutic abortion and its definition of guidelines is broad enough to accommodate the circumstances under which it might be considered necessary to obtain an induced abortion;

(iv) the abortion law limits the therapeutic abortion procedure to hospitals accredited by the Canadian Council on Hospital Accreditation or approved by provincial health authorities. While in some instances hospitals of eight beds were accredited, additional provincial requirements for the rated bed capacity of hospitals which are eligible to establish therapeutic abortion committees varied from an undesignated number to 50 and 100 beds. There were a number of other additional provincial requirements for eligibility. Taken together these requirements set by provincial health authorities were a major factor which made a sizeable number of general hospitals ineligible to establish therapeutic abortion committees. When these requirements were added to the established medical custom that the therapeutic abortions are usually done by obstetrician-gynaecologists, the number of hospitals eligible to do the abortion procedure was effectively reduced to two out of every five hospitals in the nation;

(v) in addition to the requirements set by provincial health authorities most hospitals where abortions are done have developed their own requirements to be met by patients prior to their applications being reviewed by therapeutic abortion committees. These requirements include one or more of: prior consultations with one, two or three physicians; a social service review; a residency requirement; tests for congenital deformities; contraceptive counselling; the consent of a

spouse or partner; length of gestation; or interviews with patients by members of the therapeutic abortion committee. The use of these different requirements meant that some women seeking a therapeutic abortion had their applications speedily reviewed, while others in similar circumstances experienced considerable delay or had their applications rejected;

(vi) delay by physicians is increasing risk and stress – on an average, women took 2.8 weeks after they first suspected they had become pregnant to visit a physician. After this contact had been made there was an average interval of 8.0 weeks until the operation was done. This kind of delay results in higher cost of health services, increases the stress on patients, and puts off the abortion until later in the pregnancy with the increased risk this can entail;

(vii) there has been an absence of detailed reviews by provinces – the abortion law makes provision for review of the operation of the therapeutic abortion procedure by provincial health authorities. There have been no detailed reviews by the provinces of provincial regulations imposing conditions for the establishment of therapeutic abortion committees, the hospital requirements to be met by patients before their applications will be reviewed by a committee or the range of circumstances that may be seen to constitute danger to a woman's health. Despite nation-wide medical care insurance there is a financial deterrent for some women to obtaining a therapeutic abortion. One out of five women who had a therapeutic abortion paid extra medical fees and in some instances the performance of the operation was contingent upon payment of the extra fees. These charges were not evenly distributed among all abortion patients, but affected most of those women who were young, were less well educated, or were newcomers to Canada;

(viii) women are leaving the country to obtain abortions – for every five women who obtained an abortion in Canada, at least one woman left the country for this purpose. About 9600 Canadian women obtained induced abortions in 1975 in the United States. Relatively few Canadian women went to other countries for the operation. Seven out of eight women in a small group of Canadian women surveyed who had abortions in the United States would have preferred to have had an abortion in Canada, if they had known or had been told this option was available. Over half of these women said that their doctors felt they had little chance of getting an abortion in Canada, were morally opposed to assisting them, or were unwilling to refer them to a hospital where this procedure was done in Canada;

(ix) special treatment centres are beneficial – there were fewer risks for patients at hospitals which had developed considerable specialization in doing therapeutic abortions. When this situation has occurred in the treatment of other health conditions in Canada it has on occasion resulted in the establishment of special treatment centres. This trend toward the specialization of abortion treatment has already partly evolved, although it has not been formally recognized by hospitals or provincial health authorities;

(x) family planning information is lacking – Canadians lack accurate information about contraception. In terms of the allocation of public effort and resources, family planning has been only modestly supported. More money is spent on paying for the treatment and care of women who have induced abortions than on ways of seeking a reduction in the number of abortions, and in providing more effective programmes of family planning and sex education. Existing sex education courses in schools, the work of public health programs and the efforts of voluntary associations when considered together have had little impact on the population as a whole;

(xi) statistics concerning abortion are inadequate – the classification system for abortion requires extensive review in light of the different purposes for which information is compiled.

There were almost as many abortions in Canadian hospitals which were classified under other headings as there were therapeutic abortions. These other abortions varied considerably in number among regions and different types of hospitals. Information is required about the use of contraceptive methods and the volume of induced abortions. Greater use could be made of much of the information collected which is neither fully analyzed nor made public. Fuller analysis of existing sources would provide more information for the public on the operation of the abortion law and the health consequences of abortion.

(C.L.B. April 1977 pp.254-258)

Sexual offences

The Law Reform Commission of Canada has published Report No. 10 on "Sexual Offences". The Commission reiterates the view put forward in Working Paper No. 22 on the subject [noted at (1978) 4 C.L.B. 962] that the part of the Canadian Criminal Code dealing with sexual offences is in urgent need of reform, and notes that consultations had proved that there was total agreement on the validity of the proposition that the reform of the law in this area should be based on these three fundamental principles (upon which the present

recommendations were based)—(a) protecting the integrity of the person, (b) protecting children and special groups and (c) safeguarding public decency.

(C.L.B. April 1979 pp.431-433)

NEW ZEALAND

Law of rape—D.P.P. v. Morgan

The Criminal Law Reform Committee has presented a report to the Minister of Justice on "the decision in *DPP* v. *Morgan*, a rape case". In that case the House of Lords, by a majority, held that if a person accused of rape honestly believed that the woman was consenting to intercourse he should not be convicted even where his belief was not based on reasonable grounds.

This ruling was subject to much criticism at the time and was described by some as tantamount to a "rapists charter". The Committee rejects this criticism and considers that the presence or absence of reasonable grounds for the accused's belief is a matter to which the jury will be directed to have regard in determining whether the accused honestly believed that the woman was consenting.

The Committee takes the view that the law as stated by the majority in Morgan's case is also the law in New Zealand. However, the Committee considers that it would be helpful to amend s.128 of the Crimes Act 1961 New Zealand so that the statutory definition of rape includes the mental element nec- to the offence. In particular, this would make it quite clear that recklessness as to whether a woman is consenting is sufficient to attract criminal liability.

(C.L.B. October 1980 pp.1297-1298)

UNITED KINGDOM - ENGLAND AND WALES

Sexual offences

The Criminal Law Revision Committee has reviewed the law relating to and penalties for sexual offences and issued a Working Paper which is expected to serve as a basis for further discussion of the subject.

Following the reference to it of sexual offences, the Committee states that it became necessary for an important provisional decision to be made at the beginning of its deliberations, namely, to what extent the criminal law should reflect the fact that certain kinds of sexual conduct are commonly thought to be morally wrong or an outrage to public standards of decency. Explaining the approach adopted by it, the Committee states—

We have tried to bear in mind that what was commonly thought to be morally wrong in one age may not be so in another: and sexual acts which by common consent called for legal sanctions at one time may not be regarded in the same way a century, or even a decade, later. The converse is also true. Buggery was not established as a statutory offence until the reign of Henry VIII and ceased to be one for consenting adult males in private in 1967. Incest did not become a crime in England and Wales until 1908. Sexual intercourse outside marriage has always been contrary to Christian morality but has only been a crime when the female has been below a certain age, and that age has varied from 12 in the 13th century to 16 at the present time. It is however pertinent to point out that until comparatively modern times many kinds of sexual misconduct were dealt with by the ecclesiastical courts. This problem had to be considered and resolved by the Committee on Homosexual Offences and Prostitution (the Wolfenden Committee). They asked themselves what was the function of the criminal law in the field of sexual conduct and concluded that it was—"to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence".

They went on to say—"It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined".

We have attempted to follow the same approach.

The Working Paper sets out the following provisional conclusions and invites comment—

Rape and allied offences

(i) The offence of rape should remain substantially in its present form and punishable with a maximum of life imprisonment, but sexual intercourse induced by threats (other than threats of force) or other intimidation or by fraud should not be rape. Procuring sexual intercourse by threats or fraud should, however, be punishable with a heavy penalty under the offences mentioned in paragraph (viii) below.

(ii) The presumption that a boy under 14 is incapable of having sexual intercourse (and therefore of committing rape) should be abolished.

(iii) The offence of rape should be extended to enable a prosecution of rape to be brought in all cases where a man has sexual intercourse with his wife without her consent, whether they are cohabiting or not. A prosecution for marital rape should need the consent of the Director of Public Prosecutions.

(iv) The offence of rape should not be extended to cover other forms of vaginal penetration or any form of oral or anal penetration.

(v) No special provision should be introduced to make evidence of a man's previous convictions for sexual offences admissible against him on a charge of rape: such evidence should be admissible only where it now is under the present law.

(vi) Two degrees of rape, punishable with different maximum penalties, should not be created.

(vii) The offences under ss. 2 and 3 of the Sexual Offences Act 1956 (procuring a woman by threats or intimidation or by false pretences respectively to have unlawful sexual intercourse in any part of the world) should be retained in substantially the same terms as at present. If, as we provisionally propose, unlawful sexual intercourse induced by threats (other than threats of force) or other intimidation or by fraud should not be rape,

the present maximum of two years' imprisonment for these offences should be increased to five years.

(viii) The offence under s. 4 of the Act of 1956 of administering to a woman any drug, matter or thing with intent to stupefy or overpower her so as to enable any man to have unlawful sexual intercourse with her should be extended to protect males as well as females and to cover all sexual acts, including homosexual acts.

Non-consensual buggery

(ix) Non-consensual buggery on a man or woman should be retained as a separate offence and not merged with rape or indecent assault.

(x) The maximum penalty for all forms of non-consensual buggery should be life imprisonment.

Indecent assault

(xi) The maximum penalty for all forms of indecent assault should be five years' imprisonment.

(xii) Two degrees of indecent assault, punishable with different maximum penalties, should not be created.

Sexual intercourse with young girls

(xiii) There should continue to be two offences of unlawful sexual intercourse with young girls, the more serious being with a girl under 13, the less serious being with a girl under 16.

(xiv) It should be a defence to unlawful sexual intercourse with a girl under 16 that the defendant believed that he was lawfully married to her.

(xv) It should be a defence to unlawful sexual intercourse with a girl under 16 or with a girl under 13 that the defendant believed her to be aged 16 or over.

(xvi) An honest belief, as opposed to a belief on reasonable grounds, should be sufficient for the defences proposed in paragraphs (xiv) and (xv) above and for all other defences proposed in this Working Paper. The burden on the defendant of establishing those defences should be evidential only.

(xvii) We reject the suggestion that a man should not be guilty of unlawful sexual intercourse unless there is some fixed age difference (say four years) between the parties: nor should it be material to liability that the girl took the initiative.

(xviii) The maximum penalty for unlawful sexual intercourse with a girl under 16 should continue to be two years' imprisonment. Where a girl is under 13 it should remain at imprisonment for life.

Consensual buggers

(xix) Consensual anal intercourse between a man and a woman should no longer be an offence where the woman has reached a specified age. We invite comment upon whether the age should be 16 or 18.

(xx) Consensual anal intercourse by a male with a female below the minimum age or with another male below the minimum age should continue to be a separate offence called "buggery" and should not be merged with the offence which we are proposing of gross (or serious) indecency.

(xxi) Buggery with a boy or girl under 13 should be punishable with life imprisonment. Where the boy or girl is aged 13 or over but is under the relevant minimum age for buggery the maximum penalty should be five years' imprisonment.

Indecency with the young

(xxii) The age of consent for acts of sexual indecency (subject to our proposals above for buggery) with a girl should remain at 16.

(xxiii) Consensual conduct with a girl under 16 which is now punishable

under section 14 of the Act of 1956 as indecent assault and indecent conduct with or towards a child under 14 which is punishable under section 1 of the Indecency with Children Act 1960 should be punishable under the following scheme—

It should be an offence—

(a) to commit an act of gross indecency with or towards a girl under 13 or to incite her to such an act; or

(b) to commit an act of gross indecency with a girl between 13 and 16;

We invite comment on whether the offence should be drafted in terms of "serious indecency" rather than "gross indecency".

(xxiv) The maximum penalty for the offence with a girl under 13 should be five years' imprisonment. Where the girl is between 13 and 16 it should be two years' imprisonment.

(xxv) The scheme set out in paragraph (xxiii) above should also apply to acts of gross (or serious) indecency with boys under 16, the same maximum penalties being applicable.

(xxvi) If the minimum age for homosexual relations between males is to be reduced from 21 to 18, as the Policy Advisory Committee on Sexual Offences have provisionally proposed in their Working Paper, there should be an offence of gross indecency between males, similar to section 13 of the Act of 1956, where one or both parties is below 18, in order to protect young men aged between 16 and 18. The maximum penalty for this offence should be two years' imprisonment. A man aged 18 or over should have a defence if he believes that the other man is also aged 18 or over.

(xxvii) It should be a defence to the proposed offence of indecency with a girl under 16 that the defendant believed that he was lawfully married to her.

(xxviii) It should also be a defence to the proposed offence of indecency with a boy or girl under 16 that the defendant believed that the victim was over 16.

Sexual relations with severely subnormal men and women

(xxix) In place of the existing offences penalising sexual relations with the severely subnormal consideration should be given to the establishment of a scheme along the following lines—

A person responsible for a defective, male or female, should be able to apply to a county court for a non-molestation order which would in effect prohibit a named man from associating with the defective. Breach of the order should constitute contempt of court.

The criteria relevant to the making of an order might be—

(a) whether the man against whom the order is to be made is likely to have sexual relations with the defective or has already done so; and

(b) whether either—

  (i) the defective is likely to suffer harm from having sexual relations with this particular man, or

  (ii) the defective is incapable of giving or withholding consent to sexual relations.

We should be grateful for comment on the practicability and desirability of such a scheme.

Incest

(xxx) We invite comment on whether incest between father and daughter should remain an offence at all ages or only where the daughter is below a specified age; and, if the latter, whether the age should be 18 or 21.

(xxxi) We invite comment on whether incest between brother and sister should remain an offence at all ages or only where one of the parties is below a specified age; and, if the latter, whether the age should be 18 or 21.

(xxxii) Incest between mother and son and grandfather and granddaughter should remain an offence subject to any age which may be specified in respect of paternal incest.

(xxxiii) A party to incest below an age to be specified (possibly 18) should be exempted from criminal liability. The exemption should not apply to incest between brother and sister.

(xxxiv) It should be an offence for a man to have sexual intercourse with his legally adopted daughter under 18 but the offence should not extend to step children or *de facto* adopted children.

(xxxv) All types of incest, including incest between brother and sister, should remain triable on indictment only.

(xxxvi) The maximum penalties for incest, namely life imprisonment where a man commits the offence with a girl under 13 years and seven years in all other cases, should be retained.

(xxxvii) The name incest should be retained to describe any offence that remains (excluding any offence under paragraph (xxxiv) above).

Sexual acts in public

(xxxviii)(a) Consideration should be given to the creation of an offence penalising sexual intercourse (with a member of the same or the opposite sex), or gross (or serious) indecency with another person, in circumstances where the act is likely to be seen by others to whom it would be likely to cause serious offence;

(xxxviii)(b) Alternatively the act should be likely to be seen by "members of the public" and be likely to cause serious offence, "members of the public" being defined so as to include occupiers of neighbouring premises;

(xxxviii)(c) If the form of provision described in sub-paragraph (b) above were chosen, the ingredient of causing serious offence might be dispensed with and the offence simply be defined in terms of having sexual intercourse or doing an act of gross (or serious) indecency with another person in circumstances where the act is likely to be seen by "members of the public";

Whichever formula is adopted it should be necessary to prove that the defendant knew that his conduct was likely to be seen by others or was reckless as to that. The offence should be punishable with 12 months' imprisonment and triable either way.

(xxxix)(a) If the form of provision described in sub-paragraph (a) or (b) of paragraph (xxxviii) above were chosen (under which a likelihood of causing serious offence would have to be established), consideration should also be given to the creation of an offence penalising any person who, whether alone or with another person, engaged in acts of gross (or serious) indecency in the presence of others on premises of common resort;

(xxxix)(b) If the form of provision described in sub-paragraph (c) of paragraph (xxxviii) above were chosen (under which it would not be necessary to establish a likelihood of causing serious offence), the "common resort" provision in sub-paragraph (a) of this paragraph would not be needed provided that it were made clear that "members of the public" included persons admitted to the premises of a club.

(xl) As an alternative to the offences described in the previous two paragraphs, homosexual conduct (i.e. buggery and gross indecency) should remain punishable as such where it occurs in public, or where it occurs in private and more than two persons take part or are present, as under section 1(1) and (2)(a) of the Sexual Offences Act 1967. It is for consideration whether in that event section 1(2)(a) could be relaxed by an exception for acts occurring "on a domestic and private occasion". Heterosexual conduct in

public should be dealt with by a provision along the lines of the offence proposed by the Law Commission.

(xli) Homosexual acts between males in a lavatory to which the public have or are permitted to have access, including such acts in cubicles, should continue to be offences and should be punishable with 12 months' imprisonment and triable either way.

Consensual homosexual acts between women (lesbian acts)

(xlii) It should remain an offence for a woman to commit a homosexual act with a girl under 16 but the criminal law should not be extended to consensual homosexual acts between women aged 16 or over.

Abduction

(xliii) Sections 17, 19 and 20 of the Act of 1956 should be repealed and replaced by an offence of abduction of a girl under 16 from her parent or guardian against his will with intent to have sexual intercourse with her. It should be a defence that the defendant believed her to be aged 16 or over.

Bestiality

(xliv) The offence of buggery with an animal should be renamed bestiality. It should be punishable with six months' imprisonment and triable summarily only.

(xlv) It should be an offence, punishable with five years' imprisonment and triable either way, to procure a person to commit bestiality.

(C.L.B. January 1981 pp.178-183)

UNITED KINGDOM - SCOTLAND

Incest

The Scottish Law Commission has published a Report entitled *The Law of Incest in Scotland* (No. 69: Cmnd 8422: HMSO £4.80). The Report canvasses the reasons for the retention of incest as a crime, the scope of the offence, alternatives to punishment and prosecution and penalties, procedure and evidence, and concludes that—

(i) Incest should be retained as a separate criminal offence.

(ii) The present definition of incest, requiring penetration, should be retained and should not be extended to other forms of sexual misconduct.

(iii) The prohibition against incest should extend to the following relationships based on consanguinity:
  (i) parents and children;
  (ii) grandparents and grandchildren;
  (iii) great-grandparents and great-grandchildren;
  (iv) brothers and sisters;
  (v) uncles and neices, aunts and nephews,
  regardless of whether the relationship is of the full blood or of the half blood.

(iv) The illegitimate child should be placed with regard to incest in the same position as the legitimate child.

(v) Sexual intercourse between an adopted child (or former adopted child) and an adoptive parent (or former adoptive parent) should be characterised as incest.

(vi) The crime of incest should not be constituted by intercourse between a person and the relatives of his or her spouse.

(vii) It should be a separate offence for any step-parent or former step-parent to have sexual intercourse with his or her step-child under the age of 16 years.

(viii) If any person over the age of 16 years is in a position of trust or authority in relation to a child under the age of 16 years and is a member of the same household, it should be a criminal offence for that person to have sexual intercourse with the child.

(ix) (a) Where relationship or age is a relevant factor, it should be a defence to the charge that the accused did not know of, and had no reason to suspect, the relationship of the other party, or believed on reasonable grounds that the other party was of or over the age of 16;

(b) it should be a defence to the charge that the accused did not consent to have sexual intercourse or to have sexual intercourse with the other party.

(x) It should be competent to prosecute incest and the offences contained in Recommendations (vii) and (viii) on indictment in the High Court and Sheriff Court and, on the direction of the Lord Advocate, on a summary complaint in the Sheriff Court.

(xi) The maximum penalties for incest and for the offences contained in Recommendations (vii) and (viii) should be as follows (a) on indictment in the High Court—life imprisonment; (b) on indictment in the Sheriff Cort, (unless remitted to the High Court for sentence)—two years imprisonment; (c) on summary conviction in the Sheriff Court—three months imprisonment.

(xii) Provision should be made to require the court, before passing sentence on a person convicted of incest or of an offence mentioned in Recommendation (vii) or (viii), to obtain a social enquiry report about that person's circumstances and to take into account that report and any other information before it which is relevant to his character and condition.

(C.L.B. April 1982 pp.643-644)

UNITED KINGDOM

Prostitution and allied offences

The Criminal Law Revision Committee has published its *Working Paper on Offences relating to Prostitution and Allied Offences* (HMSO: £4.30).

On 8 July 1975 the then Home Secretary, the Rt Hon. Roy Jenkins, asked the Committee to review, in consultation with the Policy Advisory Committee on Sexual Offences, the law relating to, and penalties for, sexual offences. It was made clear that it was being asked to look into offences connected with prostitution as well as other sexual offences.

The Committee decided to tackle the task in two stages. First, it sought observations from interested persons and bodies on offences other than those relating to prostitution. With the benefit of their advice and especially that of the Policy Advisory Committee, it published in November 1980 a Working Paper containing provisional proposals for sexual offences other than those relating to prostitution.

Whilst that Working Paper was in the course of preparation, it sent out a detailed questionnaire to all those persons and bodies whom it thought able to assist with information about prostitution and suggestions as to how the criminal law on prostitution should be formulated. It received a

great deal of information and advice in response to that invitation. It was now ready to seek, within the more formal structure of a Working Paper, comments on a number of proposals for reforming the law on prostitution. It had consulted the Policy Advisory Committee very closely at all stages before the issue of this Paper. Their advice had been invaluable.

This was the fourth Committee in fifty years to be asked to report upon the law relating to the practice of prostitution. The first, the Street Offences Committee, was set up in 1927 under the chairmanship of Mr Hugh Macmillan, KC, (later to become Lord Macmillan). It reported in 1928. The second, under the chairmanship of Sir John Wolfenden (later Lord Wolfenden), was given its terms of reference, which included the law and practice relating to homosexual offences, in 1954. Its report, presented to Parliament in 1957, has become known as the Wolfenden Report. The third was the Home Office Working Party which reported in 1976.

Each time, the task of persons charged with reviewing the law had become more difficult. Yet, with the important exception of street offences, the law on prostitution today was substantially as it was at the beginning of this century. The Sexual Offences Act 1956 gives a spurious air of modernity to the relevant legislation. In fact, it merely consolidated the earlier enactments with minor corrections and improvements but without substantive amendment. What makes the situation worse is that in some instances judicial decisions have given a wider meaning to the statutory language and in others a narrower one than the words bear in ordinary English usage. For example, a newsagent who takes money from a prostitute for placing a card advertising her services in his window might be committing the offence (punishable with 7 years' imprisonment) of living in part on the earnings of a prostitute, an offence that is more obviously aimed at the prostitute's ponce. Again, the way that the courts have extended the notion of a brothel may be thought not to accord with most people's idea of what a brothel is. Whatever else is required the present law is plainly in need of a revision in which the elements of the relevant offences are stated clearlv and in modern terms.

The Committee invites comment on all aspects of the law relating to prostitution which are discussed in the paper. The following are the principal proposals on which comment is particularly invited.

Assisting and profiting from the prostitution of others

(1) Sections 30 and 31 of the Sexual Offences Act 1956 (man living on earnings of prostitution and woman exercising control over prostitute respectively) should be repealed and replaced by more detailed provisions dealing with behaviour that ought to be expressly prohibited by the criminal law.

(2) It should be an offence for a person for gain to exercise control or direction over a prostitute or to organise prostitution.

(3) We invite comment on whether it should be an offence:

(a) for a person knowingly to publish an advertisement of the services of a prostitute;

(b) for a prostitute to conduct her own advertising.

(4) We invite comment on whether it should be an offence to arrange or facilitate knowingly and for gain a contract for prostitution.

(5) We invite comment too on whether, as most of our members consider, other offences adequately cover the ground so that it is unnecessary specifically to penalise poncing where the ponce plays no part in the prostitution. Some of our members, however, would continue to penalise poncing as a relatively minor offence. If an offence is retained all agree that the first part of the presumption in s. 30(2) of the 1956 Act (defendant living with or habitually in company of a prostitute) should be retained).

(6) The offences proposed in paragraphs (2) and (4) above should be triable either way and punishable on indictment with imprisonment for five years and two years respectively. Any offences along the lines of those suggested in paragraphs (3) and (5) above should be triable summarily only and punishable with six months' imprisonment or a fine substantially above £1,000 or both.

(7) Sections 33 to 36 of the 1956 Act should be replaced by a scheme of offences, which makes no reference to brothels as such, broadly along the following lines. It should be an offence:—

(a) to manage or act or assist in the management of premises or other accommodation in connection with their use, in whole or part, for the purpose of prostitution;

(b) to let the whole or part of premises or other accommodation for use, in whole or part, for the purpose of prostitution, or to be knowingly a party to such a use continuing;

(c) for the tenant or occupier or person in charge of any premises or other accommodation knowingly and habitually to permit their use in whole or part for the purpose of prostitution.

These offences would not apply in the case of premises used for prostitution by not more than two prostitutes having their home there. It will be necessary, however, to ensure that the "nest of prostitutes" remains illegal.

(8) The common law offence of keeping a brothel should be abolished.

(9) The offences proposed in paragraph (7) above should be triable either way and punishable with two years' imprisonment on conviction on indictment.

(10) We would be particularly grateful for information on how section 35(2) of, and Schedule 1 to, the 1956 Act work in practice and for comments on our proposal that they should be repealed and replaced merely by a provision implying in all leases a covenant against immoral user.

Street offences

(11) Section 1(1) of the Street Offences Act 1959 should not be amended to require proof of annoyance.

(12) We do not propose the introduction of an element of persistence into the offence.

(13) The word "common" should be removed from the expression "common prostitute" but we are divided upon whether the words "being a prostitute" should be removed.

(14) We invite comment on the worth of the cautioning system and whether it should be retained.

(15) Any offence along the lines of s. 1 of the 1959 Act should retain the element of "loitering".

(16) The offence should continue to apply to loitering or soliciting in a street involving the participation of a prostitute (including cases where she is visible from inside her house) but it should not be extended to the use of red lights, model signs or similar forms of advertising. These form part of a proposal mentioned in paragraph (3) above.

(17) We invite comment on the penalties, other than imprisonment, for street soliciting.

(18) There should continue to be an offence along the lines of s. 32 of the 1956 Act penalising male homosexual soliciting, whether by a prostitute or not.

(19) It should be made clear that the offence extends to any soliciting for a homosexual purpose rather than to soliciting "for immoral purposes", the meaning of which has been held to be a question of fact. There should continue to be no requirement on the prosecution to prove annoyance. The requirement that soliciting should be persistent should remain.

(20) The present maximum penalty of two years' imprisonment under s. 32 of the 1956 Act is too high for homosexual soliciting. The offence should be punishable with only one month's imprisonment (or made non-imprisonable altogether) and become triable summarily only, although some of us would retain it as triable either way. A cautioning system should not be introduced for this offence.

(21) The nuisance caused by men accosting women for sexual purposes arises principally from kerb-crawling. We propose three offences to deal with kerb-crawlers. It should be an offence:—

(a) for a man to accost a woman from a motor car for sexual purposes so as to put her in fear;
(b) for a man to accost a woman from a motor car for sexual purposes so as to cause her annoyance;
(c) for a man to accost a woman from a car for the purpose of prostitution.

(22) The offences proposed in paragraph (21) above should all be triable summarily only, the first being punishable with three months' imprisonment or a fine of £1,000 or both, the other two with one month's imprisonment or the same fine or both.

A fresh approach?

(23) We do not favour proposals for empowering local authorities to designate areas either as ones where a stricter legal regime is to operate against prostitution or as ones where the general law is relaxed.

(24) Nor do we favour the licensing of brothels.

Procuration

(25) Offences along the lines of s. 22(1) of the 1956 Act should be retained, namely:—

(a) procuring a woman to become, in any part of the world, a common prostitute;

(b) procuring a woman to leave the United Kingdom intending her to become an inmate of or frequent a brothel elsewhere;
(c) procuring a woman to leave her usual place of abode in the United Kingdom, intending her to become an inmate of or frequent a brothel in any part of the world for the purposes of prostitution.

(26) It should continue to be an offence as under s. 23 of the 1956 Act to procure an under-age girl to have sexual intercourse in any part of the world with a third person. The current age limit of 21 should be reduced to 18 but any change should await a revision of our international obligations in this respect.

(C.L.B. April 1983 pp.541-546)

Prostitution in the street

The Criminal Law Revision Committee (a standing committee to examine such aspects of the criminal law of England and Wales as the Home Secretary may refer to it from time to time) has recently published its Sixteenth Report (Cmnd 9329, HMSO, £4) on the subject of *Prostitution in the Street*.

In 1980 the Committee issued a working paper inviting public comment on sexual offences, and similarly in 1982 issued a working paper on prostitution. Its report on sexual offences was published in April 1984 (reported in 10 CLB 1239). While in the final stages of that report, the Committee was asked to consider and publish a short report dealing with the nuisance of kerb crawling in advance of its full report on prostitution. Kerb crawling was seen as only one aspect of the problem, and as the Committee has done here, has covered all aspects of street prostitution and male soliciting in one report.

The recommendations of the Committee, as summarised in the report, are as follows—

Women and street prostitution

1. **Section 1(1) of the Street Offences Act 1959 should be retained as it is with the deletion of the word "common" from the expression "common prostitute". Accordingly, it should be an offence for a woman being a prostitute to loiter or solicit in a street or public place for the purpose of prostitution**
2. **The formal recording of cautions for use in evidence when the woman had not admitted when cautioned that she had been soliciting should be discontinued, although the police should not be discouraged from cautioning a woman informally or from administering a formal caution after admission of guilt.**
3. **The operation of the 1959 Act should not be extended to cases where both prostitute and client are in a building, whether the building is open to the public or not.**
4. **The power of arrest in s. 1(3) of the 1959 Act should be retained.**
5. **All offences under the 1959 Act should be punishable with a fine at level 3 on the standard scale.**

The accosting of women

6. It should be an offence for a man to use a motor vehicle in a street or public place for the purpose of soliciting a woman for prostitution.
7. It should be an offence for a man in a street or public place persistently to solicit a woman or women for the purpose of prostitution.
8. It should be an offence for a man to solicit a woman for sexual purposes in a manner likely to cause her fear.
9. The above offences should be triable summarily only and punishable with a fine at level 3 on the standard scale in the case of 6 and 7 and at level 5 in the case of 8.

Homosexual soliciting

10. It should be an offence for a man persistently to solicit in public place another man or men for sexual purposes.
11. The above offence should be punishable with three months' imprisonment and possibly triable either way as an exception to the scheme introduced by the Criminal Law Act 1977.

(C.L.B. October 1984 pp.1688-1689)

Evidence

AUSTRALIA - WESTERN AUSTRALIA

The competence and compellability of husband and wife to give evidence in criminal proceedings

The Law Reform Commission has considered and reported on the law as to the competence and compellability of husband and wife to give evidence in criminal proceedings. It recommends –

(i) at present, the spouse of an accused is a competent witness (i.e. he or she is not disqualified from giving evidence) for the prosecution and the defence in all criminal proceedings. The law in this respect should not be altered;

(ii) the law as to the compellability of a spouse of an accused to give evidence for or against the accused is not as clear. The general rule is that the spouse cannot be compelled to give evidence. However, there are exceptions to this rule, but their true extent is uncertain. A spouse is certainly compellable in respect of specific offences, mainly of a sexual nature, or relating to the taking advantage of females, or involving the property of the spouse of the accused. The spouse may possibly be compellable when the accused has been charged with an offence against the person, health or liberty of his or her spouse and in the case of offences tried summarily. The Commission has considered the two opposing interests at issue when considering compellability, namely the interest of

society in the detection and punishment of offenders, and the interest of society and of the parties to a marriage in preserving marriage and its confidential nature. In the absence of reliable information as to the effect of compellability on the preservation of marriage and on the interests of society, the Commission does not consider that the law should go so far as to provide for compellability in all cases or non-compellability in all cases.

(iii) the spouse of an accused should be compellable to give evidence on behalf of an accused in all cases, unless jointly charged with the accused;

(iv) the interest of society in the detection and punishment of those who commit serious sexual offences and offences involving personal violence or harm (including attempts or offences which include as an element the threat or fear of personal violence) justifies compellability of the spouse. While the spouse of an accused is compellable at present in the case of most serious sexual offences, the spouse of an accused is compellable only in the case of a few offences involving personal violence or harm;

(v) any extension of compellability into the area of offences against property is not justified at this stage. The law could be further reviewed in the light of experience with the changes proposed by the report.

The Commission considered giving the court a judicial discretion to order compellability in special cases should the interest of justice require it, instead of specifying the offences for which the spouse is compellable. The Commission concluded that the discretion alternative had defects, the principal one being that of uncertainty, in that neither the prosecution nor the defence would be able to plan their case.

The report also deals with such other related matters as –

(a) whether communications between spouses should remain privileged (i.e. whether the spouse should continue to be able to refuse to disclose communications made *to* him or her *by* his or her spouse):

(b) whether where two persons are jointly charged one should be able to compel the spouse of the other to give evidence;

(c) what effect a dissolution of a marriage or the separation of spouses should have on the rules as to non-compellability; and

(d) whether the prohibition on comment by the prosectuion on the failure of the defence to call the accused's spouse should be lifted.

The Commission's recommendations in regard to these matters are –

(i) privileged communications between spouses should extend to communications made *by* the witness spouse *to* his or her spouse, as well as to statements made *to* the witness spouse *by* the other spouse. But the privilege should not apply to offences in respect of which the spouse is compellable (this is the present law);

(ii) as to (b), the co-accused should be able to compel the spouse of the other accused to give evidence just as if the co-accused had been tried separately (this would probably change the present law);

(iii) if a marriage has been dissolved, the spouses should be compellable to give evidence as if they had never been married. As to separated spouses, the present law is that the rule as to non-compellability applies. On balance, this rule should remain, otherwise the law would be uncertain and the possibility of a reconciliation reduced;

(iv) as to (d), the prohibition against comment by the prosecution should be lifted. This is in line with the recommendation of the English Criminal Law Revision Committee.

(C.L.B. January 1977 pp.132-133)

AUSTRALIA - SOUTH AUSTRALIA

Spouse witnesses in prosecutions for causing death or serious injury to children

The Law Reform Committee of South Australia has published a Report "Relating to the Competence of Spouses as Witnesses in Criminal Prosecutions for Injuries Causing Death or Serious Bodily Injury to Children" (45th Report). The Attorney-General's Reference concerned the problem which arises in criminal prosecutions for what is colloquially called "baby bashing" because spouses who are often the only eye witness of the affair are neither competent nor compellable witnesses in prosecutions laid under the State's Criminal Law Consolidation Act.

The Reference had arisen as the result of a communication from the State Coroner to the Attorney-General stating that he was unable to commit a man for prosecution for manslaughter in a "baby bashing" case because his spouse who was the only other eye witness refused to give evidence and her refusal had to be upheld. The Coroner had informed the Committee that there were other cases which had arisen during his period of office where a committal was not possible because of the operation of the rule.

The Report reviews the present state of the law, and its historical basis and development. The result of the present law was that if the

parties were married, a spouse could indulge in "baby bashing" with little fear of prosecution for an offence (otherwise than under s. 82e of the Community Welfare Act) if the other spouse was the only witness because of the spousal immunity. If on the other hand the parties were living together in a de facto relationship, either party to that relationship was both competent and compellable as a witness in a "baby bashing" prosecution.

In the case of a prosecution under s. 82e of the Community Welfare Act (against a person having the care, custody, control or charge of a child, who maltreats or neglects the child, or causes the child to be maltreated or neglected, in a manner likely to subject the child to unnecessary injury or danger) the appropriate regional panel must give their approval before a complaint can be laid but if consent is given and the complaint comes on for hearing the spouse witness is both competent and compellable. If an indictment is filed charging an offence under the provisions of the Criminal Law Consolidation Act, no approval is required but the spouse witness is not compellable nor in some cases (depending on the charge laid) even competent.

As regards this anomaly, the majority of the Committee (the Chairman dissenting) felt that they lacked the necessary expertise to make a positive recommendation, but suggested the problem could be solved in one of three ways—

(a) by requiring that approval be given by the panel before a charge for an offence can be laid in any Court;
(b) to remove the requirement for approval by the panel before the laying of a complaint under s. 82e of the Community Welfare Act;
(c) to provide that the panel review all cases of child injuries of this kind and make recommendations for or against prosecution in all cases but that if the recommendation is against prosecution, the Attorney-General be enabled, notwithstanding the recommendation, to direct the laying of a prosecution, where a public interest in his opinion requires it, in the case of death or serious bodily harm caused to a child.

The Committee recommends that the recommendation contained in the Third Report (on Court Procedure and Evidence) of the Criminal Law and Penal Methods Reform Committee of South Australia, to the effect that spouses should be compellable as well as competent witnesses in all cases of assault on a child under 16, should be adopted.

(C.L.B. July 1979 pp.801-802)

Evidence of adultery

Section 9 of the Manitoba Evidence Act protects witnesses and parties in Manitoba from being compelled to admit their adultery in any legal proceedings. In an informal report the Law Reform Commission of Manitoba has recommended the abolition of this privilege, with the proviso that any legislation adopting this recommendation should only apply to prospective proceedings. It would not be fair to abolish privilege in cases where the parties had relied on the privilege in the preparation of their defence.

(C.L.B. October 1980 p.1306)

UNITED KINGDOM - SCOTLAND

Law of Evidence in Scotland

The Scottish Law Commission has published Memorandum No. 46, on the "Law of Evidence", summarising a research paper on the subject which had been prepared for it by Sheriff I. D. MacPhail [the research paper was noted at (1979) 5 C.L.B. 1195].

In an introduction it is pointed out that the summary, which runs to over 200 pages, is to be read in conjunction with the research paper, itself running to over 800 pages, and is intended only as a consultative document.

In approaching the subject the Commission proceeded on the basis that although condification of the law of evidence was an eventual objective the procedural framework within which evidence is elicited in Scottish courts, will remain largely as at present and it was guided by the following principles which it considered should govern any discussion of the law of evidence—

(i) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
(ii) As a general rule all evidence should be admissible unless there is a good reason for it to be treated as inadmissible.
(iii) Where a report of an event has been committed contemporaneously to writing in the ordinary course of a person's work, that writing should be given evidential value.
(iv) Every person should be both a competent and compellable witness unless there is some good reason to the contrary.
(v) The rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary.

Different aspects of the law of evidence were examined under the following main headings—

(i) judicial knowledge,
(ii) competence and compellability of witnesses,
(iii) the examination of witnesses,
(iv) the recording of evidence,
(v) written statements in lieu of oral evidence,
(iv) public documents and judicial records,
(vii) real evidence,

(viii) reference to oath,
(ix) the admissibility of extrinsic evidence in relation to documents,
(x) the admissibility of evidence on collateral issues,
(xi) opinion and expert evidence,
(xii) privilege,
(xiii) hearsay,
(xiv) the admissibility of evidence illegally or irregularly obtained,
(xv) the burden and standard of proof,
(xvi) corroboration.

In the summary the Commission draws attention to a comprehensive number of pertinent questions and makes proposals, on which comment and criticism are invited, in the following terms—

(lxv) A spouse should be a competent witness for the Crown in all cases.

(lxvi) With regard to the compellability of spouses should—

(a) the judge decide in each case whether the spouse is to be compellable or not,
(b) the spouse be compellable in all cases in which she is competent,
(c) the spouse be compellable only where the offence is serious, or cannot be proved without the spouse's evidence, or
(d) the present areas of compellability be extended with a view to the protection of the interests of children?

(lxvii) If a spouse is not entitled to decline to answer any questions should there be any sanction against failure to answer a relevant question?

(lxviii) Should the spouse be a compellable witness for the accused in all cases unless she is charged and tried with him?

(lxix) We propose that the evidence of a witness called on behalf of one accused should be competent evidence for or against another accused.

(lxx) Should the spouse of an accused be a competent witness for a co-accused with the spouse accused's consent in every criminal case?

(lxxi) The law relating to the fact that the spouse of a co-accused may not be called as a witness generally, should be rationalised.

(lxxii) Should the wife of an accused be competent to give evidence on behalf of a co-accused whether or not the accused is willing?

(lxxiii) Where there are two accused A and B, should Mrs A be compellable for B in all circumstances, or should she be compellable for B only in cases where she would be compellable on behalf of the prosecution?

(lxxiv) We propose that both the prosecution and a co-accused should be entitled to comment on the fact that the accused's spouse has declined to give evidence.

(C.L.B. January 1981 pp.201-219)

Evidence in cases of rape and other sexual offences

The Scottish Law Commission has published a Report (Scot. Law Com. No. 78) on *Evidence in Cases of Rape and other Sexual Offences*. The Report is concerned with the admissibility in trials of rape and other specified sexual offences of evidence concerning the character and sexual history of the alleged victim. In the Report, the 19th century cases which established the principles governing the admissibility of evidence of the character and sexual history of the alleged victim are examined. The Commission identifies areas of uncertainty in the development and application of these principles and conclude that the present law is unclear and out of touch with contemporary sexual attitudes.

The Commission's own summary of its recommendations is as follows:

(i) As a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time been of bad character, associated with prostitutes or engaged in prostitution.

(ii) As a general rule, in cases of rape and other sexual offences, the court should not admit questioning or evidence which shows or tends to show that a complainer has at any time engaged with any person in sexual behaviour not forming part of the subject-matter of the charge.

(iii) The prohibitions contained in Recommendations (i) and (ii) above should not apply to questioning or evidence adduced by the Crown.

(iv) Where questioning or evidence would be prohibited under Recommendation (ii), the court should admit such questioning or evidence where it is satisfied, on an application by or on behalf of an accused person, that it is necessary to explain or rebut evidence led or to be led otherwise than by or on behalf of that accused person.

(v) Notwithstanding the general prohibition contained in Recommendation (ii), the court should admit questioning or evidence concerning sexual behaviour involving the complainer and any person where it is satisfied, on an application by or on behalf of an accused person, that the evidence (a) relates to matters forming part of the *res gestae*, or (b) is relevant to a defence of incrimination.

(vi) Notwithstanding the general prohibitions contained in Recommendations (i) and (ii), the court should admit questioning or evidence relative to any matter prohibited under these Recommendations where the court is satisfied, on an application by or on behalf of an accused person, that it would be contrary to the interests of justice to exclude the questioning or evidence concerned.

(vii) Where otherwise prohibited questioning or evidence is admitted by the court, the court should have power at any time to limit as it thinks fit the extent of that questioning or evidence.

(viii) An application to lead evidence or to ask questions prohibited under Recommendation (i) or Recommendation (ii) should be made at any time during the course of a trial, and should be heard in the absence of the jury (if any), the complainer, any person cited as a witness, and the public.

(ix) Our recommended reforms to the laws of evidence should apply to the following offences in addition to rape itself, namely: attempted rape, sodomy or attempted sodomy, assault with intent to rape, indecent assault, indecent behaviour, including any lewd, indecent or libidinous practice or behaviour, and statutory offences under ss. 2, 3, 4, 5, 8 and 9 of the Sexual Offences (Scotland) Act 1974, ss. 96(1)(a) and 97 of the Mental Health (Scotland) Act 1960, and s. 80(7) of the Criminal Justice (Scotland) Act 1980 and, as appropriate, to cases where both the complainer and the accused are of the same sex.

(x) The foregoing recommendations should apply to cases tried on indictment and summarily.

A draft Evidence In Sexual Offences Bill is annexed to the Report.

(C.L.B. October 1983pp.1382-1383)

Family Law

AUSTRALIA - TASMANIA

Illegitimacy

The Tasmanian Government is planning to introduce legislation

designed to raise the status of illegitimate children. Under the proposals children born out of wedlock will be known as "ex-nuptial" children and will be placed on an equal footing with legitimate children in relation to claims of succession and family and family estates. The legislation will be made to operate retrospectively and will give an illegitimate child a means of proving the identity of his father before his fathers' death. Children will be able to apply to a court to have a blood test ordered. The test will not be conclusive evidence of paternity, and may be declined by the man concerned. However, a court will, in a case of refusal, be able to draw certain inferences from such refusal.

(C.L.B. October 1976 p.428)

Obligations and de facto relationships

The Law Reform Commission of Tasmania has presented a Report (No. 36) on "Obligations Arising From De Facto Relationships". The Report examines the case for and against granting rights to de facto spouses and compares the existing law in the State with that in force in some other Commonwealth jurisdictions. The Commission concludes that subject to certain specific safeguards, it is appropriate to legislate to relieve existing hardships and injustices in respect of such relationships. It is, however, emphasised that the Commission does not recommend the creation of a new de facto status, co-extensive with, or similar to, the status of marriage.

The following is a summary of the Report's recommendations—

(i) the Maintenance Act 1967 should be amended to enable a dependent man to claim against a woman in similar circumstances to those in which a dependent woman can claim against the man; and to allow a court, if satisfied that a dependency in fact exists and that special circumstances justify such a course, to give effect to the complaint even though the 12 months cohabitation period has not been established;

(ii) the Workers' Compensation Act 1927 should be amended in the following manner—

(a) that a definition of a 'dependent male' be incorporated in addition to 'dependent female' so that a male dependent can be paid benefits under the Act. The definition would be similar to the definition of 'dependent female', mutatis mutandis,

(b) that the definitions of both these expressions should not include the words italicized in the existing definition set out below—

"Dependent female' means a woman who for not less than three years immediately before the date on which the worker died, or sustained an injury or was disabled as the result of a disease, although not legally married to him lived with him as if she were his wife *on a permanent and bona fide domestic basis* (being a female who was, at that date, dependent wholly or in part upon the earnings of the worker).",

(c) that the period in the definition of 'dependent female' and 'dependent male' should be reduced from three years to 12 months, with a proviso giving the court power to order the payment of an appropriate benefit where the 12 months' cohabitation period has not been proved and special circumstances exist,

(d) that claims of competing dependents should be determinable in such proportions as may be agreed by the parties or, in default of agreement, by the court;

(iii) the Fatal Accidents Act 1934 and the Motor Accidents (Liabilities and Compensation) Act 1973 should be amended so that a partner in a de facto relationship is regarded as a member of the family; and the 12 months' qualifying period for cohabitation (with the court's power to reduce the period in special circumstances) should also apply;

(iv) the Testators Family Maintenance Act 1912 should be amended to enable provision to be made out of the estate of a deceased person on behalf of a partner in a de facto relationship; the same rules regarding the length of cohabitation and the court's discretion should apply. Where there are competing claims the court would have to balance the conflicting interests using criteria similar to those in s. 3 of the Inheritance (Provision for Family and Dependants) Act 1975 (of the U.K.);

(v) the Deceased Persons Estates Duties Act 1931 should be amended so that a de facto spouse who satisfies the rules earlier suggested would have rights similar to a widow or widower, and thus be liable to duty at a lower rate and be entitled to the relief afforded by the Act in the case of quick successions;

(vi) the new rights given to de facto spouses as a result of the Commission's proposals should start on a date to be fixed and should not be retrospective, except that for the purpose of computing the period of 12 months cohabitation to qualify for a dependency, it should be permitted to be wholly or partly immediately prior to the effective date of the Act, provided the whole period is a continuous one.

(C.L.B. April 1978 pp.345-347)

Class of claimants under fatal accidents legislation

The Law Reform Commission of Western Australia has published a Working Paper entitled "Fatal Accidents" (Project No. 66) following a Reference which asked it to consider and report on whether the State's Fatal Accidents Act of 1959 should be amended to widen the class of persons (including any posthumous child) entitled to claim, and to make provision for an amount to be awarded in the nature of a solatium.

The Commission reviews the state of the existing law and notes that the only persons entitled to damages under the Act are those who can show dependency and also establish that they are one of the classes of relatives designated by the Act—spouses, children, step-children, grandchildren, parents and grandparents.

The law in a number of other Commonwealth jurisdictions is examined and the Commission notes that the category of dependents who may claim has remained virtually unchanged since the legislation was adopted in the State in the middle of the last century but in 1959 legislation brought within the definition of "parent" and "child", persons related to the deceased illegitimately or as a result of adoption. The Commission's provisional view is that some extension would be justifiable and the paper discusses three possible approaches—

(a) by adding to the prescribed class,
(b) by extending the protection to any person who establishes a family relationship with the deceased,
(c) by extending the protection to any person whatever who can show that he was dependent upon the deceased.

If the prescribed class is to be widened, the Commission examines what classes of other relatives, for example, brothers and sisters, foster children, divorced spouses and de facto spouses should be added to the list.

As regards provision for a solatium, the Paper notes that under the present law (unlike the position in South Australia and the Northern Territory where there is such provision) a claim is limited to the recovery of economic or material advantages which the deceased would have provided to the surviving claimant had the deceased lived. Proposals for reform both within and outside Australia are reviewed and the arguments for and against discussed. The Commission reaches no firm conclusions on the matter and invites comment on this issue and on the other issues raised in the Paper.

(C.L.B. April 1978 p.347)

De facto relationships

The New South Wales Law Reform Commission has published a 120-page Issues Paper entitled *De Facto Relationships* in response to a reference from the State's Attorney-General. It observes that more and more legal problems associated with de facto spouses and their families are coming to the attention of the courts and of lawyers generally. In part this is because the number of people living in de facto relationships appears to be increasing. It also appears that de facto spouses are increasingly likely to bring disputes over such matters as property and custody before the courts. Whatever the explanation, judges are now commenting regularly on the increasing frequency with which they encounter the legal problems of de facto families.

There is also evidence of mounting dissatisfaction with the existing law. This dissatisfaction is often expressed by judges who consider that the law forces them to reach unjust results in particular cases. Usually (but not always) it is the woman who suffers hardship. For example, in one recent New South Wales case a woman had lived with a man as his wife for 20 years in his house, performing household tasks and caring for him in his illness. Her claim for a share in the house after the man's death failed because the court could not find evidence of a "common intention" that she should share the ownership of the house. The judge said that the case was one in which "injustice [resulted] from the failure of the law to adapt to changing patterns of cohabitation". In another case a woman lived with a man as his de facto wife for two years before his death. She provided him with substantial financial assistance, but the money had not been used for the acquisition or improvement of the house in question. The woman's claim to a share in the house failed, the judge observing that the existing law could cause "significant hardship".

Dissatisfaction with the current law is also reflected in the activities of law makers and law reform bodies. South Australia passed legislation in 1975 to improve the legal position of a de facto spouse whose partner has died. In 1977 the Tasmanian Law Reform Commission issued a report proposing important changes to the law of de facto relationships in that State. In New South Wales official agencies have pointed to defects in the existing law, including the failure of the law to provide adequate remedies for a de facto spouse threatened with domestic violence.

In the short period since the Commission received the reference, it had often heard it said that the question is whether the law should "recognise" de facto relationships. In fact, the law already recognises and regulates de facto relationships for a variety of purposes. This is true both of Commonwealth legislation (which applies throughout Australia) and State legislation, although there are important differences among the States. Examples are given to show the wide range of circumstances in which the law expressly recognises de facto relationships.

The Issues Paper compares the legal position of married couples (and their families) with that of de facto couples (and their families). The purpose of the comparison is not to suggest that the differences should necessarily be removed; there may be very good reasons for them. It is, however, essential to compare the legal position of married and de facto couples in order to isolate the policy questions requiring careful consideration. Some of the main differences under the law applying in New South Wales are as follows—

(a) The Family Law Act 1975 (a Commonwealth Act) gives the Family Court power to alter the property rights of husband and wife. The Court must take into account a number of matters set out in the Act, but it can decide future ownership of property according to what is "just and equitable", irrespective of which party has the formal title to the property. The Family Law Act does not apply to property disputes between de facto spouses. These disputes are decided under State law and that law does not give the court any discretion to alter the parties' property rights, even where the court thinks that an alteration is necessary to achieve fairness between the parties.
(b) The Family Law Act allows a court to make a maintenance order in favour of one party to the marriage against the other. Under New South Wales law a de facto spouse cannot obtain an order for his or her support.
(c) The Family Law Act allows the Family Court to issue injunctions at short notice to protect a married person (usually the wife) against domestic assault. While it may be possible for a de facto spouse who is threatened with domestic violence to obtain an injunction from a State court, there is no convenient or accepted procedure for doing so. Other forms of legal protection against domestic violence under State law are cumbersome and often ineffective.
(d) Disputes between married couples concerning the custody of their children are decided by the Family Court. This is a specialist court, which has counsellors and welfare officers attached to it and which uses novel procedures designed to minimise the bitterness associated with matrimonial disputes and to promote the welfare of the children. The Family Court cannot hear custody (or other) disputes between de facto spouses. In New South Wales such disputes may be heard by any one of several courts. While the State courts regard the welfare of the child as the paramount consideration, in general they do not have the facilities or procedures of a specialist family court.
(e) A married couple may adopt a child jointly. People living in a de facto relationship may not adopt a child jointly, even where one partner is the natural parent of the child.
(f) Under New South Wales law a person whose de facto spouse has died cannot claim a share of the spouse's estate (except of course where he or she is a beneficiary under the will of the deceased person). A married person has rights under the law of testator's family maintenance and the law of intestacy (which governs the distribution of the property of a person who dies without making a will).

The Issues Paper notes that "In one sense it is too late to ask whether the law should attempt to regulate by legislation the rights and duties of de facto spouses (whether as between themselves, or in relation to other persons or government). ...Australian law for many years has specifically acknowledged the existence and consequences of such relationships in areas such as social security and workers' compensation. The significant question is therefore not whether the law should expressly govern de facto relationships but how much further (if at all) the process of regulation should be taken. Specifically it is important to ask to what extent (if at all) the rights and duties of cohabiting couples should be assimilated to those of married couples".

The Paper examines, in a preliminary way, what can be said about the nature of de facto relationships in Australian society. This sets the social background to the legal issues. The Paper shows that Australian patterns of marriage, divorce, and living together without marriage have been changing in the 1970s. The proportion of people going into their first marriage has declined; the age at which both men and women marry for the first time has been going up; a higher proportion of marriages end in divorce, and there are strong indications of an increase in de facto relationships, particularly among young people who have never been married and among divorced and separated people.

These changes have been linked to the downturn in the economy since 1974 which has forced some people to postpone marriage, in some cases indefinitely. These economic conditions may have had their greatest effect on the marriage chances of poorer people. At the same time, there have been changes in social attitudes: there is an increasing acceptance of de facto relationships, particularly among young, never-married tertiary educated people. These groups are likely to see de facto relationships as being free from many of the legal and social constraints and financial obligations imposed by formal marriage.

As a combined result of these two trends, it appears that an increasing number of Australians are living together without being formally married and almost 50 per cent of these families contain children, according to an analysis of 1976 Census Tables.

However, the paper also identifies another type of de facto relationship: long-term relationships usually among older people who have been living together "as married" for a considerable period of time. These relationships may have been established as a response to some of the legal, financial, emotional and religious problems formerly (and in some cases, still) associated with divorce.

To get some idea of the number of people involved in de facto relationships the Commission made a calculation based on Australian Census figures. It concludes that for 1976 it is possible to identify about 66,000 families which are headed by a couple living together without being formally married (23,000 in New South Wales). However, official figures which directly confirm this estimate are not available. Not all of these families, of course, will necessarily experience any of the legal problems identified in the Paper.

The considerable number of de facto relationships involving children suggests that the inquiry should take into account the importance of parental responsibilities. It also highlights the complexity of de facto relationships, many of which are likely to involve considerable financial and emotional ties.

The Paper sets out the major arguments for and against further regulation of de facto relationships. These are, in summary—

Against further regulation

(a) To grant de facto spouses the same rights and duties as married spouses, even in limited areas, would undermine the institution of marriage.

(b) To grant additional rights to de facto spouses may produce a contest between a legal spouse and a de facto spouse. Therefore the rights of a legal spouse may be adversely affected by the improved legal position of a de facto spouse.

(c) To attach rights and duties to people who live together without marrying subjects them to legal rules which they may have chosen to avoid.
(d) To grant further legal protection to de facto families reinforces the assumption that women are dependent on men.
(e) Once the law specifically acknowledges and regulates de facto relationships, there is no logical basis for refusing to take a similar approach to other domestic relationships such as brother and sister households, homosexual unions and extended families.
(f) To regulate de facto relationships further creates the difficulty of defining such a relationship for legal purposes.
(g) Regulation of de facto relationships would require far-reaching changes to the law. Some of these changes might upset arrangements people have made in reliance on existing law, or create uncertainty.
(h) Further legal regulation implies that more people will be in a position to make claims, directly or indirectly, on the government or the community generally. For example, if a de facto spouse can claim compensation for the death of a partner, the cost of compensation schemes to the community will be increased.

In favour of further regulation

(a) The law cannot ignore de facto relationships except at the price of causing injustice. The fact that de facto relationships have long been expressly acknowledged by the law demonstrates the futility of the argument that they should simply be ignored.
(b) De facto spouses have the same need for assistance from the law in resolving questions about their rights and duties as do married couples in similar circumstances.
(c) The problem of defining a "de facto relationship" need not be a major stumbling block. Several different legal definitions are already in use. If it is decided that de facto spouses should be eligible for benefits the law might provide, law makers are capable of defining what sort of relationship should entitle a spouse to the benefit.
(d) Since a major reason for regulating de facto relationships is the similarity between them and marriages, there is no compelling reason why similar regulations will be required for other domestic relationships which do not share the characteristics of marriage.
(e) Unless the rights and duties of de facto spouses are regulated by legislation, de facto relationships provide opportunities for exploitation.
(f) The alternative to further legal regulation of de facto relationships may be that the burden of support will fall on the social security system rather than on family members. For example, a de facto spouse who is permitted to claim a share of the estate of a deceased partner may thereby avoid the need to claim a government pension.
(g) Providing legal protection to de facto spouses need not reinforce any stereotyped notions of female dependence. In any case, family law relating to married couples no longer relies on these stereotyped notions.
(h) It is likely that few people going into de facto relationships give careful consideration to the legal consequences of their actions. In addition, the reasons why couples form de facto relationships may alter during the course of their living together. In any event it is

possible to accommodate those who do not wish to be bound by conventional rules, by allowing them to make their own agreements.

Possible approaches

Assuming that some regulation of de facto relationships is desirable, the question arises as to the form that regulation should take. The Paper identifies a number of approaches that could be taken. In doing so it is not intended to suggest that a case for reform has been made out. The purpose is to indicate the range of policy alternatives that need to be considered.

The most sweeping approach would be to equate the rights and duties of de facto spouses with those of married couples. This could be done, in theory, by redefining "marriage" to include all de facto relationships. In Australia, quite apart from the policy questions raised by such a proposal, it would encounter overwhelming constitutional obstacles.

An alternative to redefining marriage is for the State to pass a series of specific measures designed to provide de facto spouses with the same rights and rights as apply to married couples. The New South Wales Anti-Discrimination Board, for example, has recommended that "all legislation which affects the parties to a marriage, whether by the granting of rights, the imposition of obligations or otherwise, be amended to include the parties to a de facto relationship."

In 1977 the Tasmanian Law Reform Commission proposed that further legal recognition should be extended to de facto relationships, but that such relationships should not be treated automatically as if they were legal marriages. The Commission recommended that recognition should be based on proof of dependence, but that it should be open to a de facto spouse to prove dependence only where the parties had lived together for at least 12 months.

The South Australian Family Relationships Act 1975 allows a person who has been living in a de facto relationship to apply to the court for a declaration that he or she is a "putative spouse". A putative spouse is defined as a person (i) who has lived with another person for at least five years, or (ii) who has lived with that other person for a lesser period but has had sexual relations with the person resulting in the birth of a child.

A person who has been declared to be a "putative spouse" has the same rights as a married person in relation to such matters as succession to property, superannuation benefits and damages claims in respect of the death of a partner. The South Australian Act makes no provision for "putative spouse" to bring claims for maintenance or for an adjustment of property rights.

A fourth approach avoids attempting a general definition of de facto relationships. It requires an examination of each area of law in which legislative regulation of de facto relationships is an issue. A judgment then has to be made as to whether such relationships should be regulated further and, if so, what form the regulation should take.

Some Questions

Having identified four major options, the Paper asks a series of general and specific questions to which it invites responses. The following are some of the questions asked—

(i) Are the arguments for and against further legal regulation of de

facto relationships stated fairly? Are there any other arguments which should be taken into account?

(ii) Are there any other questions which should be put? Should the Commission carry out its own research before coming to any conclusion, and if so, what sort of inquiries should it make?

(iii) Is there a case for greater legal regulation of de facto relationships? If so, what approach should the law take?

(iv) Are there special problems in relation to minority groups, such as Aboriginal and ethnic communities, that require particular attention?

(v) Should State courts be given powers, similar to those the Family Court has in relation to married couples, to alter the property rights of de facto spouses according to what is "just and equitable?"

(vi) Should legislation enable de facto spouses to bring maintenance claims against their partners? If so, should the principles be the same as those applied to married persons under the Family Law Act?

(vii) Should the courts have specific powers to restrain acts of violence within the households of de facto spouses, and if so, what should these powers be?

(viii) Should the States refer power to the Commonwealth to make laws with respect to the custody, guardianship and maintenance of ex-nuptial children (including children born to de facto spouses), to allow these matters to be dealt with by the Family Court in the same way as cases involving children born within marriage? If the power is not referred, should the present laws be amended to enable State courts to decide custody and maintenance cases according to the same principles and procedures followed by the Family Court?

(ix) Should the State laws of adoption permit de facto spouses to adopt a child jointly? If so, in what circumstances? What rights should the father of a child born in a de facto relationship have where someone else applies to adopt his child?

(x) Is it anomalous that a de facto spouse can claim under workers' compensation legislation for the death of a partner at work, but may have no claim for "common law" damages where the death is caused by the employer's negligence? Should the right to claim common law damages be extended to de facto spouses, and if so, on what basis?

(xi) Should a specialised State family court be established? Would such a court, with procedures and facilities similar to those of the Family Court, overcome the problems associated with the constitutional division of legislative responsibility between the Commonwealth and the States?

The Paper emphasises at this stage the Commission has no preference for any particular approach to the policy questions raised by the reference on de facto relationships. It intends to publish a final report, containing recommendations, after interested persons and organisations have had an opportunity to make submissions and, where appropriate, to discuss their views with the Commission.

(C.L.B. April 1982 pp.658-654)

Aboriginal customary law

The Law Reform Commission has published a Discussion Paper (No. 18) entitled *Aboriginal Customary Law – Marriage, Children and The Distribution of Property.* It is not a Commission report. Rather it contains a summary of the Commission's work in the areas of marriage, children and the distribution of property in the Aboriginal Customary Law Reference. The Paper summarises the following Research Papers prepared by the Commission: *Promised Marriage in Aboriginal Society* (ACL RP1); *The Recognition of Aboriginal Customary or Tribal Marriage: General Principles* (ACL RP2); *The Recognition of Aboriginal Tribal Marriage: Areas for Functional. Recognition* (ACL RP3); *Aboriginal Customary Law: Child Custody, Fostering and Adoption* (ACL RP4); *Aboriginal Customary Law: Traditional and Modern Distributions of Property* (ACL RP5);

The Reference from the Commonwealth Attorney-General to the Law Reform Commission is for an inquiry and report on the question "whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only" and, in particular:

(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
(c) any other related matter.

Since 1977 the Commission has been conducting extensive consultatons and research into the Reference. In November 1980 the Commission issued a Discussion Paper (ALRC DP 17), which has been widely distributed and commented on. In the light of these comments and further work, the Commission has decided to produce further short discussion papers, each dealing with specific areas of its Final Report, so as to promote further public discussion and comment on the Commission's specific proposals. As well as the present Discussion Paper, on marriage, children and the distribution of property, it is proposed to discuss the criminal law and sentencing, and community justice mechanisms, in later papers.

Accordingly, this Discussion Paper raises issues and promotes discussion.

(C.L.B. July 1983 pp.971-972)

A Maintenance Agency

The National Maintenance Inquiry appointed by the Australian Federal Attorney-General has published its Report entitled *A Maintenance Agency for Australia.*

The Terms of Reference of the Inquiry were as follows—

1. The Family Law Branch of the Attorney-General's Department is to inquire into maintenance systems and make recommendations to me, as Attorney-General, on the establishment of a national agency to improve significantly maintenance enforcement and collection within Australia.
2. The inquiry shall include a review of the following—
   (a) the system operating within the Department of Community Welfare of South Australia;
   (b) the operations of the Collector of Maintenance, Western Australia;
   (c) the court based collection and enforcement systems operating in Canada, including the Automatic Enforcement of Maintenance Orders Programme and Parental Support Programme in Ontario;
   (d) the Federal Child Support provisions in the United States of America, including maintenance and collection programmes of relevant States;
   (e) the Supplementary Benefits Commission "liable relative" programme in the United Kingdom; and
   (f) the "Liable Parent Contribution Scheme" in New Zealand.
3. In respect of the various systems reviewed, the report shall provide—
   (a) a conceptual analysis of the systems;
   (b) an account of the operation of the systems;
   (c) an evaluation of the effectiveness of the systems; and
   (d) an assessment of the relative suitability of the systems for adoption within Australia.
4. In respect of the systems considered suitable for Australia (including modification of systems), the inquiry shall examine the operational costs and resources implications of the systems.
5. The inquiry shall recommend upon the siting, structure and functions of a national agency, with likely cost projections.
6. In performing the inquiry, offices of the Branch shall take account of proposals for maintenance reform from interested persons and bodies and shall consult as appropriate with the Family Law Council, the Department of Finance, the Department of Social Security, the Australian Taxation Office, the Public Service Board, the Family Court of Australia and Western Australia and other relevant agencies.
7. The Branch shall present to me a written report with recommendations on or before 1 September 1983.

The Inquiry Team, in examining the total field of maintenance, recognised three basic issues—

(a) liability, i.e. the scope of the legal obligation to maintain;
(b) assessment, i.e. the quantum of obligations; and
(c) enforcement.

The Inquiry's Report is divided into Chapters dealing, respectively, with maintenance in Australia, an examination of models in the Australian Capital Territory, South Australia, Western Australia, New Zealand, the United States of America, the United Kingdom and Canada, the selection of a model for Australia, and additional matters, such as the procedures for enforcement of maintenance orders, taxation treatment of maintenance, and social security and the level of maintenance orders.

(C.L.B. July 1984 pp.1244-1245)

Domestic violence

The Australian Law Reform Commission has published a Discussion Paper on domestic violence in the Australian Capital Territory. The Discussion Paper follows a Reference from the Australian Federal Attorney-General to review and report on—

(a) the laws in force in the Australian Capital Territory with respect to domestic violence and matters arising from domestic violence; and

(b) any related matters.

In performing its functions in relation to the Reference, the Commission was required—

(a) to consult the Australian Institute of Criminology, the Family Law Council and such other persons and bodies as it thinks appropriate; and

(b) to take into account any other laws or proposals for laws that are or may be relevant.

The Reference was made by the Attorney-General having regard to—

(a) the Community Law Reform Program for the Australian Capital Territory; and

(b) the need to make adequate provision for the prevention of domestic violence, that is, violence done or threatened to be done to a person who is married to, or living as husband and wife with although not legally married to, the person who does or threatens to do the violence.

In its inquiry the Law Reform Commission asserts that certain basic principles and aims underlie the suggestions and arguments. They are—

1. domestic violence is substantially a hidden problem which needs to be brought into the open;
2. domestic violence must, so far as possible, be stopped;
3. its victims must be able to escape from it and avoid being subjected to further attacks;
4. its victims' needs for support, advice and accommodation must be properly catered for by the welfare agencies; and
5. in so far as public and private attitudes accept the phenomenon of domestic violence, such attitudes should change.

The Discussion Paper is restricted to domestic violence between adults who are living together or who have lived together. Violence to children is a separate problem which has been the subject of a separate inquiry. (Australian Law Reform Commission, Report No 18, *Child Welfare* (Australian Government Publishing Service: Canberra: 1981). This is the basis for the Child Welfare Ordinance (ACT), which is not yet in force.

The Paper points out that acute dilemmas are created by the problem of domestic violence. For example, the need to protect the victim raises difficult civil liberties problems in connection with police powers. The theories of causes of domestic violence are surveyed and it is concluded that, though no single theory adequately explains why a person turns to violence in a particular case, the law and other institutions should respond with a range of strategies to deal with the problem.

It is suggested that, although domestic violence is substantially a hidden problem, it exists just as much in the Australian Capital Territory as it has been shown to exist elsewhere. A 'phone-in' will be conducted to assess the extent of the problem in the Territory.

One of the principal concerns of the Paper is to examine how the victim's needs can be adequately provided for. These are—

1. health services;
2. physical protection;
3. support, advice and counselling services;
4. accommodation; and
5. financial support.

With regard to health services, the Paper states that it is argued that health services are important referral points and should be more sensitive to the fact that a victim's injuries have been caused by domestic violence. It is suggested that in-service training programmes should be conducted to heighten health-workers' awareness of the problem.

In relation to physical protection, the Paper discusses both short-term (or emergency) and long-term protection. The Paper states that victims of domestic violence may need to escape, and the welfare services should provide facilities for escape.

With regard to the role of the police, the Paper states that the police are at the front line and face a very difficult job in dealing with domestic violence. The Paper canvasses the issues of the proper role for the police, whether a 'hard' or 'soft' approach is appropriate and whether the police can be expected to perform a welfare function. It is suggested that the police would be aided by specialist welfare workers from a crisis intervention unit.

As to the powers of the police, the Paper finds that difficult problems arise out of two competing values: the need to protect the victim versus the civil liberties of the citizen. These problems are discussed in the Paper in connection with—

1. police powers of entry—should they be widened in domestic violence cases?;
2. police power of arrest without warrant—should they be changed, or at least codified, in connexion with domestic violence cases?;
3. police bail—should the police be able to impose bail conditions (as in New South Wales)?;
4. prosecution—do the police have a consistent and rational policy on prosecuting domestic violence offenders?; and
5. compellability of spouse as a witness—should the domestic violence victim be made a compellable witness?

With regard to, respectively, long-term protection for victims of domestic assault, support, advice and counselling for the victims and emergency accommodation, the Discussion Paper states, *inter alia*—

Long-term protection: How can the victim obtain long-term protection from the courts? At present court orders or injunctions are often criticized as being "not worth the paper they are written on" because a breach of an order not to assault or not to harass the victim only results in a further court case, usually weeks after the breach. It is suggested that breach of an order should result in immediate arrest and a criminal prosecution. A new type of order is discussed which would be obtained by a simple procedure in the magistrate's court (rather than the Family Court which does not cater for *de facto* relationships). A victim of domestic violence could obtain a wide variety of orders including non-molestation, physical exclusion (i.e. the aggressor is not allowed to go near the victim), and accommodation orders (i.e. the aggressor is excluded from the family home). The possibility of court-ordered counselling and therapy programmes for the offender are discussed.

The application for an order would be heard by a magistrate applying the civil standard of proof and an order against a person would not be a criminal conviction. The police should be able to apply for an order on behalf of the victim in appropriate cases. The possiblity of conducting these hearings in a closed court is discussed.

If the order is breached and the offender is arrested, should he be granted bail by the police? It is suggested that instead he should be taken before a magistrate as soon as possible.

Support, advice and counselling for the victim: The victim's needs for support, advice and counselling are considered and it is suggested that the present fragmented and non-specialist services which are available to domestic violence victims be supplemented by a professional, specialized unit which can provide 24-hour crisis intervention and can arrange follow-up services so that the whole range of problems generated by domestic violence can be satisfactorily managed. This unit would assist police when they attend 'domestics', would provide short-term support and advice to the victims and the aggressors. It would act as a nerve-centre for referral on to other agencies. The Paper stresses how important such a unit will be for a proper response to the problem of domestic violence.

Accommodation: The accommodation needs of the victim range from the short-term, emergency accommodation presently provided by women's refuges to the long-term problem of setting up a new home if the family breaks up. The Paper stresses that public housing bears the primary responsibility for meeting these needs, if the victim is without adequate financial means. The proposed domestic violence specialized unit should, amongst other things, be able to provide emergency accommodation so that the victim who cannot go or who chooses not to go to a women's refuge has somewhere else to go. A refuge for the attackers is also suggested as a means for defusing domestic crises.

As to the causes of domestic violence, the Discussion Paper further states—

There is disagreement about the causes of domestic violence. Yet in devising strategies for dealing with it, it would greatly assist to know what the causes are. There are four theories: 1. The pathological explanation; 2. The psychological explanation; 3. The structural explanation; 4. The male supremacy explanation. The treatment of these theories is necessarily brief in this paper. The proponents of each theory do not argue that there is a single cause but rather that a particular theory may play an especially significant part in explaining why there is domestic violence in our society.

The pathological theory posits that the violent party is 'sick'—is a psychopath—who needs to be treated. This theory has been extended by some writers to arguing that the victim exhibits pathological tendencies—she is masochistic. The argument that the victim is a masochist has been rejected by other writers.

The psychological explanation does not look to mental illness as being the cause so much as certain psychological predispositions in both the batterer and the victim. For example, the batterer is said to be, typically, jealous, excessively dependent and insecure. The psychological theory looks not just to the psychological make-up of the individuals but also the *interaction* of their personalities. Some combinations are explosive so that 'as individuals the man may not be violent nor the woman willing to tolerate abuse, but once in the relationship, a dynamic is set up such that violence recurs in a remarkably stable fashion. In some cases, cross-cultural marriages may give rise to explosive pressures, or immigrants may find that their culturally-based expectations and norms are subjected to intolerable pressures in a new country.

The structural theory looks to pressures of the environment, such as unemployment, powerlessness, crowded accommodation and so forth to explain why people turn to violence. They lash out in their frustration.

Finally, the male supremacy theory looks to established sex roles in which the male is dominant and acts to maintain his dominance, by violence if necessary, because violence is accepted as a means of control in our society. The traditional patriarchial pattern is perpetuated not only in the wider society but also in the family.

None of these theories by itself is sufficient to explain why violence occurs in one family and not in another. The truth probably lies in a combination of these theories, but in different degrees in each particular case. Indeed it would be surprising if there *was* a single explanation. Domestic violence is a complex problem with complex causes. Accordingly, a range of strategies for coping with the problem would seem to be indicated.

One factor which needs to be discussed is alcohol. Many people will argue that alcohol causes domestic violence. But there is overwhelming evidence that alcohol is not the cause. At most it may be a factor in lessening inhibitions against the use of violence. 'It may release the trigger of violence but it is not a direct cause'. In many incidents of domestic violence it plays no part at all.

Another explanation which should be mentioned is the 'cycles of violence' theory which argues that violence in the home is behaviour which is learned in childhood so that violence is perpetuated, generation after generation. The theory is one aspect of the psychological explanation—those who have been subjected to or who have witnessed violence in childhood are predisposed to being violent adults. The theory goes further and argues that the *victims* of violence are conditioned to be victims by their childhood experiences and will gravitate towards a violent mate. The cycle theory has been rejected by some writers. Whether the theory is sound or not, it makes no difference to the basic principle underlying this inquiry: family violence must be minimised to the greatest extent possible.

In its summary, the Discussion Paper either asks the following questions or concludes as follows—

1. that health service workers must be more sensitive to the problem of domestic violence. They can be of great assistance to the victims;
2. that welfare agencies must be able to provide victims in danger with a safe escape route;

3. that the police play a vital and difficult role in dealing with domestic violence. Is their training adequate for this task? Should the police simply apply the criminal law or should they also act as social workers? It is suggested that a crisis intervention unit could aid the police;
4. should the police have wider powers of entry to deal with domestic violence? Should a telephone warrant system be adopted?;
5. should police power of arrest without warrant be changed or codified in connexion with domestic violence offences?;
6. where police have arrested a person for a domestic assault, should police be given the power to impose bail conditions so as to provide more protection for the victim of the assault?;
7. on the question of prosecution in domestic violence cases, the decision to prosecute should not be left to the victim. In the ordinary course, the police should take this responsibility unless there are compelling reasons to the contrary. This is not to say that the victim's right to bring a private prosecution should be taken away. The rationale for deciding whether to prosecute or not in domestic violence cases should be properly worked out;
8. there are competing arguments for making a spouse a compellable witness in domestic violence cases. Is it suggested that a domestic violence victim should be made compellable so that it is easier for her or him to say: "I have to give evidence";
9. that no suggestions are made for reform of the Family Court injunction procedure;
10. it is suggested that there be a new, simple procedure for obtaining an order in the magistrate's court for dealing with repeat offenders. Such an order would in no way impinge on, or be in substitution for, the criminal process. An application for an order would be a civil proceeding and an order against an aggressor would not be a criminal conviction. It is suggested that the police could apply for an order on behalf of the victim. The types of orders which could be obtained would be able to deal with violence, harassment and intimidation and would be able to exclude the aggressor from the family house. It is tentatively suggested that the court could order counselling for the aggressor;
11. that a 24-hour domestic violence unit, together with effective publicity (discussed below), is an indispensible and vital part of the strategy for dealing with domestic violence. The South Australian crisis intervention unit is regarded by workers in the field as the single most effective measure that has been adopted to deal with domestic violence. Such a unit can assist the police and act as a nerve centre for referral by other agencies;
12. that emergency accommodation should be made available to both the victims and perpetrators of domestic violence;
13. that if a magistrate makes an accommodation order, under the suggested new procedures, its effect will be temporary and will provide no long-term solution to any accommodation problems which may be faced by the participants in domestic violence;
14. that the courts already determine the parties' respective long-term accommodation rights. The victim of domestic violence will, in many instances, have to turn to the public housing sector for her accommodation needs;
15. that the public housing sector bears much of the burden of providing shelter for the victim of domestic violence. It should also provide emergency accommodation so that the women's refuges are not so overburdened. Clear policies on priority and emergency housing need to be worked out;
16. that efficient provision of information and advice can lower the financial barrier facing domestic violence victims;
17. that the provision of therapy programmes and counselling for the perpetrators of domestic violence is a vital measure for dealing with the problem. Such programmes will probably be used in conjunction with court processes;
18. that there may be some difficulties faced by a domestic violence victim in claiming compensation.

In its conclusion the Law Reform Commission observes, *inter alia*—

> In dealing with a subject as complex and difficult as domestic violence, it is inevitable that what has been said in this paper will not be exhaustive. The purpose of this paper is not only to stimulate discussion and comment on what has been written but also to invite members of the public to submit further suggestions for alleviating the problems created by the phenomenon of domestic violence.

(C.L.B. January 1985 pp.157-161)

BANGLADESH

Population control

The Institute of Law and International Affairs in Bangladesh has completed a study of the legal aspects of population control and has submitted it to the Government. The report, which was financed by the World Bank, examines laws on abortion, contraception, sterilisation, age of marriage, registration of vital statistics and the employment of women and children, and will be used by the government to formulate more "pragmatic programmes and policies", according to the newspaper.

(C.L.B. April 1977 p.263)

BARBADOS

Report of the National Commission on the Status of women in Barbados

The National Commission on the Status of Women in Barbados, appointed in 1976 with wide ranging term of reference, has now presented its most comprehensive Report. Its 1,461-page Report examines the historical background, traditional attitudes; women and the law; education; women and employment; health; the family; women and the church; and politics; and the media; the contribution of women, and abortion.

Included among its 212 recommendations, and of particular interest to lawyers, are—

(i) that the law relating to breach of promise of marriage remain unchanged;

(ii) that any amending and consolidating Marriage Act should clearly and precisely detail the formalities required for the solemnisation of a valid marriage, and the legal effect of failure to comply with these formalities. Such legislation should deal with the effect of duress, mistake and capacity;

(iii) that the law relating to jactitation of marriage remain unchanged;

(iv) that the right to claim damages for enticement and harbouring be abolished;

(v) that compensation for loss of consortium be no longer based on the old common law view of a husband's proprietary rights in his wife, but that legislation should equate such rights and provide that where the husband or a wife is tortiously injured through the negligence of another person, the other spouse should be allowed to recover certain reasonable expenses incurred, for example medical expenses. The Fatal Accidents Act successfully provides for the situation where the injury results in the death of a spouse, and similar legislation could make provision for

reasonable and adequate compensation for cases where the injury is not fatal;

(vi) that the presumed agency and the agency of necessity be retained;

(vii) that husband and wife be given the right to bring an action in tort as if they were not married with the restrictions included in the Married Persons Act of Trinidad and Tobago;

(viii) that a married woman be given the right to acquire and retain an independent domicile like any other person of full capacity;

(ix) that support obligations be mutual so that in cases of need each spouse should be legally responsible for the financial support of the other;

(x) that a spouse's act of adultery should not be an absolute bar to financial relief;

(xi) that consideration be given to the extent of which the conduct of the spouses should necessarily be of primary importance, and to whether conduct should be only one of the factors considered in determining the liability of spouses financially to maintain each other;

(xii) that the conduct of the parties should in no way affect support obligations to children of the family;

(xiii) that other factors meriting the court's consideration should be: the financial needs, responsibilities and obligations of each of the parties, the financial resources including income and earning capacity of each of the parties, and the property which may have passed from one spouse to the other under any other system of property sharing or transfer;

(xiv) that the old approach of a fixed sum for maintenance should be abolished;

(xv) that support obligations be extended to include the wider definition of the family thereby bringing parents within the scope of legally enforceable maintenance provisions;

(xvi) that the enforcement procedures be reviewed and attachment of earnings be introduced;

(xvii) that by definition, parties living in common law unions be included in the general maintenance provisions already outlined;

(xviii) that legislation be enacted to remove the legal disabilities of children born out of wedlock. Subject to recognition of paternity, such children would then fall within the general maintenance provisions already outlined;

(xix) that the sole ground for divorce should be that the marriage has broken down: how this should be evidenced is left open for discussion;

(xx) that provision be made for counselling and reconciliation;

(xxi) that the welfare of children of the family and support and property obligations be given the utmost consideration;

(xxii) that a petition be entertained only after two years of marriage;

(xxiii) that restraint on anticipation be abolished;

(xxiv) that the presumption of advancement be abolished;

(xxv) that the law relating to matrimonial property be regulated through legislation;

(xxvi) after careful consideration of Barbados family property law, the social situation and the views advanced by members of the public, a two-fold system provide for –

(a) common ownership of specific family assets (the matrimonial home) during the lifetime of the spouses,

(b) legal rights of inheritance;

(xxvii) that the common ownership principle should include parties living in a common law union for five years, and that the seven year period required by the Succession Act be reduced to five years, in the interest of uniformity;

(xxviii) that there should be a lower rate of estate duty for female spouses inheriting from their partners than for male spouses on the ground that a male spouse is more likely to have an income (pension) of his own than a non-earning female;

(xxix) that the exemption level for small estates should be raised. The importance of this reform is especially desirable for persons for whom the estate constitutes their only substantial means of livelihood;

(xxx) that the income tax law should permit partners to a marriage to elect which of them should function as the primary object of income tax assessment, instead of requiring the husband to be that primary object, and the higher earning partner should be treated in default of such choice as that primary object;

(xxxi) that the law should protect married persons from being compelled to incur the penalties for defaulting in their obligations to return their partners' incomes through the lack of cooperation of the other partner;

(xxxii) that any discriminatory provisions which prevent the husband of a Barbadian woman from registering as a Barbadian citizen, a right now enjoyed by the wife of a Barbadian man, be altered;

(xxxiii) that some restriction probably residential, be placed on persons seeking to become citizens of Barbados by registration. Such restriction should apply to both men and women;

(xxxiv) that the Infants Act (Minors Act) be amended to give equal

rights to both parents;

(xxxv) that provision be made to enable custody and other related proceedings more readily to be brought before the court in respect of illegitimate children;

(xxxvi) that the provision which singles out a woman for preclusion from cleaning machines be repealed since women are now competent to undertake such tasks with the required care and caution, and the inclusion of such a provision could deprive women of certain jobs. The Commission would like to see the following provided for all workers male and female; proper health standards, suitable and sufficient seating accommodation and organised intervals for meals and rest;

(xxxvii) that informed active participation in the labour force and more specifically in the particular job undertaken, be encouraged so that any defects in the practical application of the law may readily be seen and consequently be remedied;

(xxxviii) no change in the present law relating to larceny between husband and wife;

(xxxix) that the marital coercion rule should be reformed on the pattern of the Criminal Justice Act, 1925 (U.K.);

(xl) that the same exemption relating to impeding arrest be enjoyed by both wife and husband;

(xli) that an Indecency with Children Act be introduced;

(xlii) in relation to rape, that legislation be introduced to clarify the law relating to consent of the victim and the intention of the accused;

(xliii) that procedural changes be introduced and restriction be placed on publicity – the approach of the Criminal Law Amendment Act of Canada could be considered;

(xliv) that the maximum punishment on conviction for the offence of rape be the same as it is at present, life imprisonment;

(xlv) a review of existing Pensions legislation to ensure that there will be no differences in provisions made for public officers on the basis of sex;

(xlvi) that the Leave Passage Legislation be so amended as to allow females to enjoy the same privilege as males in the same grades, and the amendment be worded in such a way as to avoid duplication of leave passages;

(xlvii) that the Ministry of Labour investigate means by which those sections of the Factory Act relating to the provision of rest and lunch room facilities, sanitary conveniences can be applied in the case of agricutural labourers;

(xlviii) that until a Building Code is established, it be made

mandatory for landlords to provide facilities stipulated by the Factories Act on premises let as business houses, such facilities to attain a specified standard;

(xlix) that employees be compulsorily required to use safety equipment when exposed to health hazards;

(l) that discrimination on the basis of sex be prohibited from all advertisements, application forms or any other source of recruitment;

(li) that a Family Court be established to deal with domestic, family and juvenile problems, and that provisions be made for supporting services;

(lii) that legislation be amended to remove the fixed maximum so that an order appropriate to the means of the parties involved may be made by the court before which affiliation and maintenance orders are adjudicated;

(liii) that any proposal to change the existing abortion law in a more permissive direction should contain provisions not only for providing an abortion service but for mounting an anti-abortion education programme;

(liv) that before attempting to change the abortion law efforts should be made to ensure that the contemplated change represents the collective national desire and that the nation is made fully aware of the possible consequences of its choice;

(lv) that the service should permit abortion on the sole request of women up to the twelfth week of pregnancy;

(lvi) that beyond twelve weeks, abortion should be permissible under specified conditions;

(lvii) that in the case of those under 18 years, those over 40 years, and those with four or more children, indications for termination of pregnancies beyond twelve weeks should be liberally interpreted;

(lviii) that where medical termiantion of pregnancy beyond twelve weeks involved high medical risk, possibly death, to the mother, the consent of at least one parent of minors and the spouse/partner of older women should be obtained;

(lix) that abortions only be performed by a registered medical practitioner;

(lx) that a counselling mechanism should be included in the service for women who wish to be aborted beyond the twelfth week of pregnancy (This may be achieved by referral from the doctor to a special social service agency followed by a delay of not less than three and not more than seven days before the abortion is performed. This is to give the woman a chance to weigh the advantages and disadvantages of having an abortion before making a final decision);

(lxi) that consideration should be given to the devising of a system to ensure that abortions are not performed on pregnant women who had an induced abortion within the previous six months;

(lxii) that provision for adequate and up-to-date record keeping should be made;

(lxiii) that the service should be available in the following places—

(a) separate in and out-patient facilities at the Government Hospital,

(b) Government clinics operating out-patient facilities with in-patient cases referred to the facilities at (a),

(c) the Family Planning Association – on an out-patient basis with in-patient cases referred to at (a), and

(d) private sector;

(lxix) that medical practitioners and auxiliaries who object to abortions on the grounds of conscience, should not be required to work in any of the publicly provided facilities.

One of the Commission has entered a minority report (principally in disagreement with the recommendation that grounds for abortion be widened), and the Commission's Chairperson, Ms. Norma Monica Forde, has presented a separate statement which urges more wide-ranging reform of family and other laws. In particular she would see the abolition of all the old common law actions which were designed to protect the proprietory rights of the man and only in small measure and indirectly benefited the woman, such as breach of promise of marriage, jactitation of marriage, and loss of consortium.

The three volumes of the Report may be obtained from the Barbados Government Printing Office.

(C.L.B. January 1979 pp.126-132)

Family Law Act 1981 (No. 29 of 1981)

This Act reforms the law relating to the dissolution and nullity of marriage, judicial separation and restitution of conjugal rights.

In line with the recent trends, it also provides for counselling with a view to facilitating reconciliation in matrimonial causes and in this respect, in addition to the marriage counselling services of the Family Services Division, provides for the approval and registration of voluntary organisations as marriage counselling organisations. The Act also lays down as one of the responsibilities, of an Attorney-General representing a party, to promote reconciliation.

The Act lays down the following principles to be applied by the courts in relation to marriage—

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
(c) the need to protect the rights of children and to promote their welfare; and
(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.

In relation to matters connected with the parental rights and the custody and guardianship of children, the Court is empowered, inter alia, to—
(a) order directing the parties to attend a conference with the Chief Welfare Officer or Chief Probation Officer,
(b) order that the child be separately represented.

As to the custody of children, the welfare principle is emphasised, and the contravention or failure to comply with custody orders is made an offence punishable with a fine not exceeding $5000.

The Act also provides for the registration in the courts of Barbados of foreign custody orders, and for the transmission of Barbadian custody orders to overseas countries.

The Act provides for the registration and enforcement of maintenance agreements, cohabitation agreements or separation agreements and extends the application of these provisions to overseas maintenance agreements.

Recognition and enforcement of overseas decrees is provided for and any such decree valid under common law rules of private international law is also given recognition, under the provisions of the Act.

The Act, therefore, repeals the Married Women (Separation and Maintenance) Act (Cap. 220) and the Matrimonial Causes Act (Cap. 221).

(C.L.B. October 1981 p.1197)

CANADA

Family Law

The Canada Law Reform Commission has issued its Report on Family Law which has been tabled in the Parliament. The Report makes the following major recommendations –

(i) wherever possible many of the legal problems associated with family conflict should be settled through the establishment of a Unified Family Court:

(ii) immediate steps should be taken by the provincial Attorneys General and the Minister of Justice to create in every province a superior court, presided over by a federally-appointed judge, with comprehensive jurisdiction over all family law matters. The court should have a social as well as a legal arm, offering a broad range of dispute-resolution techniques for family problems:

(iii) the only basis for dissolution of marriage should be the failure of the personal relationship between husband and wife:

(iv) all adversary pleadings should be removed from the law of dissolution of marriage; the dissolution process should be commenced by either or both spouses filing with the court a simple and non-accusatory notice to seek dissolution:

(v) settlement of property matters and financial provision on dissolution of marriage should be effected in the context of economic re-adjustment and kept separate from matters relating to the breakdown of the personal relationship between the spouses:

(vi) marriage per se should not create a right to receive or an obligation to make financial provision after dissolution; a formerly married person should be responsible for himself or herself:

(vii) the purpose of financial provision on dissolution of marriage should be one of rehabilitation to overcome any economic disadvantages caused by marriage and not a guarantee of security for life for former dependent spouses:

(viii) the common law rules respecting the eligibility for, amount of, or rationale behind maintenance on divorce, and all case law dealing with analogous situations, such as alimony, should be discarded:

(ix) children should have two fundamental rights when their parents' marriage ends:
   (a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and
   (b) the right to economic support.

(C.L.B. July 1976 p.273)

CANADA - SASKATCHEWAN

Matrimonial property

Law Reform Commission of Saskatchewan has submitted its report (May, 1976) relating to the exercise of judicial discretion in the distribution of matrimonial property and co-ownership of the matrimonial home. In (1975) 1 CLB Issue 2 Page 49 a brief summary appeared of an earlier working paper.

The Commission recommends continuation of the exercise of judicial discretion in the distribution of matrimonial property, and the imposition of co-ownership of the matrimonial home by operation of law.

In 1975, the Married Women's Property Act was amended to allow wide judicial discretion to be exercised in any question regarding ownership or possession of property of married persons. While this legislation was prepared prior to completion of the Commission's final proposals, it reflects in large measure the proposals of the Commission as they relate to judicial discretion. The Commission, therefore, endorses the legislation as a substantial enactment of the first phase of its tenative proposals. The Commission had suggested that –

(i) all property owned by the spouses should be available for redistribution by the Court:

(ii) the matter of distribution of matrimonial property should be brought before the Court by a simple application which would usually be made at the time of divorce, but that applications during the marriage should also be permitted:

(iii) moral misconduct, as distinct from economic misconduct, should not be considered as a factor influencing the division of property between the spouses:

(iv) insofar as the redistribution may take place at the time of divorce, the court should consider the question of distribution of property and that of maintenance as interrelated: and

(v) the court should be given the power to make any order that seemed most appropriate to the particular circumstances of each case.

On the question of ownership of the matrimonial home, under the proposed legislation both spouses will own an equal share in the home. Each will have equal management, control and occupational rights in the home. The draft legislation also deals with household goods used in the actual home of the married couple, regardless of whether their residence is a house or a rented apartment.

(C.L.B. July 1976 pp.277-278)

Impact of divorce on existing wills

The Ontario Law Reform Commission has published a short report which studies the impact of divorce upon existing wills. It notes that occasionally ex-spouses have been the unintended recipients of windfall benefits resulting from their former spouses' neglect to alter a will following divorce.

The Commission isolates five general approaches –

(i) to permit wills to be revoked by implication because of a general change of circumstances;

(ii) to allow a judge to decide whether it would be just in a particular case to let the will stand;

(iii) to state that all existing wills are revoked by the subsequent divorce of the testator:

(iv) to modify the will by striking down all gifts to an ex-spouse;

(v) to deem the ex-spouse to have died before the testator for the purpose of interpreting the provisions of the will.

It considers each in turn, and concludes that (v) avoids the difficulties inherent in the other approaches, but seeing merit and disadvantages in all. Its preference is to recommend (v) in the following terms –

(i) the Wills Act should be amended to provide that where a testator is divorced, or where his marriage has been annulled, after making a will, the will shall be read for all purposes as if the former spouse had died before the testator, unless the will expressly provides otherwise. Such an amendment should operate to revoke all dispositions of beneficial interests in favour of the ex-spouse, to revoke provisions conferring a general or special power of appointment on the ex-spouse, and to revoke provisions naming the ex-spouse as executor or trustee;

(ii) although the amendment should operate to invalidate the appointment of an ex-spouse to act as trustee for a secret trust, established before the testator's divorce, it should not otherwise interfere with the secret trust;

(iii) the amendment should apply to all wills of persons dying after the enactment of legislation implementing the reform and so be of retrospective effect.

(C.L.B. April 1977pp.263-264)

Proof of marriage

The Law Reform Commission of British Columbia has published a "Report on Proof of Marriage in Civil Proceedings" (L.R.C. 32). They concluded that compliance with the requirement that a marriage be strictly proved in divorce proceedings could cause a petitioner financial and (by delaying the progress of proceedings) personal hardship, especially where expert evidence is needed in order to prove a "foreign marriage". There was no convincing basis or rationale for requiring such "strict proof" and the law relating to proof of marriage in such circumstances needed simplifying. The Commission therefore recommended that the Evidence Act of British Columbia be amended to reflect the following principles—

(i) in any civil proceeding where it is alleged that a ceremony of marriage took place, either in British Columbia or in another jurisdiction,

 (a) the evidence of a party to the ceremony or some other person present thereat, shall be evidence of the fact that the ceremony took place,

 (b) a document purporting to be the original or certified copy of a certificate of marriage alleged to have taken place is admissible as evidence of the fact that the ceremony took

(ii) where evidence of a ceremony is so adduced, a marriage that is formally valid shall be deemed to have taken place unless evidence to contrary sufficient to raise a reasonable doubt has been adduced, or, in exceptional circumstances, by reason of the unusual nature of the ceremony described or the document tendered the court requires further evidence that a formally valid marriage took place;

(iii) in the absence of evidence to the contrary, a marriage deemed formally valid in accordance with paragraph (ii) shall be presumed to be essentially valid.

(C.L.B. October 1977 pp.657-658)

CANADA- NEW BRUNSWICK

Matrimonial property

The Law Reform Division of the Department of Justice of New Brunswick has published a Discussion Paper entitled "Matrimonial Property Reform for New Brunswick" [briefly noted at (1978) 4 C.L.B. 979]. The Department of Justice explains that the thrust of the proposal for reform is to recognise in the law of New Brunswick the principal that marriage is an economic partnership in which both spouses share equally without regard to the specific roles and responsibilities assumed by each. To give substance to this principle the Department proposes that matrimonial property fall into two

categories (a) the matrimonial home and household goods and (b) family assets. The following is a summary of the Paper's tentative proposals—

(i) subject to a limited discretion in a court to deal with inequitable situations, both spouses would be deemed by law to have a joint interest in premises owned by either spouse and occupied as a matrimonial home regardless of when the property was acquired, who paid for it and whether it was a gift or inheritance. Spouses would share equally in the ownership and maintenance of the home and would have an equal say with regard to selling it. The same principle would apply to household goods (the normal accountrements of a home) except where the property was pre-owned by one spouse or was acquired by one spouse by gift or inheritance;

(ii) with limited exceptions, all other property acquired by either spouse after the marriage would fall into the category of "family assets". Property falling into this category could be owned and dealt with by either spouse separately, but there would be a continuing interest in each spouse in an undefined half of the total family assets. Spouses would also share equally the family debts;

(iii) where the spouses were unable to agree on how the family assets and debts were to be shared, a court could resolve the matter by deciding what assets and debts should be included. The court would exercise this discretion in accordance with legislative guidelines outlining what could and could not be included (e.g. gifts and business assets would, in general, be excluded). The court would have a discretion as well, limited by legislative guidelines, to broaden the scope of family assets and to alter the shares receivable by the spouses where exceptional circumstances, as outlined in the legislation, existed;

(iv) an application could be made to a court for a division of matrimonial property in the event of divorce, death, separation or in any situation in which it was necessary to prevent the squandering of property;

(v) in dividing the property a court could award specific items to each party, and would, after determining the value of the assets and the amount of family debts, order the spouse with the greater property to make an equalising payment to the spouse with the lesser property;

(vi) the proposed regime would apply to all persons who make their habitual residence in New Brunswick, except spouses who contract between themselves to be bound by the existing law of separate property or by a private arrangement. A party to an existing marriage would have one year to opt out with respect to previously acquired property, but, in the absence of agreement with the other spouse, would be bound with respect to

newly acquired assets by the new law;

(vii) parties to a so called "common law" marriage would be subject to the recommended rules governing the sharing of "family assets", but not the rules relating to the matrimonial home;

(viii) a division of property should, wherever possible, be effective prior to a determination about maintenance to be paid by one spouse to the other. Maintenance should be based on reasonable needs and should be available to both husbands and wives.

(C.L.B. January 1979 pp.160-164)

CANADA - SASKATCHEWAN

Interspousal tort immunity

The Law Reform Commission of Saskatchewan has published a Report under the title "Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts". [The related Working Paper was summarised at (1979) 5 C.L.B. 829.]

The Report records that the common law rule of interspousal tort immunity still forms part of the law of Saskatchewan, and notes that this immunity has been abolished in Manitoba, Ontario and Prince Edward Island (with abolition recommended in Alberta); and in England and Wales, New Zealand, Tasmania, Queensland, Victoria and the Australian Capital Territory.

The Commission concludes that there is no longer any logical basis for the proposition that in instances of tortious conduct the spousal relationship is sufficient reason for denying access to the courts. As a relic of days gone by, with no modern justification for its retention, the doctrine ought to be abolished.

Under the existing contributory negligence legislation, where a married person is injured as the result of the negligent conduct of the spouse and another, the injured person is allowed to recover only those losses attributable to the negligence of the other tortfeasor, even when the negligent spouse has insurance covering the liability. With the abolition of interspousal tort immunity, the Commission recommends that this provision is unnecessary and should be repealed.

The Report notes that a family member (daughter, son, husband or wife) who is injured, or dies, while a passenger in an insured family member's automobile as a result of the insured's negligence, is barred by statute in most Canadian common law jurisdictions (except Ontario, since 1975) from recovering damages from the insured's

insurer. Since the greatest number of interspousal tort actions would no doubt arise as a result of automobile mishaps, the abolition of interspousal tort immunity, if it is to be of any practical significance and not cosmetic only, must apply to passengers. With the abolition of interspousal tort immunity, insurance companies would be liable for personal injuries or death suffered by one spouse as a result of the other insured spouse's negligence in all instances other than as a passenger or as a person "insured by the contract". There was no merit in the argument that there is more likelihood of collusion between spouses as passengers than between them as driver and pedestrian or as drivers in separate automobiles. Consequently, the exclusion from coverage of family members as passengers ought to be repealed.

(C.L.B. April 1980 pp.623-624)

CANADA - MANITOBA

Use of term "illegitimate"

The Attorney-General referred to the Law Reform Commission of Manitoba the matter of whether references in the statutes of Manitoba, and specifically the Testators Family Maintenance Act to "illegitimates" could be repealed and replaced by a more socially-acceptable term. In an informal report the Commission agreed that the term "illegitimate" was a distasteful one but did not feel that the answer lay in a simple change in terminology in various statutes. Indeed it feared that the outlawing of an unpleasant word might lead to the conclusion that an unpleasant problem had been solved. It therefore did not recommend that any other words be substituted for the words "illegitimate child" or "illegitimate children", either in the Testators Family Maintenance Act or any other statute in which they appeared, but recommended instead that a separate project be undertaken concerning the status of illegitimacy with a view to its possible abolition.

(C.L.B. October 1980 p.1309)

CANADA - SASKATCHEWAN

Equality of status for married persons

A century and a half ago, John Stuart Mill wrote that "Marriage is the only actual bondage known to our law. There remain no legal slaves except the mistress of every home."

A report of the Law Reform Commission of Saskatchewan, entitled *Tentative proposals for an Equality of Status of Married Persons Act*, observes that married women's property legislation between 1870 and 1907 in England and Saskatchewan removed the principal disabilities placed upon married women by the common law. However, the approach adopted in that legislation led to a reformulation of the status of married women which now appears anachronistic, and in some cases fails to provide complete equality of status for married women. This report has attempted to identify those few examples of substantive inequality which remain in our law, and demonstrates that there is little in the Married Persons' Property Act, virtually unchanged since 1907, which could not be repealed and replaced with a straightforward legislative statement to the effect that a married woman has the same capacity and status as a married man.

The Commission therefore recommends repeal of the Married Persons' Property Act, and adoption of an Equality of Status of Married Persons Act which would set out the principle of equality of status, and explicitly abolish the remaining disabilities affecting married women.

In addition, the Commission has examined the Marriage Settlements Act and provisions in the Queen's Bench Act relating to marriage settlements. Although the subject matter of that legislation differs in content and purpose from the Married Persons' Property Act, it is best understood against the same background in common law and equity. For that reason, it is convenient to recommend revision of marriage settlements legislation in these proposals.

Interspousal marriage settlements are now best regarded as a species of interspousal contract, and for all purposes should conform to the rules applicable to interspousal agreements under the Matrimonial Property Act. The protection for creditors and others in the Marriage Settlements Act applies to marriage settlements, but not other interspousal contracts, and is at any rate of little practical significance.

The Commission therefore recommends repeal of the Queen's Bench Act provisions relating to settlements, and the Marriage Settlements Act; the Matrimonial Property Act should be amended to make the requirements for binding interspousal agreements apply to all interspousal marriage settlements.

(C.L.B. January 1982 pp.184-188)

Enforcement of maintenance orders

The Law Reform Commission of Saskatchewan published in March 1982 *Tentative Proposals for an Enforcement of Maintenance Orders Act*. The Law Reform Commission considers that the Provincial maintenance law is long overdue for major reform. Reform of maintenance law should include both change in the grounds for awarding maintenance, and in the enforcement system. The Commission, however, agrees with the Law Reform Commission of Canada that the enforcement of maintenance orders is the "weakest link" in family law. For that reason, and because of the concern expressed about the enforcement problem in Saskatchewan, the Commission has chosen to make recommendations for reform of the maintenance enforcement system before continuing with its study of other aspects of maintenance law.

The policy of the law relating to maintenance enforcement should pursue three goals—

(i) First, and most importantly, it should, alone or in conjunction with social assistance, provide a regular flow of income to spouses and children in need as the result of separation or divorce. It is not enough that remedies should be effective to collect accumulating arrears, though the present system does not even meet that criterion. Most spouses and children who obtain a maintenance order are dependent upon a regular flow of maintenance, or social assistance in default of payment, to provide day-to-day living expenses.

(ii) Second, the regular flow of income which families in need require should be available without the trauma, expense and delay of continuing court proceedings. The burden of enforcing maintenance orders should not rest solely on the shoulders of the maintenance creditor. The present system is not only unnecessarily onerous for spouses who are attempting to rebuild their lives after a separation or divorce, but also fails to encourage pursuit of enforcement remedies.

(iii) Third, the enforcement system should encourage and compel defaulting spouses and parents to meet their maintenance obligations. The inadequacy of existing remedies now often permits evasion of that responsibility, and lack of co-ordination between the courts and the Department of Social Services may both encourage evasion, and deter the maintenance creditor from pursuing enforcement remedies. The taxpayers of the province expect reasonable efforts to be made to enforce maintenance obligations if assistance is to be granted in cases in which maintenance is unavailable or unenforceable.

The Commission's Background Paper, *Family Maintenance Between Husband and Wife*, considered several approaches to reform of the maintenance enforcement system. The most obvious approach to reform would be, as the Background Paper described it, to "increase the efficiency of current mechanisms". There are limits to what can be achieved in that way. It is simply not possible to adapt existing remedies to guarantee a regular flow of income in many cases. But if maintenance obligations are to be effectively brought home to persons who are charged with them, enforcement remedies must be reasonably effective. The other approaches to the enforcement problem discussed below do not eliminate that concern. The Commission believes that considerable importance should be attached to improvement of existing remedies.

The Commission's Background Paper also considered "automatic enforcement" programmes. Automatic enforcement programmes in operation in many Canadian and American jurisdictions place a responsibility on public officials to initiate enforcement proceedings on behalf of maintenance creditors. Such programmes meet some of the problems which cannot adequately be resolved within the existing system in Saskatchewan by removing the enforcement burden from the shoulders of the maintenance creditor. The Unified Family Court is presently considering establishment of an automatic enforcement programme

within the framework of existing legislation. It will provide an opportunity to test one varient of automatic enforcement in Saskatoon.

The third option for reform discussed in the Commission's Background Paper was described as "payment and enforcement by a public agency". The Background Paper described such a programme in these terms—

> An agency could be established (perhaps attached to the court) both to pay maintenance and to secure its enforcement. Upon the claimant spouse proving need, the agency would furnish him or her with cash and then proceed to recoup the money from the other.

There are some clear advantages to such an approach. A family in need would receive a regular flow of money, and would be relieved of the burden of initiating enforcement proceedings. Since enforcement would be undertaken by the agency providing assistance, it would be able to recoup a substantial part of the money advanced for assistance. A programme of this sort has been in operation in the State of Michigan for some time, and has been regarded as a success by most observers. The Commission is of the opinion that better co-ordination between enforcement of maintenance orders in the courts and social assistance programmes is necessary if the maintenance enforcement system is to ensure a regular flow of income to spouses and children in need, while adequately protecting the public purse. However, the Commission believes that those goals can be achieved without creating a new public agency to administer grants of assistance to families in need. The relationship between social assistance and maintenance enforcement will be the topic of Chapter IV of this report.

In summary, the Commission believes that effective reform of maintenance enforcement law must include three elements—improved remedies, automatic enforcement, and better co-ordination between social assistance programmes and maintenance law. The legal framework required to implement a new maintenance enforcement system has been cast in the form of a draft Enforcement of Maintenance Orders Act. In addition, to facilitate better co-ordination between social assistance and maintenance enforcement, some changes in social assistance policy and regulations have also been proposed.

Finally, it should be noted that the Commission's recommendations are intended to provide a workable foundation for an enforcement system which can operate in all parts of the Province. There is a very real danger that an automatic enforcement system which works well in the Unified Family Court in Saskatoon cannot be reproduced in courts outside the major urban centres. A pilot automatic enforcement project in the Unified Family Court in Saskatoon is undoubtedly a useful addition to the unified family court project. However, care must be taken in interpreting the results of the unified family court project when designing an automatic enforcement system to operate in other courts. If a pilot project is thought to be a necessary prerequisite to establishment of a Province-wide maintenance enforcement system, it would be desirable to complement the pilot project in the Unified Family Court with a pilot project in a Provincial court outside the major urban centres.

(C.L.B. July 1982 pp.1078-1080)

Succession to property

The Law Reform Commission of Manitoba has published its *Report on "The Survivorship Act"*.

Survivorship legislation is found throughout Canada, the United States and Great Britain. Statutory provisions were required because the common law did not provide for a rule regarding sequence of deaths unless the respective claimants could prove a sequence on the balance of probabilities. For some deaths, especially those caused by common disaster, this proved impossible. Its summary of the recommendations is as follows—

(i) That the statutory presumption of the sequence of deaths under "The Survivorship Act" be amended so that it shall be deemed that each decedent has survived the other or others.

(ii) That the proposed statutory presumption of the sequence of deaths apply where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others.

(iii) That the Legislature adopt a general rule of survivorship as follows—

Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act.

(iv) That the proposed Survivorship Act contain a provision granting the executor of a deceased spouse the right to claim a share in the other spouse's estate as set forth in "The Dower Act", C.C.S.M. c. D100, when spouses die simultaneously or in circumstances in which the sequence of their deaths is uncertain.

(v) That the proposed Survivorship Act contain a provision which would require the proceeds of insurance to be paid in accordance with sections 193 and 230 of "The Insurance Act" and thereafter the proposed Survivorship Act would apply to their disposition.

(vi) That annotations be added to sections 193 and 230 of "The Insurance Act" which indicate that the proposed Survivorship Act applies to distribute the insurance proceeds from the estate of the insured.

(vii) That the Legislature adopt a rule of succession for joint tenants under the proposed Survivorship Act as follows—

Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purpose of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

(viii) That "The Law of Property Act", C.C.S.M. c. L90, be amended to add a provision to abolish tenancies by the entireties.

(ix) That the Legislature adopt a rule regarding substitute gifts under the proposed "Survivorship Act" as follows—

Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will—

(a) dies before another person;
(b) dies at the same time as another person; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the will provides is deemed to have occurred.

(x) That the Legislature adopt a provision pertaining to substitute personal representatives as follows—

Where a will contains a provision for a substitute personal representative operative if an executor designated in the will—

(a) dies before the testator; or
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose or probate, the case for which the will provides is deemed to have occurred.

(xi) That the proposed "Survivorship Act" contain a provision for the sequence of deaths with respect to general and special powers of appointment so that, unless a contrary intention appears, where the donee has purported to exercise the power of appointment by will, the donee shall be deemed to have survived the donor for the purpose of the power of appointment.

(xii) That the proposed "Survivorship Act" contain a transition provision where the Act will apply to all deaths unless the evidence establishes, on a balance of probabilities, that the deaths occurred prior to the date the proposed Act comes into force.

A draft Act Respecting Survivorship and a draft Act to Amend the Law of Property Act are appended to the Report.

(C.L.B. January 1983 pp.157-164)

CANADA

Wife battering

The Legislative Assembly's Standing Committee on Social Development has published its *First Report on Family Violence: Wife Battering*. In 1982 when considering the Annual Report of the Ministry of Community and Social Services, the Committee focused attention on the problem of wife battering in Ontario. It was clear to the Committee that battered women needed help now and could not await the results of lengthy hearings. Accordingly, the Committee concentrated on the responses of the criminal justice and social service systems to wife assault, and not on the causes of violence.

Wife battering is an intolerable act of criminal violence, and the Committee considers that Government and society must respond to this serious social problem by changing attitudes so that wife battering is no longer condoned. The Committee defines wife battering as any form of physical assault perpetrated by an adult male against an adult female, presently or previously living together, the definition extending to marital and common law relationships.

(C.L.B. April 1983 pp.773-774)

CANADA - BRITISH COLUMBIA

Breach of promise of marriage

The Law Reform Commission of British Columbia has issued a Working Paper (No. 39) on the *Breach of Promise of Marriage*. The tentative conclusion reached is that the action for breach of promise of marriage should be abolished, and the Commission has accordingly made tentative proposals. Final recommendations will take into account responses to the Working Paper.

In coming to its tentative conclusion, the Commission has observed that fundamental changes in the law of divorce, the existence of adequate alternative remedies in those cases where the parties to a broken engagement require protection, and the fact that the action for breach of promise is often used to wreak revenge or blackmail, suggest that the action should be abolished. Moreover, while at one time it may have been desirable to compensate a party to a broken engagement for hurt feelings and lost status, today it is unlikely that any policy is served by awarding damages in these cases. An engagement is often only a means of testing the parties' compatibility, and if an engagement is broken, a party with hurt feelings is probably in a better position than if an unhappy marriage had taken place. Lastly, sanctions which are necessary to govern commercial arrangements, are inappropriate for agreements to marry made between people who are probably unaware that the commitments they have made are viewed at law as binding contracts.

(C.L.B. July 1983 p.972)

Interspousal immunity in tort

In the Province of British Columbia, one spouse cannot sue the other in tort. This rule is enshrined in s. 10 of the Married Women's Property Act. When first enacted almost 100 years ago this provision represented an improvement over an even more restrictive common law position. Today the rule is an anachronism.

In a Report on the subject recently issued the Law Reform Commission of British Columbia examines the rule and its consequences. The Commission recommends its replacement by a new and modern statement of the law concerning the rights of spouses to sue each other. It also examines the implications of a change in the rule and makes recommendations with respect to insurance legislation, insurance contracts and contriburoty fault.

A Working Paper setting out effective proposals for changes in the law was circulated in June 1982. The response, while not large, generally agreed with the proposals. Draft legislation to implement the Commission's recommendations is annexed to the Report.

The recommendations, as summarised by the Commission, are as follows—

(i) Section 10 (3) of the Married Women's Property Act, RSBC 1979, c. 252 be repealed and replaced by provision comparable to the following—

Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.

(ii) Section 10 (1) of the Married Women's Property Act be amended by striking out the words "including her husband".

(iii) Section 5 of the Negligence Act, RSBC 1979, c. 298 be repealed.

(iv) Section 240 (b) of the Insurance Act, RSBC 1979, c. 200 be repealed.

(v) Insurance Motor Vehicle Act, Regulation No. 6.11 be repealed.

(vi) A provision be added to the Insurance Act, and the Insurance (Motor Vehicle) Act, prohibiting the exemption from liability, under motor vehicle insurance policies, for personal injuries to members of the insured's family.

(vii) Legislation implementing recommendations (i) to (v) should apply only to causes of action arising after that legislation comes into force.

(C.L.B. October 1983 pp.1415-1416)

Intentional interference with domestic relations

The Law Reform Commission of British Colombia has published its final Report on *Intentional Interference with Domestic Relations*. The Commission's conclusion and recommendations, as set out in the Report, are as follows—

Conclusion

A. *Statutory Remedy*

Our conclusion is that existing remedies, which ostensibly protect family relations, are anachronistic and ineffective. Their potential for abuse adds additional weight to the conclusion that they should be abolished.

We are concerned, however, that abolishing these torts might be regarded as an attack on the institution of marriage. Torts of interference with domestic relations tend to recognise and support the respect generally given in our society to marriage and the family. In the Working Paper we observed: There may be, however, some merit in retaining these actions as an expression of society's disapproval of certain conduct. We think that the disadvantages of these actions weigh heavily against retention. Perhaps it would be desirable to enact legislation which provides a remedy for intentional interference with family relations, provided the statutory remedy focuses upon protecting the relationship itself, and not upon providing damages for hurt feelings or loss of services or society. We are sceptical that such an approach is necessary, but we would appreciate comment on this issue. Legislation which might provide adequate protection for family relations should attempt to avoid the evils that exist under the current law. Such legislation might embody or reflect the following principles:—

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without claim of right, to interfere with a relationship between another person and that person's spouse, parent or child.
(2) The nature and degree of freedom from interference described in (1) to which a person is entitled is that which is reasonable, due regard being given to the lawful interests of others.
(3) When considering what constitutes reasonable freedom from interference under (2), the court may have regard to whether the conduct
    (a) was consented to by some person entitled to consent; or
    (b) occurred in circumstances which would be privileged under the law of defamation.
(4) An injunction may be granted with respect to any actual or apprehended interference that is actionable under (1).
(5) An action or right of action under (1) is extinguished by the death of the person entitled to bring the action.

It is difficult to determine when a court should provide a remedy under such legislation, and what that remedy should consist of. For example, an 18-year-old child may leave home to live in a common law relationship with a 22-year-old woman. The parents, upset by this turn of events may blame the common law spouse for destroying their relationship with their son. Should they be entitled to a remedy for interference with that relationship? Would it make any difference if the son married, or intended to marry, his common law spouse upon obtaining majority?

Many people would probably agree that no remedy should be available in this kind of case. Perhaps the courts would have no trouble dealing with such legislation. We are reluctant, however, to endorse legislation that may encourage actions which cannot presently be brought for many innocent kinds of interference with family relationships.

On the other hand, there are many cases where a remedy might be desirable. For example, A, the owner of a bookstore, is reluctant to lose the service of B, the bookstore accountant. B is about to leave since B's spouse's employment involves an impending transfer to another part of the country. A might react in different ways. A might offer B a substantial salary increase in the hope that B would stay notwithstanding the spouse's departure. Alternatively, A might take positive steps, in the spirit of Iago, to poison the marriage, perhaps going so far as to encourage or reward a third person to entice or seduce one of the spouses. Should either or both courses of conduct result in liability for A? Liability to whom—B, B's spouse or both? What should the measure of damages be? Clearly, there are many questions which must be resolved if this kind of approach is adopted.

In the Working Paper we invited comment on whether legislation along these lines was desirable. We suggested that perhaps the most telling argument in favour of this approach would be a perceived need for society to express its disapproval of certain kinds of conduct that injure family relationships. Nevertheless, we had some doubts whether a new tort, which made intentional interference with a family relationship actionable, would protect those relationships, and deter such conduct.

Our correspondents shared our concerns and did not favour the creation of a new statutory tort. The general view was that it would lead to the same abuses encountered in the abolished actions. One correspondent observed that a statutory tort would represent no improvement over the current law unless it defined the nature and degree of interference that was actionable and listed the remedies that were applicable.

The response we received, consequently, only confirmed our conclusion that a new statutory tort to protect family relationships was undesirable.

B. *Recommendations*

We have made the following Recommendations in this Report—

1. Section 76 of the Family Relations Act, RSBC 1979, c. 121 be repealed and a section similar to the following be substituted—

    76. No claim for damages shall be made by a spouse against any person on the ground that the person has committed adultery with his spouse.

2. The actions of enticement and harbouring of a spouse be abolished.
3. (a) The actions of enticement and harbouring of a child be abolished.
    (b) Sections 36 and 37 of the Family Relations Act, be amended to allow the court to make an order on the application of any person who may exercise custody as defined in s. 34.
    (c) An order under ss. 36 or 37 of the Family Relations Act, sought against another person who is also entitled to custody, may not be made unless the court first makes a custody order.
4. The action of seduction of a child be abolished.
5. (a) Recommendations 1, 2, 3 (a) and 4 should apply whether or not the cause of action arose before legislation implementing these Recommendations comes into force.
    (b) Notwithstanding (a), an action commenced before legislation enacting Recommendations 1, 2, 3 (a) and 4 comes into force may be continued as if the legislation had not been enacted.

It is important to remember that the abolition of these actions does not affect the rights of a spouse or child who has been injured by another. Recommendations 1 and 2 affect the rights of one spouse against a third party who has committed adultery with the other spouse, or who has enticed or harboured the other spouse. Recommendations 3 and 4 affect the rights of a parent against third parties who have enticed, harboured or seduced the parent's child. If a spouse or child has been injured by another, their rights against that person are unaffected by these recommendations.

(C.L.B. July 1984 pp.1250-1252)

Matrimonial property

The Law Reform Commission of Saskatchewan has published a Report entitled *Tentative Proposals for the Reform of the Matrimonial Property Act*. The Commission had begun its review of the 1979 Act shortly after it was proclaimed in 1980.

In this Report, the Commission's approach to reform of matrimonial property law is based on the concept of marriage as a partnership. For that reason, spouses should be entitled to share in the property that they had worked and saved to acquire during the course of the marriage. The Commission's proposals attempt to work out the consequences of the partnership notion in a more thorough manner than does the present Act.

Although a new Act is proposed, much of it is similar in content and structure to the present Act, and many portions of the existing legislation have been retained. In that sense, the report does not so much reject the old Act as build upon it, taking advantage of the experience that has been gained in practice since the original Act was adopted.

The Commission emphasises that its proposals are tentative only and invites comments and criticism from the public. A final report to the Minister of Justice will be issued by the Commission only after the public has had an opportunity to comment on the proposals.

As summarised in the report, the following are the Commission's major proposals incorporated in the draft Act—

1. The presumption of equal sharing of matrimonial property should be retained.
2. A substantial failure by a spouse to make the contribution that would ordinarily be expected of him or her in the circumstances of the marriage should be a consideration on which a court may base an unequal division; but otherwise the court ought not attempt to compare the relative contributions of the spouses.
3. Property brought into marriage by a spouse should ordinarily be exempt from division, including any increase in value unrelated to the efforts of the spouses.
4. Gifts and inheritances received by a spouse after marriage should be exempt from division unless it can be shown that a gift or inheritance was intended for both spouses.
5. The conduct of the spouses toward one another during marriage should not be a factor in dividing matrimonial property.
6. The material date for dividing matrimonial property should ordinarily be the date the spouses separated, with appropriate adjustments made for the use and appreciation of the property from that date until the date of the court order.
7. The courts should be directed to preserve economically viable farms and businesses, where it is fair and practical to do so, by ordering payments to be made over time or otherwise deferring distribution.
8. Pensions should be expressly included as matrimonial property, and the court should be empowered to impose a trust on or vest an interest in a pension plan, or divide the value of an interest in a pension plan according to a prescribed formula.
9. The Homesteads Act should be repealed, but the traditional homesteads concept should be modernized and integrated into Part I of The Matrimonial Property Act.

Other changes include new provisions respecting conflict of laws, dissipation, applications after death of a spouse, and contracting out of the Act.

(C.L.B. January 1985 pp.163-164)

Abortion

The second report of the Senate Select Committee on Population Trends in Fiji recommends the reform of Fiji's abortion law to enable women, in consultation with their physician, to decide whether or not to continue their pregnancies. The committee recommends that terminations should be done by registered medical practitioners during the first 24 weeks of pregnancy and that such services would be made an integral part of the family planning services in cases of contraceptive failure (noted in IPPF *Law file*).

(C.L.B. July 1977 p.472)

GHANA

Intestate Succession

The draft of an Intestate Succession Decree has been prepared as part of the Fourth Programme of the Ghana Law Reform Commission. The aim is to provide Ghana with a uniform law of intestate succession. The new Decree would replace s.48 of the Marriage Ordinance (Cap.127), s.10 of the Marriage of Mohammedans Ordinance (Cap.129), and the customary law rules relating to succession to the estate of an intestate person in so far as such rules are inconsistent with the provisions of the Decree.

Under existing customary law the position of a widow is insecure, for example. She has no absolute right to any portion of her deceased husband's property, though by her many duties in the home she contributes substantially to the making of a home for husband, herself and children. She is left with nothing on his death but a doubtful right of residence in her deceased husband's house in addition to some maintenance which is rarely given.

Further, children in Matrilineal Communities in Ghana acquire only a life interest in their deceased father's house, and in some cases they acquire even less than this. For purposes of succession to property they are not regarded as members of their father's family.

Under s.48 of the Marriage Ordinance, the rules of intestate succession in force in England in 1884 are applied in Ghana. These rules have themselves been amended on a number of occasions in their country of origin. Another defect of section 48 relates to the fact that these rules of distribution vary depending on whether the deceased person is the husband or the wife. When a woman married under the Ordinance dies intestate, her husband takes two-thirds of her total estate, the family gets one third and the children nothing.

Under s.10 of the Marriage of Mohammedans Ordinance the property of a Ghanaian Muslim who marries in accordance with Muslim rites and registers such a marriage devolves in accordance with Islamic Law.

This provision is honoured more in the breach than in the observance. This is probably due to the fact that Ghanaian Muslims are either not aware of the provisions of Cap.129, or if they are aware of them, they find the procedure very cumbersome and tedious.

Further, under Islamic law any person who is not a Muslim may not succeed to the property of a Muslim. So that where a Muslim dies leaving children or other dependants who are not Muslims, they may not be entitled to any portion of the intestate's property.

The proposed new rules of intestate succession are aimed at ending the present multiplicity of systems and ensuring that justice is done to the dependants of the intestate. The Commission has therefore suggested changes which will give surviving spouses and children of intestate persons some share of their spouses' or parents' property as the case may be. Succession to stool and other group-owned property is not to be affected by the new rules.

(C.L.B. May 1975 pp.52-53)

Maintenance of Children

A new Decree has been prepared by the Law Reform Commission, intended to replace the Maintenance of Children Act (Act 297) which never functioned satisfactorily.

The Decree provides for the establishment of a family Tribunal, one of the members of which shall be a woman.

The personnel of the family Tribunal is in fact a combination of the conciliation committee and the Court under Act 297. The family Tribunal is empowered to make a binding order in the same way as a District Court.

The proposed Decree enables a complaint to be brought before the Tribunal for a maintenance order against any parent or guardian or any person legally liable to maintain the child, who has failed to do so.

The proposed Decree enumerates the circumstances under which an application for a maintenance order may be made. Under Act 297, the only occasion when such an application could be made was when a father had wilfully neglected to provide reasonable maintenance for his child. Under the proposed Decree, any parent or guardian or any other person who is legally liable to maintain a child, and who neglects to do so, may be compelled by law to pay towards the child's maintenance or to make some reasonable contribution towards it.

Under Act 297 the Court could only make a maintenance order for a sum not exceeding (₵10.00) ten cedis. This was one of the greatest defects of Act 297 for that amount even at the time when the Act was passed in 1965 was grossly inadequate. The proposed Decree has avoided stipulating any sum, whether minimum or maximum, which may be awarded as maintenance. The criterion is whether the parent or guardian or the person to be charged with the child's maintenance is able to pay or to contribute as the case may be.

The proposed Decree corrects a serious defect in Act 297 which provided that a father could only apply for custody of his child if the mother had brought proceedings against him for maintenance of that child. Under the Decree a father or a mother may at any time apply for custody of the child.

Paternity suits are also dealt with under the proposed Decree, but a new element which was not provided for in Act 297 has been introduced. Where a woman dies after delivery of a child, but before she could bring a paternity suit, a relation may apply to the family Tribunal for a declaration of paternity.

The procedure in respect of applications before the family Tribunal has been designed to drastically reduce the expense of bringing such an application, as well as to expedite the hearing of such cases.

One of the reasons why Act 297 was not patronised was due to the fact that very often the parties concerned did not wish to have their case heard in the public court. The proposed Decree makes it mandatory for all proceedings under the Decree to be heard in private. It is presumed that the informality of the proceedings in the absence of the general public will encourage the spirit of compromise and diminish any inhibitions the parties may have about coming out frankly with their difficulties.

(C.L.B. January 1975 p.50)

Intestate Succession

As part of its Fourth Programme, the Commission has produced a comprehensive working paper on the laws of intestate succession and has submitted ten tentative proposals to the public for comment and discussion.

The proposals are –

(i) there should be a unified system of intestate succession throughout Ghana irrespective of one's ethnic group religious belief or form of marriage:

(ii) the new law should apply to all Ghanaians, and also to non-Ghanaians who are married to Ghanaians or have issue by Ghanaians and die intestate.

(iii) the new rules of Intestate Succession should apply only to the self-acquired property of a deceased person. The new rules shall not apply to family property, stool property, skin property or society property or, to any rank or office of these institutions:

(iv) where a deceased person is survived by spouse/spouses and children (if any) then all the self-acquired household chattels, for example refrigerator, television set, radiogram, furniture, furnishing, crockery, cooking utensils, books etc. should go to the surviving spouse/spouses and children (if any) and in equal shares absolutely. Motor vehicles however will not form part of the household chattels:

(v) the rest of the deceased person's property (both movable and immovable) shall be shared as follows:

  (a) one-fourth of the whole residue shall go to the deceased's family ("family" in this sense, in the view of existing customary laws, depends on whether the deceased is a member of a matrilineal or patrilineal community);

  (b) one-fourth of the whole residue to the surviving spouse/spouses;

  (c) one-half of the whole residue to all the surviving children of the deceased equally;

(vi) Where the deceased has left spouse/spouses but no children then the surviving spouse/spouses shall take one-half of the whole residue and the remaining one-half shall go to the family of the deceased:

(vii) where the deceased has left surviving children but no spouse, then three-fourths of the whole residue shall go to the children and the remaining one-fourth shall be given to the family of the deceased:

(viii) where a deceased person has no spouse or children at the time of his death, the whole of his estate including the household chattels shall devolve on the family of the deceased absolutely:

(ix) where the deceased has left no spouse or child and his family cannot be traced within a period of twelve months, then his whole estate shall devolve upon the State.

(x) where a deceased person is entitled upon his death to any insurance benefits, e.g. life policies, social security contributions, superannuation and other provident funds, but during his life-time has made nominations so as to prejudice the rights of his spouse/spouses or children, then the court may, on the application of any of these persons, order that certain portions of these funds be paid to the applicant, unless the court is satisfied that the applicant will not suffer undue hardship if the order were to be refused.

These proposals were sent to various bodies, organizations, institutions and individuals with special interest in the matter. The proposals were discussed on radio and television to enable the public to understand the confused state of the existing law, and the scope and nature of the proposed reform.

At this stage two main views have emerged as the general consensus of public opinion on the Commission's proposals –

(i) there should be a unified system of succession throughout the country.

(ii) widows and children should be protected and adequately provided for under the new law.

The Commission is now considering the manner in which the estate of a deceased person, who has died intestate, should be distributed among those who should be properly regarded as beneficiaries of the estate. It has not been an easy undertaking, but the Commission hopes to be unanimous in its ultimate proposals and recommendations.

(C.L.B. July 1976 pp.282-283)

Age of Marriage

The government is preparing legislation to raise the age of marriage to 21 years for boys and 18 years for girls. The present age of marriage is 18 years for boys and 15 years for girls.

(C.L.B. January 1978 p.122)

Hindu marriage and divorce

The Law Commission of India has recently forwarded a Report to the Government following a reference on the question whether irretrievable breakdown of marriage should be introduced, as a ground of divorce, into the marriage law applicable to Hindus. The Commission consulted the public by means of the following questionnaire —

1. Do you agree with the suggestion that the Hindu Marriage Act be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce?
2. If the reply to Q.1. be in the affirmative, what circumstances, in your opinion, should be considered to be sufficient to prove irretrievable breakdown of marriage?
3. How long should the parties have lived separately before the court can come to the conclusion that there has been an irretrievable breakdown of marriage?
4. Should the presence of children operate as a bar to the grant of a decree of divorce on the ground of irretrievable breakdown of marriage? If so, should the bar be absolute or partial?
5. Are there any special circumstances in which, in your opinion, a decree for divorce should not be granted even if irretrievable breakdown of the marriage is established? If so, please specify the circumstances.

The history of the matter is as follows. The Marriage Laws (Amendment) Act 1976 effected certain important modifications to various provisions of the Hindu Marriage Act 1955 and the Special Marriage Act 1954, some of which implemented the 59th Report of the Law Commission on the former Act. Some implemented the recommendations made by the Committee on the Status of Women.

Divorce by mutual consent (a matter not dealt with in the Law Commission's Report) was provided for, by inserting s. 13B into the Hindu Marriage Act. Such divorce was hitherto available under the Special Marriage Act, or only under Muslim law. Khul (khoola) and Mubara'at are two forms of divorce by mutual consent recognised by Muslim Law.

At the same time, another measure of far-reaching importance was introduced, by adding provision to the Hindu Marriage Act allowing a wife to petition for divorce (whether or not the marriage had been consummated) on the ground that it had been solemnized before she had attained the minimum age prescribed by the Act (15), provided she had repudiated the marriage after attaining that age and before reaching the age of 18. (C.L.B. July 1978 pp.624-625)

Failure to pay maintenance or alimony

The Law Commission of India has submitted its 73rd Report on "Criminal liability for failure by husband to pay maintenance or permanent alimony granted to the wife by the court under certain enactments or rules of law". The Commission's principal recommendation is the creation of a new criminal offence by amending the Indian Penal Code so that where a decree or order for the payment of maintenance or permanent alimony is made against a husband in favour of his wife by a court and the husband, having sufficient means to pay, contumaciously disobeys such decree or order, he shall be liable to imprisonment for a term not exceeding six months and shall also be liable to pay fine not exceeding twice the amount of the arrears outstanding and not less than the amount of such arrears. The imposition of a fine would be mandatory and the wife would be entitled to be paid the arrears out of the fine.

The Commission makes detailed proposals regarding the class of maintenance and alimony orders and decrees to which the new offence would apply, and proposes that the offence should be compoundable at the instance of the wife, without the leave of the court.

The following is a summary of the ancilliary procedural amendments proposed–

(i) the Code of Criminal Procedure should provide that a wife should not be entitled to file a complaint for the new offence unless a notice in writing stating the amount of arrears outstanding, and intimating her intention to file a complaint, has been delivered to her husband or sent to him by registered post, and unless at least one month has expired since the date on which the notice was so delivered or the date on which, when correctly addressed, it would have reached the husband in the ordinary course of post, as the case may be;

(ii) the Code of Criminal Procedure should also provide that in any prosecution for the new offence (where the complaint was filed by the wife and not by someone else on her behalf) the court shall stop all further proceedings and acquit the accused if, at the first hearing or within such further time not exceeding one month as the court may allow, he pays to the wife in court, or deposits with the court–

(a) the amount to which the criminal proceedings relate,

(b) interest at such rate, if any, as has been fixed by the decree or order, or in the absence thereof, at the rate of 12 per cent per annum since the date of default, and

(c) such costs, if any, as the court may deem fit to allow;

(iii) the statutory defence mentioned in para. (ii) above should not be available to an accused husband if, having obtained the benefit of the provision once in respect of any amount due

under a decree or order, he again makes a default in the payment of an amount falling due under that decree or order, for three months or three other periods, as the case may be, whether consecutive or not;

(iv) a new rule should be inserted into the Code of Civil Procedure to provide that where a decree or order for maintenance or permanent alimony has been made against a husband in favour of the wife and the husband is guilty of disobedience to the decree or order, the right of the wife to make a complaint for the new offence shall not in any manner affect her right to apply for execution of the decree or order. However, during the pendency of criminal proceedings instituted in respect of any such complaint—
   (a) the wife shall not be entitled to make any application for execution of the decree or order,
   (b) if, on any application for execution of the decree or order made by the wife prior to the institution of such criminal proceedings, proceedings are pending in any court, those proceedings shall remain suspended for the duration of the criminal proceedings, but not so as to affect any attachment of the property of the judgment-debtor that might be subsisting immediately before the date on which the criminal proceedings were instituted.

Further where any amount is paid to the wife out of the fine recovered in such criminal proceedings, the payment shall amount to satisfaction of the decree or order in full or in part, as the case may be.

(C.L.B. January 1979 pp.163-165)

JAMAICA

Family Law

During 1975 proposals of the Legal Reform Division resulted in legislation in various areas of family law. The main legislation in this area was the Family Court Act which set up a Family Court in the Corporate Area to administer the laws relating to the family and to provide a model for establishment of similar Courts in the rural areas. Attached to the Court are officers of the various Agencies upon whose activities and services the Court will be dependent – Agencies such as the Adoption Board, Child Care and Protection Services, Public Assistance Service, the Probation Service, the Police, Marriage Family and Special Counselling Service and a Health Service. The intention is to provide not only a legal service but to direct cases according to their particular circumstances to the appropriate agency to be dealt with and to create an atmosphere conducive to the solution of family problems.

The jurisdiction of the Family Court is at present limited to the administration of the laws relating to adoption, custody and guardianship of children, maintenance, affiliation and juvenile. It is expected, however, that eventually, this Court will exercise exclusive jurisdiction in respect of all laws affecting the family relations such as the law relating to divorce and other areas of matrimonial law. In the meanwhile, these laws are being examined by a Committee with a view to making proposals for reform.

To ensure the effectiveness of the Family Court it was necessary to amend some of the laws in respect of which the Court exercises jurisdiction. The maximum sums which the Court could order to be paid for maintenance under the Maintenance Act and the Affiliation Act were $8.00 and $4.00 respectively. This restriction on the Court's power has been removed and the Court can now exercise discretions as to the amount to be awarded having regard to the needs of payee and the means of the payer.

These Acts were further amended to make a parent obliged to maintain a child until he or she attains the age of 16 or at the discretion of the Court, age 18 instead of age 14 or 16 as obtained prior to the amendment.

(C.L.B. July 1976 pp.284-285)

Illegitimate and legitimate children

Also prepared by the Legal Reform Division, and now with the Draftsmen are two pieces of legislation directly relating to the bulk of our children population – i.e., those born to unmarried parents. For years these children have suffered discrimination under the law – such discrimination cannot be defended in a society which supports human rights and social justice for all. An Act which will remove the distinction between legitimate and illegitimate children and bring all our children on equal footing in all respects is soon to be implemented.

(C.L.B. July 1976 pp.285-286)

Maintenance

The other Act is the Reciprocal Enforcement of Maintenance Orders Act which will replace the existing Maintenance (Facilities for Enforcement) Act. The latter Act does not provide machinery for the application of or enforcement of maintenance orders in respect of children of unmarried parents whose fathers have left the Island. These fathers, therefore, are able to evade their responsibility to maintain their children by taking up residence abroad. The new Act will make provisions for the application and enforcement of these orders and will generally provide an improved scheme for the reciprocal enforcement of maintenance orders.

(C.L.B. July 1976 pp.284-285)

Divorce and matrimonial causes

The Family Law Committee of Jamica has published its Report No. 1 containing their recommendations for the reform of law relating to divorce and matrimonial causes.

Dissolution of marriage

One of the principal recommendations is that the existing grounds for dissolution of marriage be abolished and be replaced by one ground, viz, the irretrievable breakdown of marriage.

The existing grounds for divorce are—

(a) adultery;

(b) desertion without cause for three years;

(c) cruelty;

(d) insanity;

(e) continuous separation for five years.

In addition a wife may present a divorce petition on the ground that her husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality.

The Report notes that until the introduction of ground (e) in 1969 the concept underlying the grant of a decree of divorce was that of matrimonial offence. The introduction of the separation ground in 1969 marked the first step taken away from this concept, but, it is pointed out, even where this ground is relied on the concept re-emerges where the petition is opposed, for then the petitioner must prove that the separation was wholly or substantially due to the wrongful act or conduct of the respondent. The substitution of irretrievable breakdown is intended to move completely away from the concept of specific fault as the basis for divorce.

With regard to what should be evidence that a marriage had broken down irretrievably, two proposals are made. The main proposal is that the court should grant a decree of divorce if it is satisfied that the parties have been separated for 12 months and there is no likelihood of cohabitation being resumed. The period of separation may be continuous or may be two aggregated periods broken by one period of resumption of cohabitation not exceeding three months immediately preceding the presentation of the petition.

The alternative proposal is that irretrievably breakdown of marriage should be evidenced by—

(a) two years separation with the consent of the respondent or

(b) three years separation without the necessity of consent by the respondent.

The Report indicates the nature of the separation required to prove irretrievable breakdown of marriage. It states that it involves more than mere physical separation, there must be at least a recognition that the marriage is at an end. It is immaterial that this state of affairs is brought about by the action or attitude of one party or that the decision to treat the marriage as having ended is not communicated to the other. The time from which the commencement of the separation is to be reckoned will depend on the circumstances of the case.

The possibility of the requisite separation occurring where the parties continue to reside under the same roof was also considered. The Report recommends that legislation implementing the suggested reform should specifically enact that "the parties to a marriage may be held to have separated and to have lived separately notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other."

The existing law prohibits the presentation of a petition for divorce within three years of marriage except in cases of exceptional hardship suffered by the petitioner or exceptional depravity alleged on the part of the respondent. The Report recommends the reduction of the prohibition period to two years— the court to be given discretion to hear a petition within this time if it is satisfied that—

(a) there are special circumstances by reason of which the hearing should proceed, and

(b) that the parties have considered reconcilliation with the assistance of a marriage counsellor.

It has also been recommended that the requirement under the existing law that a decree absolute of divorce or nullity should not be granted unless the court is satisfied that reasonable arrangements have been made, or will be made, for the care and upbringing of the children of both parties or the children of one party accepted by the other as a part of the family should be retained with one modification. That is—it should apply to all the relevant children under age 18 and not age 16 as obtained at present.

The Committee recognised that there will be the need for adequate counselling services which will arise if their proposals are adopted. Consequently the Report recommends that Family and Marriage Counsellors be assigned to the Supreme Court—

(i) to assist the parties to a marriage in their efforts at reconciliation;

(ii) to provide counselling in relation to divorce problems and generally to assist the parties in resolving such problems whether before or after divorce;

(iii) to provide counsel, assistance and supervision in relation to questions of custody of and access to children of the family;

(iv) to make reports to the Judge on any of the matters at (i) to (iii) and generally as to matters affecting the welfare of the parties or the children of the family or as to the prospects of improvement of the maritial relationship.

Another recommendation is that the absolute and discretionary bars to divorce be abolished. The remedy of decree of presumption of death and dissolution of marriage is to be retained.

Annulment of marriage

The Report also recommends drastic reform to the law relating to nullity of marriage. At present a decree of nullity may be granted in respect of a void or voidable marriage. The Committee considered the concept of the voidable marriage which is valid until annulled and void thereafter as being highly artificial. They felt that the only distinction should be one between valid marriage terminable only by dissolution or death and void marriages which have never come into effect. Accordingly the Report recommends that the category of voidable marriages be abolished and that a decree be granted only on those grounds on which such a decree may now be granted in respect of a void marriage.

There is some doubt as to whether the lack of consent, whether by reason of duress, fraud, mistake or unsoundness of mind, renders a marriage void or voidable. The Committee was of the view that in the contract of marriage consent should be regarded, as in all other contracts, as a vital element. They have recommended, therefore, that the law be amended to make it clear that a marriage is void where there has been an absence of consent and that this provision be limited to marriages celebrated after the coming into effect of the legislation recommended.

Other Matrimonial remedies

The Report recommends the abolition of the remedies of restitution of conjugal rights, petitions for damages for adultery and judicial separation. These remedies the Committee considered to be anachronisms. Further grounds of objections to the damages for adultery are that it is a remedy available only to a husband, and that it is inconsistent with the removal of the concept of specific fault as the basis for divorce.

As to the decree of judicial separation, the Committee notes that it has lost most of its advantages to the petitioning spouses while it may cause undue hardship to the spouse against whom it is made. They favoured the approach adopted in the Australian Family Law Act of giving the court wide and flexible powers to grant an injunction in circumstances arising out of a marital relationship including injunctions designed to safeguard and

protect the interest and persons of the injured spouse and children of the marriage. The Law recommended that similar injunction-granting powers be conferred on the Jamaican Supreme Court.

Jurisdiction in suits for divorce and nullity

It is recommended that the Supreme Court be given jurisdiction:

(a) In suits for divorce and nullity:
  (i) where either party to the marriage is domiciled in Jamaica at the date of the institution of the suit;
  (ii) where either party to the marriage is resident in Jamaica at the date of the institution of the suit and has been ordinarily resident there for a period of not less than 12 months immediately preceding the institution of the suit;
  (iii) where either party to the marriage is a national of Jamaica.

(b) In suits for presumption of death and dissolution of marriage:
  (i) where the petitioner is domiciled in Jamaica at the date of the commencement of proceedings;
  (ii) where the petitoner is resident in Jamaica at the date of commencement of proceedings and has been ordinarily resident there for a period of not less than 12 months immediately preceding the commencement of proceedings;
  (iii) where the petitioner is a national of Jamaica.

(c) In proceedings for orders or injunctions arising out of the matrimonial relationship or for wilful neglect to maintain:
  (i) where either party to the marriage is domiciled in Jamaica at the commencement of the proceedings;
  (ii) where either party to the marriage is a national of Jamaica;
  (iii) where either party to the marriage is resident in Jamaica at the commencement of the proceedings;
  (iv) if the proceedings relate to a child of the family, where the child is present in Jamaica at the date of the commencement of the proceedings.

Under the existing law the domicile of a married women is that of her husband. The Report recommends that for the purpose of jurisdiction in matrimonial causes the domicile of a married woman should be determined as if she had never been married; and that where a person had not attained the age of 18 years but is married, or has at any time been married, then his/her domicile should be determined for the purpose of jurisdiction in matrimonial causes as if he/she had, at the date of his/her first or only marriage, attained the age of 18 years.

(C.L.B. October 1980 pp.1312-1318)

KENYA

Adoption

A Commission appointed by the President to review the law and practice relating to adoption has reported (Report of the Commission on the Law of Adoption 1974, Government Printer, Nairobi). The Commission was asked to consider particularly how far existing law and practice was consistent with traditional customs and current public opinion, the desirability of allowing the arranging of adoption by persons other than approved adoption societies, and the possible simplification and reduction of the cost of adoption proceedings. The Commission recommends the retention of the existing Adoption Act of 1959 with a number of modifications, set out in a draft Bill. It found that the existing law was, or would soon be, broadly acceptable to public opinion, provided it took into account the traditional relationship of a child to its extended family and clan. There should be no change in the functions and responsibilities of Adoption Societies. Provision should however be made for the eventual prohibition of the arranging of adoption by individuals (other than the parents or guardians of the child). Regarding cost of proceedings, the Commission recommends that applications for adoption may be presented to the court by officers of Adoption Societies without the necessity of an advocate, and that proceedings should be virtually exempt from the payment of court fees.

(C.L.B. January 1976 p.57)

NEW ZEALAND

Publication of proceedings in divorce and matrimonial property proceedings

The New Zealand Law Society has recommended that publication of details of divorce and some matrimonial property proceedings, except in technical journals, should be prohibited by law.

The recommendation would extend an innovation contained in s. 84 of the Matrimonial Proceedings Act 1963 which in recent years has restricted newspapers so that they may publish only the names, addresses and occupations of the parties and of witnesses, together with the grounds of the petition and the finding of the court. It was noted that few newspapers have exercised their right to publish even these details, but publicity continues to embarrass persons involved in divorce proceedings.

The continued right to publish even such restricted particulars was seen as contrary to the current climate relating to family law, and as being inimical to the interests of the parties involved.

(C.L.B. January 1977 p.137)

Royal Commission on Contraception, Sterilisation and Abortion reports

In June 1975 a Royal Commission on Contraception, Sterilisation and Abortion was appointed. It consisted of six, three men and three women, and was required to examine the legal, social and moral issues raised by the law and practice relating to contraception and voluntary sterilisation, and to examine the present law on abortion, its interpretation, practice and adequacy in meeting society's needs. Study of issues involved in abortion were to include the rights of the pregnant woman and the status of the unborn child. The Commission was required to recommend any changes in law or practice relating to these three broad areas and assess the likely effects on the present health, hospital and medical services.

The Commission presented a 450-page report in March 1977. This has excited strong reactions from many quarters, mainly over the recommendations relating to abortion. The Commission took the view that the status of the unborn child "although not absolute, should receive protection from the law". Following this principle it recommended extending the grounds of abortion, at present preservation of the mother's life or health to instances where there would be serious danger to the life or the physical or mental health of the pregnant woman or serious physical or mental abnormality of the child, or where pregnancy is caused through incest, or in cases where the pregnant woman is severely abnormal.

The Commission did not recommend that pregnancy resulting from rape, the extreme youth or age of the pregnant woman or socio-economic factors as such should be, taken by themselves, sole grounds for abortion.

The Commission recommended that a Statutory Committee should have over-all supervision of the administration of the abortion law. A number of panels, consisting of two doctors and a social worker should be set up to hear applications for abortion, would be responsible to this Committee. The social worker should be in an advisory capacity only, and in the event of deadlock, another doctor would be called in. The applicant's own doctor or specialist should be able to make a written statement to the panel, but not take part in making the decision.

It is explicitly predicted in the Commission's introduction to its Report that "..... if effect is given to all the recommendations ..... the number of abortions performed in this country will be reduced".

The Commission's recommendations on contraception and sterilisation were less controversial. There is an emphasis on the need for courses on human development and relationships to be provided in all schools, on the need for the expansion of family planning clinics and centres helped by finance from the Government, and on an increase both in Government and non-Government social workers and counselling facilities.

Under the Police Offences Amendment Act 1954 it is an offence not only to sell or provide contraceptives to children under 16 but also to give any information or instruction in the use of contraceptives. The Commission recommends that this be modified to allow doctors to supply contraceptives to those under 16, and to allow certain classes of people to give children under 16 information on the use of contraceptives. Broadly these classes cover those approved by the Education and Health Departments or those approved by the principal of any school.

(C.L.B. July 1977 pp.472-473)

Review of Matrimonial Law

The Minister of Justice has released a review of matrimonial law prepared by Ms P.M. Webb, former Chief Legal Advisor in the Department of Justice. The report was commissioned in pursuance of the Government's promise to institute reform of the law relating to divorce, maintenance and custody. Its release is intended to stimulate informed public discussion about matrimonial law but the Government is not committed to implementing the recommendations in the report.

The report surveys the matters dealt with in the Matrimonial Proceedings Act 1963 and the Domestic Proceedings Act 1968. The main areas are the grounds for divorce and the role of conciliation; maintenance provisions for spouses and children, including enforcement, discharge and variation; protection of children; and significant matters of procedure.

In the first area the report recommends, inter alia, that the ground for dissolution in New Zealand be framed along the lines of ss. 48—50 of the Australian Family Law Act (i.e. irreconcilable breakdown of marriage as evidenced by a period of separation), but that the separation requirement may be fulfilled if that parties have ceased to live together under the same roof; or if they have lived as two households under the same roof; or if either party has lived in a relationship in the nature of husband or wife with a third party. The waiting period should be shorter for couples without children and should preferably not exceed six months for applicants in this category.

The recommendations in the second area, as regards financial provision between spouses, are based on the premise that marriage per se should not create a right to financial provision, but that a right may be created by the reasonable needs of a spouse.

An interesting recommendation in the section on the protection of children is that the legislation state categorically that no person is to be preferred as the custodial parent on the basis of sex.

Finally, the procedural reforms recommended include provision for joint applications for divorce.

(C.L.B. January 1978 p.122)

A new Marriage Act

The Commission has produced proposals for, and the draft of a new Act on marriage. The idea is to evolve a uniform marriage law for the country, by bringing the monogamous and the polygamous systems of marriages under one Statute.

The changes proposed attempt to reform and put right certain anomalous situations in the existing law. Under the Constitution all marriages are given full recognition if properly entered into. But the Act, as at present, gives special recognition to monogamous marriages only and expressly outlaws polygamy for all who are married under the present Act. Stiff penalties await persons married under the present Act, who purport to marry concurrently under customary or Islamic Law. Conversely, the present Act forbids persons married under customary or Islamic Law to marry any other person concurrently under the Act.

But the several offences created by the present Marriage Act against polygamy have seldom ever been the subject matter of criminal prosecution and the stiff penalties prescribed by the present Act do not appear to have been imposed upon anybody, despite the fact that numerous people are believed to contravene the Act with impunity. It also has unfortunate implications on intestate succession. Further, it does not provide direct access to the High Courts, in the case of polygamous marriages, in the event of divorce, maintenance, separation, custody of children and annulment.

With regard to foreign marriages, the present Act is unsatisfactory, although it provides, in its amended form (Act No. 14 of 1971), for the solemnisation of marriage outside Nigeria by Nigerian Diplomatic Missions where at least one of the parties is a Nigerian. However, it does not provide a satisfactory method of resolving an issue of objection to such a proposed marriage. Also it does not contain a definition of marriage on the basis of which our Courts will be in a position to decide which unions formed abroad and brought before it, do or do not qualify as marriages for purposes of matrimonial inheritance and legitimacy proceedings.

Under the proposed new Act, a definition of marriage is provided to enable a Court of Law to be in a better position, when called upon to do so, to decide whether a union described before it in a matrimonial, legitimacy or inheritance dispute is or is not a marriage as understood in Nigerian jurisprudence.

Customary and Islamic Law marriages would, under the new Act, qualify as marriages under the proposed Marriage Act. This would be so where the parties to the marriage take the positive step to get their marriage registered under the proposed new Act. Once a marriage is duly registered, it would assume the same legal status and have practically the same legal effects in security and inheritance-rights as a monogamous marriage celebrated in a Church or in a Marriage Registry.

Bigamy is abolished as an offence but the existence of a monogamous marriage would still be a bar to a subsequent valid marriage.

The proposed new Act also contains a scheme for intestate succession which would apply to all those married under the Marriage Act (present or proposed) as well as those whose marriages are registered under the

proposed new Act. However, having regard to the succession rules of Islamic Law, persons subject to Islamic Law who register under the proposed new Act would be subject to the succession rules under the proposed new Act if, at the time of the registration of their marriages they indicate, in writing, in the appropriate form that they wish, in the event of death, to have their intestate property distributed under the proposed new Act.

Also the proposed reform seeks to set specified minimum age limits for marriage, namely 16 years for males and 14 years for female persons.

It also spells out in full the various impediments to a valid marriage and what the prohibited degrees of consanguinity and affinity are. It also confers on the Courts (including the State High Courts) the same jurisdiction (as in monogamous marriages) over disputes arising from duly registered Customary and Islamic Law marriages. This is without prejudice to the right to proceed in any Court exercising jurisdiction under Customary or Islamic Law marriages.

(C.L.B. April 1982 pp.662-663)

PAPUA NEW GUINEA

Customary marriage and divorce

The Law Reform Commission of Papua New Guinea received a reference in 1975 from the then-Minister for Justice to undertake a thorough review of family law in Papua New Guinea. This review was necessary because most of the existing law had been introduced from societies very different from Papua New Guinea's. The Commission has published Occasional Paper No. 5 under the title "Customary Marriage and Divorce in Selected Areas of Papua New Guinea". In the Introduction the Commission explains that whilst the recognised ideal was to ascertain the law and practice in operation in the various communities, this was not an easy task. The Commission therefore chose, for purposes of quick information, the easier approach of reviewing the substantial anthropological material already available. Mr. Samson Kaipu undertook the review under the supervision of Professor Andrew Strathern of the Department of Anthropology and Sociology, University of Papua New Guinea, on behalf of the Commission. Since a comprehensive review of all the material available on every society was not feasible, and perhaps not necessary, a small number of societies was selected and works on them reviewed in the hope that a general pattern with local variations might emerge.

The Occasional Paper contains details of rules and principles concerning marriage and divorce and other family law matters in the selected societies. A summary of such rules and principles is set out in a separate paper with recommendations on how they could be incorporated in new legislation. By means of the Paper the Commission invites the public to confirm or modify the information it has

recorded, or to supply similar information about societies not covered in the Paper.

(C.L.B. April 1978 p.348)

Family law

Working Paper No. 9 of the Papua New Guinea Law Reform Commission is entitled "Family Law". A draft Bill, which incorporates the Commission's present ideas, is included in the Paper. The Commission notes that there are currently in force some seven separate Acts dealing primarily with marriage, divorce, maintenance of wives and children, custody, access and married women's property rights. Most of the Acts are largely copies of equivalent Australian statutes which were in force in Australia at the time they were enacted in Papua New Guinea. Occasionally, passing reference is made to customary marriage, divorce and other family matters. Some of these Acts (such as the Matrimonial Causes Act) have no longer any Australian counterpart, the old laws having been repealed and replaced by more up-to-date legislation. It is proposed that most of this legislation be repealed and, where appropriate, their subject matter incorporated into the Family Law Act.

The primary purpose of the proposed Act is to provide a consolidated and simplified written law which balances customary perceptions and beliefs in relation to marriage, divorce, maintenance and custody, with the National Goals and Basic Rights and Social obligations embodied in the Constitution.

It is also proposed to put the law more within the reach of the people by giving the lower courts much wider jurisdiction in all family law matters than they now enjoy.

Different Chapters of the Paper discuss and make proposals upon—

(i) the elements of recognised marriages;
(ii) de-facto relationships and their consequences;
(iii) the registration of different types of marriage;
(iv) grounds for the dissolution of marriage (five different formulations are advanced for comment);
(v) mediation or reconciliation, procedure and evidence, jurisdiction;
(vi) custody and guardianship of children (the Commission notes that the topic of adoption will be the subject of a future Report);
(vii) recognition of foreign divorces;
(viii) the status of children and declarations of paternity (the distinction between legitimacy and illegitimacy would be removed);

(ix) the establishment of Family Courts.

Succession

The Law Reform Commission of Papua New Guinea has published Working Paper No. 12 on the law of succession. The Paper contains a draft Bill which reflects the Commission's proposals which are stated to be in line with the National Goals of the Constitution and the customary rules under which most property is already distributed upon death.

The proposals place limits on a person's freedom to dispose of his property after his death as he wishes. It is stated that this is not a proposal for any great change in the present law, for under the law as it stands, a Papua New Guinean may not dispose of customary land by will, nor may he dispose of any other property by will if custom prohibits such disposition. The proposed legislation re-affirms and clarifies this aspect of the existing law. The Commission's view is that without some restrictions on the power of will-making, there can be no equitable distribution of the benefits of development. The scheme of distribution proposed relies heavily on custom to do this, but also recognises the needs of dependants to be maintained and housed, as the primary purpose to which the assets of an estate should be applied.

(C.L.B. October 1978 pp.979-980)

Adultery and enticement

The Law Reform Commission has published Report No. 5 "Report on Adultery". The Commission seeks to reflect by its proposals the prevailing moral values of the peoples of Papua New Guinea and to use customary law dynamically and creatively as the foundation for developing a new legal system for the country. The Report contains a draft Bill which incorporates the Commission's recommendations and begins by setting out the purposes of the statute—to avoid or lessen the impact of disputes arising from adultery and enticement which often lead to broken marriages, and social disorder among the people both in towns and in the villages.

The Report recommends that adultery be defined to include—

(a) completed acts of sexual intercourse between a married person and another person not his spouse;
(b) attempted sexual intercourse between a married person and another person not his spouse;
(c) any act of a sexual nature between a married person and another person not his spouse, if by custom such an act is unlawful.

Under the Commission's proposals the innocent spouse would be able to take either the adulterous spouse or the person with whom

the adulterous spouse has committed adultery, or both of them, to court. It would not be a matter for the police. The hope is expressed that on the whole disputes would be settled peacefully outside the courts which should be used only when parties cannot settle their own problems satisfactorily.

Under existing legislation (the repeal of which is proposed), it is an offence to induce a female to have sexual intercourse with a man who is not her husband. The Report recommends that a new action for enticement be created to deal with the situation where a married person is persuaded to live apart from the spouse so that the enticed spouse can have sexual intercourse with the enticer or some other person.

The complaint would normally have to be laid within six months of the day the complainant had knowledge of the adultery or the enticement but the court would have power to extend the time limit by a further 12 months for good reason.

The Report recommends a number of defences to actions for adultery and enticement—

(a) where the complainant has consented to or connived at or assisted in the act of adultery or enticement,
(b) a child below the age of puberty should not be a defendant in any proceedings for adultery,
(c) where the complainant actually had knowledge of the adultery or enticement and had forgiven one or both parties before the complaint,
(d) if a person consents to an act of adultery only because of subjection to an act of sorcery which is accepted under the custom of the social group as requiring the person to have sexual intercourse in circumstances amounting to adultery—but the defence of sorcery would not be available to the other party to the adultery.

The Commission considers that Village Courts afford the best forum for determining arguments that arise over adultery and enticement and recommends that a single Village Court magistrate should have power to mediate in these cases. The exercise of mediatory jurisdiction should be given special emphasis and only when mediation fails should the matter be heard by the full Village Court of not less than three magistrates.

The Commission expresses the strong belief that in relation to adultery disputes (and other disputes) the courts' primary role should be to mediate. Mediation should be a gradual, persuasive and non-coercive process aimed at restoring peace, not only between the people directly affected, but also their clans. Mediation settlements should be recorded and should be enforceable as if they were court

orders. If mediation fails, the court should proceed to hear the case and have jurisdiction to award compensation not exceeding K.200. Where compensation is not paid, the court should have power to order the adulterers to do community work for the maximum of eight hours a day for six days for a total period of up to four weeks. If the court considers that community work would not be appropriate (because it would not be practicable or because it could not be well supervised) then imprisonment not exceeding six months could be ordered.

The Report recommends that the strict rules of evidence should not be applied and the courts should receive and consider any available relevant information. The Commission proposes that a relative should be able to appear on behalf of the complainant provided the complainant gives express consent, and the court gives the relative permission to deal with the matter, pointing out that this recommendation is a compromise approach between allowing any relative to be able to make a complaint without the consent of the innocent spouse, and excluding the relatives completely.

(C.L.B. October 1977 pp.658-659)

Domestic violence

The Law Reform Commission of Papua New Guinea has received the following reference from the Minister of Justice—

Because—

(a) domestic violence is contrary to the principles of our Constitution; and
(b) the law does not enable the police and courts effectively to protect women from domestic violence.

Enquire into and report to me on—

(i) the nature and extent of domestic violence as a social problem; and
(ii) the legal remedies available for complaints of domestic violence; and
(iii) any changes to the law which may be necessary or desirable to achieve the protection of women from domestic violence; and
(iv) the steps which should be taken to bring the problem of domestic violence to the public notice.

In undertaking this reference you will—

(a) consult with such bodies or people as you consider appropriate, including the National Council of Women; and
(b) consider whether "domestic assault" should be a specified offence in criminal law so that the police are obliged to prosecute even when the victim will not proceed with charges; and
(c) examine the law of evidence and the defence of provocation with particular reference to domestic assault; and
(d) consider any other relevant aspect of the topic as may be revealed during enquiry.

(C.L.B. July 1983 pp.946-947)

TRINIDAD AND TOBAGO

Wardship

For consideration are–

(a) Legitimation by subsequent marriage of a child born of an adulterous union.

(b) Custody of an illegitimate child whose mother is abroad.

(c) Removal of the monetary limit in case of custody proceedings in the Magistrate's Court.

Infants

Suggestions are -

(a) The ability of a father to apply for the custody of his child other than by way of habeas corpus proceedings.

(b) The conferment of jurisdiction on the High Court to entertain proceedings hitherto confined to a Magistrate's Court.

(C.L.B. May 1975 pp.56-57)

UNITED KINGDOM - ENGLAND AND WALES

Injuries to unborn children

The Law Commission (England and Wales), on a reference from the Lord Chancellor, has submitted its report as to what the nature and extent of civil liability for ante-natal injury should be (Cmnd. 5709).

The Commission, after referring to the Report of the Scottish Law Commission on the same subject (Cmnd. 5371) to support its view, is of opinion that it is "highly probable that the common law would, in appropriate circumstances, provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault." The likely ground of liability would be the tort of negligence. But the Commission gives a number of reasons why legislation is desirable, and annexes to its report a draft Congenital Disabilities (Civil Liability) Bill.

The legislation would deal with the rights of a living person, no rights being given to a foetus. The general principle would be that wherever pre-natal injury is caused intentionally, negligently or by a breach of statutory duty there would be liability for that injury. As a general rule, whenever there is liability in tort at common law to a parent for an act or omission which causes pre-natal injury to a child, or whenever a breach of statutory duty giving rise to a liability in tort to a parent causes pre-natal injury to a child, the child would be entitled to recover damages for his disability.

(C.L.B. January 1975 p.52)

Occupancy rights in the matrimonial home and domestic violence
The Scottish Law Commission has published Memorandum No. on these subjects. As the introduction to the consultative memorandum explains, the Commission advances provisional proposals for reform of the law of Scotland relating to occupancy rights in the matrimonial home, and in particular the law on —

(a) the right of a husband and of a wife to attain, retain or recover occupancy of the matrimonial home;
(b) the possessory rights of a married couple in the furniture and plenishings of the home; and
(c) the civil remedies available to protect a spouse and the children from the other spouse's violence in the home.

The memorandum is the second of three consultative memoranda to be published having a bearing on family property law. Volume 1 describes these issues simply and briefly for the benefit of those primarily interested in broad issues of policy rather than detailed technical solutions and at the end of the volume, a summary of the Commission's provisional proposals is set out in numbered propositions to facilitate comment and criticism. Volume 2 contains a detailed account of the existing law and technical problems, the options for reform and the arguments underlying the proposals. The two volumes are linked together by appropriate cross-references.

Set out below is a summary of the Commission's proposals concerning personal occupancy rights in the matrimonial home and remedies against domestic violence —

Personal occupancy rights in the matrimonial home

One spouse owner or tenant

(i) a spouse who has no possessory rights in the matrimonial home (e.g. as owner or tenant) should be given a personal right to occupy the home enforceable against the spouse who has such possessory rights, and should no longer be treated by law as a mere precarious possessor;

(ii) (a) the court should have power on application by either spouse to make orders restricting or regulating the exercise by either or both of the spouses of their rights of occupancy or management, (b) in the absence of a court order regulating occupancy or management, it is for consideration whether the spouse who has no possessory rights in the home should be conceded a bare right of occupancy or should have the same right to occupy and manage the property as if the spouses were co-owners: or whether some other solution should be adopted;

(iii) in making the orders mentioned in Proposition 2 the court should be directed to have regard to all the circumstances of the case including —

(a) the needs and resources of the spouses,
(b) the conduct of the spouses in relation to each other and the state of their matrimonial relationship,
(c) the needs and interests of any dependent children living with either spouse, and

(d) the extent (if any) to which the dwelling is used for the purpose of a business, trade or profession;

(iv) (a) where one spouse raises an action to enforce his or her occupancy rights in the matrimonial home, or applies to the court for an order regulating such rights, the court should have power to make the following interim orders pending disposal of the proceedings —

— an interim order authorising the pursuer, or her or his nominee in appropriate cases, to enter the matrimonial home temporarily e.g. to collect and remove her or his goods and effects, or to reside there till the action is disposed of,

— an interim order for delivery of those goods and effects,

— if the pursuer is prima facie entitled to aliment, an interim order awarding interim aliment pending disposal,

— an interim interdict (e.g. against a husband excluding his wife),

(b) the court should also have express power of its own motion to restrict or refuse in an undefended case a crave for the first two orders mentioned in (iv)(a) as well as the usual discretion to refuse interim interdict,

(c) when a sheriff orders delivery of goods left in the matrimonial home specified in the order as proposed at paragraph (1)(ii), the sheriff should also be able at the same time to grant warrant to sheriff officers to search for and take possession of the goods, and to open shut and lockfast places. But the warrant should only be executed after expiry of a charge to deliver;

(v) the court should have power to make, on the application of a spouse —

(a) orders prohibiting the other spouse or a third party from conduct which might deprive the applicant or dependent children of occupancy of the matrimonial home or render it unsuitable for habitation as a home,

(b) orders awarding compensation to a spouse deprived of occupancy payable by the other spouse or a third party whose conduct led to the loss,

(c) orders against the other spouse or a third party to make good damage to the home done by him, and

(d) any other order which is necessary or expedient to protect or restore the occupancy of the applicant and any dependent children.

But these powers should not affect third parties acquiring property, security or tenancy rights under any deed or other writing since more appropriate safeguards against such transactions are set out below;

(vi) should it be made a criminal offence for one spouse to harass the other spouse in his or her occupation of the matrimonial home or to evict him or her from it? If so, should s. 30 of the Rent Act 1965 (which makes it a criminal offence for any person to evict or harass the residential occupier of premises) apply in such cases with or without modification?

Both spouses owners or tenants

(vii) for removal of doubt, it should be declared by statute that where both spouses have occupancy rights in the matrimonial home, a conclusion or crave by one spouse for ejection of the other spouse from the matrimonial home is incompetent except as ancillary to an exclusion order such as we proposed at Proposition (ix) below;

(viii) the court's powers proposed at Propositions (ii) and (iv) (above) to regulate and restrict the exercise by spouses of occupancy rights or rights of management should apply also to the case where the matrimonial home is held by both spouses as co-owners or co-tenants;

Exclusion orders

(ix) the court should be given a discretionary power to make an order suspending for a period or until further order a spouse's right to occupy the matrimonial home (which may be called an exclusion order) for the protection of the other spouse or any children living with him or her;

(x) the court should not make an exclusion order unless it is necessary for the protection of the applicant or any dependent children, and before making such an order the court should have regard to all relevant circumstances including where appropriate those specified in Proposition (iii) (above); but in addition it should have regard to the balance of hardship as between the spouses including the availability and suitability of any alternative accommodation for the spouse whose occupancy rights are sought to be suspended;

(xi) when making an exclusion order, the court should also have power to make any one or more of the following ancillary orders —

(a) a warrant for the defender's summary ejection from the matrimonial home,

(b) an interdict prohibiting his re-entry to the dwelling without the pursuer's express permission and possibly other interdicts designed to keep him out,

(c) where the defender is prima facie entitled to aliment from the pursuer, an order continuing the proceedings or deferring decree or superseding extract of the exclusion order or warrant of ejection or both until the pursuer lodges a bond, or finds caution, or gives an undertaking, for payment of aliment to the defender or until alternative accommodation is provided for her or him,

(d) where warrant of ejection is granted in the defender's absence, an order giving directions for the preservation of the defender's goods and effects left in the matrimonial home, and

(e) an order making the exclusion order or the warrant of ejection or the interdict subject to terms and conditions, or requiring undertakings from either spouse;

(xii) (a) it should not be competent for the court to grant an interim order excluding a spouse from the matrimonial home pending the disposal of an application for an exclusion order; but (b) the court should be empowered to grant an interim interdict against assault or molestation for the protection of a spouse or children pending disposal of an application for an exclusion order whether or not the court is requested also to grant a perpetual interdict;

Civil remedies against domestic violence

(xiii) it should be expressly provided by statute that proceedings for an interdict prohibiting one spouse from wrongfully injuring or molesting the other spouse should not be treated as incompetent or irrelevant by reason only of the fact that the spouses are living together as man and wife;

(xiv) views are invited on the question whether in proceedings for a perpetual interdict against assault or molestation between spouses, or in proceedings for breach of such an interdict, the court should be empowered to pronounce the interdict, or as the case may be to find the breach proved, on the uncorroborated testimony of one witness even if that witness is a party;

(xv) in order to protect a spouse the court should have power to pronounce an interdict prohibiting the other spouse from entering on or remaining in a specified area surrounding the matrimonial home, or a street, common stair or other place in its neighbourhood;

(xvi) (a) it should be provided by statute that where the court pronounces an interdict prohibiting one spouse (the defender) from —
— injuring or molesting the other spouse (the pursuer) or the children living with him or her or
— entering a specified area or place surrounding or near the pursuer's home or
— entering the pursuer's home without his or her permission,
then breach of the interdict by the defender in the knowledge that it has been granted should be a criminal offence for which he may be arrested and prosecuted by the competent authorities in the normal way,
(b) it should not be competent for the injured spouse to seek to enforce the interdict by a civil petition and complaint,
(c) it is for consideration whether the clerk of the court which pronounced the interdict should be under a duty to intimate the interdict forthwith in a manner prescribed by statute to the police force for the area in which the home is situated;

(xvii) no change should be made in the present rule whereby, when the court pronounces interdict prohibiting one spouse from assaulting or molesting the other, the interdict does not bind the interdicted.

(C.L.B. July 1978 pp.625-629)

Illegitimacy

The Law Commission (for England and Wales) has published Working Paper No. 74 entitled "Family Law: Illegitimacy" under its Second Programme of Law Reform. The Working Paper examines the legal position of those children who have the misfortune to be "illegitimate", and suggests reforms. The Commission points out that an important part of this work is directly concerned with the rights and duties not only of the child born outside marriage but also of both his parents. In view of the social as well as the legal importance of the subject-matter of this Paper, it expresses the hope that the provisional proposals put forward will be commented on as widely as possible.

The Commission concludes that the present law in this field contains a number of anomalies and has no doubt that reform is necessary. It had noted the considerable volume of material published during the last decade or so and parliamentary concern about the issue. Furthermore, the United Kingdom had signed (but not yet ratified) the Council of Europe Convention on the Legal Status of Children Born out of Wedlock (1975) which aims to assimilate the legal status of children born out of wedlock with the status of those born in wedlock.

Set out below is the Commission's summary of the questions raised and its provisional conclusions –

The principle for reform of the law

(1) We tentatively favour the principle that the status of illegitimacy should be abolished and that the law hitherto applicable to legitimate children should apply to all children without distinction. No attempt should be made by statute to exclude any class of father from automatic entitlement to parental rights. We seek views on whether this is the correct approach.

Guardianship and custody of children born out of wedlock

(2) The parents of children born out of wedlock would, subject to the court's control, have equal parental rights and duties; we propose the repeal of section 85(7) of the Children Act 1975, and of so much of section 1(7) of the Guardianship Act 1973 as excepts illegitimate children from the principle of equality of parental rights.

(3) Either parent of such a child would be able to apply for the court's direction on a question affecting that child's welfare.

(4) The father of such a child would be a joint guardian of the child, unless and until he is removed by the court.

(5) The father of a child born out of wedlock would have power to appoint a guardian for the child by deed or will, without having first to obtain a custody order.

(6) The father of such a child would be able to apply to the court under sections 7 and 11 of the Guardianship of Minors Act 1971 to resolve any differences between himself and a co-guardian appointed by the mother.

(7) The High Court's statutory power to remove a guardian, contained in section 6 of the Guardianship of Minors Act 1971, should be enlarged to enable either parent to be removed, whether the other parent is living or not.
(8) Section 4 of the Guardianship of Minors Act 1971 should be amended to cover the case of a dispute between a surviving parent and a court-appointed guardian.
(9) If a parent's guardianship rights have been removed by the court, the court should have power in an appropriate case to reinstate him or her.
(10) The words in section 9 of the Guardianship of Minors Act 1971 requiring a court to consider the conduct and wishes of the parents in applications for a child's custody or for access should be removed as being contrary to modern principle; and also the words "having regard to the welfare of the minor" (which are now superfluous).
(11) Amendments would be required to the Guardianship of Minors Acts and to the Children Act 1948 to ensure that the powers of the courts (and the duties of local authorities) as regards care and supervision orders are the same whether the child's parents are married or not.
(12) No special provision should be made for agreements about parental rights between parents not married to each other. The law relating to agreements between married parents should be brought in line by the repeal of section 1(2) of the Guardianship Act 1973.

Maintenance of children born out of wedlock

(13) Affiliation proceedings would disappear in their present form as well as the special form of appeal to the Crown Court and certain other features of such proceedings.
(14) Section 14 of the Guardianship of Minors Act 1971 should be repealed so that the maintenance provisions in that Act would apply to children born out of wedlock.
(15) The wider rules as to jurisdiction which now govern the maintenance of legitimate children under the Guardianship of Minors Acts would apply to all children.
(16) Section 9 of the Guardianship of Minors Act 1971 should be amended to enable the court to make a maintenance order for the child without determining the child's custody at the same time.
(17) There would be no time limit on the bringing of proceedings for the maintenance of children born out of wedlock.
(18) The father of such a child would be able to apply to the court for an order against the mother for the child's maintenance.
(19) The mother would be able to apply for a maintenance order notwithstanding that she is not (and was not at the time of the child's birth) a "single woman".
(20) The Supplementary Benefits Act 1976, the National Assistance Act 1948, the Children Act 1948 and the Children and Young Persons Act 1933 would be amended, removing the special provisions relating to children born out of wedlock.
(21) Sections 34(3) and 45 of the Children Act 1975 should be repealed, so that any custodian (including one married to the child's mother) could bring proceedings for maintenance under section 34 of that Act against the child's father instead of affiliation proceedings under section 45.

(22) The High Court and county court should have power to order secured periodical payments under the Guardianship of Minors Acts.
(23) The High Court's and county court's existing power to award lump sums for legitimate children under the guardianship legislation would extend to children born out of wedlock.
(24) Such lump sums should be capable of covering expenses incurred in connection with the birth even if incurred before birth; but there should be no special provision for funeral expenses of the child.
(25) Property adjustment orders should be available in the High Court or county court under the Guardianship of Minors Acts.
(26) A maintenance order should be available for a child over 18 who is undergoing further education or training or if there are other special circumstances, notwithstanding the fact that no order has been made before he attained 18.
(27) The rule that a periodical payments order for a child made in favour of one of his parents lapses after six months' cohabitation by his parents would apply to children born out of wedlock.
(28) Courts should have power under the Guardianship of Minors Acts similar to that under sections 35 and 36 of the Matrimonial Causes Act 1973 to vary written agreements for the maintenance of children.
(29) Section 6(6) of the Family Law Reform Act 1969, which prevents an award of maintenance from being made to an illegitimate ward of court, should be repealed.
(30) In order that the High Court in wardship proceedings should not be prevented from making a maintenance order in appropriate circumstances, that court should, where necessary, direct the issue of paternity to be tried.
(31) The provision that a maintenance order in wardship made in favour of a parent lapses after three months' cohabitation by the parents should be amended to provide for lapse after six months' cohabitation.

Inheritance

(32) A child born out of wedlock would be able to inherit on the intestacy of his relatives, as if he had been born legitimate; and his relatives would likewise be able to inherit on his intestacy.
(33) A presumption of non-survivorship on the lines of section 14(4) of the Family Law Reform Act 1969 should be enacted for the case of any paternal relations of a person born out of wedlock who dies intestate.
(34) As under section 17 of the Family Law Reform Act 1969, trustees and personal representatives should be authorised to distribute an estate without enquiry into the possible existence of relatives who may be entitled to benefit as a result of the change proposed in the law of succession; but those relatives should be permitted to trace property as under the present law.
(35) Succession claims brought by, or against the estate of, a person born out of wedlock, should not be made subject to any special conditions.
(36) The limitation in section 15(2) of the Family Law Reform Act 1969, by which the word "child" is construed as including an illegitimate child only where he is a potential beneficiary, should be abolished.
(37) Although testators and grantors may continue to use restrictive words of limitation, the word "heir" (whether in connection with a title or not) should not, in the case of future grants, necessarily be construed as meaning only a child born in wedlock.

Parental agreement to adoption
(38) Unless the court dispenses with his agreement, the father of a child born out of wedlock would have to agree to the child's adoption.
(39) Consideration might be given to allowing the mother of such a child to apply ex parte in special circumstances for an order dispensing with the father's agreement.

Parental consent to marriage
(40) The consent of the father of a child born out of wedlock to the child's marriage would be required in the same circumstances and subject to the same dispensing powers as that of the father of a child born in wedlock.

Parental powers in relation to the change of a child's name
(41) The position of the father of a child born out of wedlock in relation to a proposed change in the child's name would be the same as that of the father of a child born in wedlock.

Nationality and citizenship
(42) On the abolition of illegitimacy, a child born abroad out of wedlock should acquire U.K. citizenship from his father as of right.

Domicile and connected matters
(43) We suggest that the domicile of origin of any child should be that of his mother and that thereafter her domicile should control the child's domicile of dependence. If the parents live apart the child's domicile of dependence should be that of his father if he lives with him.

The establishment of paternity
(44) A presumption of paternity arising from the fact of marriage should replace the present presumption of legitimacy; and it should also apply where the marriage was void.
(45) There should be no presumption of paternity arising from facts other than marriage (such as cohabitation or the payment of money for the support of the child).
(46) No change should be made to the practice whereby married woman may register a child as her husband's without evidence of paternity from the husband himself.
(47) There should be a procedure whereby a father would be entitled to have his name entered in the births register of the child following the making of a custody or access order in his favour, a maintenance order against him, or a declaration of parentage.
(48) The existing procedure for re-registration of a child's birth following the marriage of his parents should be retained but it should no longer be compulsory.
(49) No system of voluntary acknowledgement of paternity other than by means of the births register should be introduced.
(50) Where, in court proceedings, it is found or admitted that a man is the father of a child, and an order in his favour for custody or access or against him for maintenance is made, the finding of admission should appear on the face of the order if either party so requests.
(51) Where, in proceedings against him for maintenance, a man successfully rebuts a presumption of paternity and the application for maintenance is accordingly dismissed, the man should be entitled to an order recording the finding of non-paternity but where an application against him merely fails, without involving the successful overturning of a presumption against him, there should be no such entitlement.

(52) There should be a procedure for obtaining a declaration of parentage without seeking any other order.
(53) The effect of a declaration of parentage should be the same as that of a declaration now made under section 45 of the Matrimonial Causes Act 1973.
(54) Only the child himself should have an unqualified right to apply for a declaration of parentage; any other person should be entitled to apply only if the court is satisfied that it is appropriate having regard to the welfare of the child that the issue be tried.

(55) The High Court and county court should have jurisdiction to make a declaration of parentage. The grounds for assuming jurisdiction should be the applicant's domicile or habitual residence in England and Wales for at least 12 months preceding the application.
(56) There should, in proceedings for declarations of parentage, be procedural safeguards designed to ensure that all relevant persons are before the court.
(57) There should be no rule of law requiring corroboration in any proceedings in which paternity is in issue. Nor should the bringing of such proceedings be subject to any time limit.

Paternity of children conceived by artificial insemination
(58) Views are invited on whether there should be a rule of law whereby a child conceived by A.I.D. with the consent of his mother's husband should for all purposes be deemed to be the child of his mother's husband and not that of the donor.
(59) If a deeming provision is thought right, views are invited as to the means by which this may be implemented.
(60) Views are invited as to whether there is any better solution to the problem of the paternity of A.I.D. children than those discussed in the paper.

(C.L.B. October 1979 pp.1199-1204)

Divorce proceedings—extension of time in nullity proceedings

The Law Commission has published a Working Paper (No. 76) on "Time Restrictions on Presentation of Divorce and Nullity Petitions" which considers the "three year rule" and seeks the public's views on possibilities for change in the law. Under English law, petitions for divorce cannot be filed within three years of marriage unless the applicant establishes that the case involves exceptional hardship to him or her, or exceptional depravity by his or her spouse.

The Commission notes that the aim of the modern divorce law is to take the heat and bitterness out of divorce proceedings and "to crush the empty shells of dead marriages" where it is clear that the marriage has irretrievably broken down, but that the present law can still cause problems. Problems have arisen, for instance, in the working of the "exceptional hardship" and "exceptional depravity" provisions of s. 3 of the Matrimonial Causes Act 1972 which established the "three year rule" referred to above.

The Commission considers that proof of exceptional hardship or depravity should not be the test for permitting divorce in the early years of marriage but believes that *some* special restriction on divorce in the early years should be retained in order to help preserve the institution of marriage by discouraging ill-considered or hasty divorce. For this reason it suggests that divorce by the "special procedure" (do-it-yourself divorce) should not be available in the early years, but that the need to show "exceptional hardship" or "exceptional depravity" should be abolished.

The options for reform discussed in the paper include—

(i) a shortening of the period of restriction from three to two years with extra safeguards designed to ensure that there is no divorce unless the marriage really has broken down beyond hope of repair; and

(ii) a total ban on divorce proceedings within one or two years of the marriage.

The Commission acknowledges that there is a view that there should be no change in the law and that the difficulty of predicting the effect of any change casts a heavy burden on those who seek reform, but nevertheless expressed the provisional view that some change is justified because the present restriction encourages men and women whose marriages have broken down to make hurtful and wounding allegations against a partner in order to get a divorce within three years of marriage. Views were sought on these and any other options for reform, and in order to attract views from the widest possible public the Law Commission had at the same time published a Summary of the Working Paper under the title "Law Reform An Invitation for Views—Divorce in the Early Years of Marriage" (noted below).

The Working Paper also proposes that the Court should be able to extend the time within which certain nullity proceedings have to be started—at present three years from the marriage—in cases where a party claimed that he did not consent to the marriage because of mental disability which prevented him from understanding what he was doing. It is noted that this item limit has caused some hardship.

It is emphasised that this Working Paper on time restrictions is not concerned with the grounds for divorce, about which the Commission intends to publish a separate Working Paper. The Commission also intends to publish an "issues paper" on financial matters in divorce.

Divorce in the early years of marriage

The Law Commission at the same time as it published the Working Paper (above) also published, as a separate document, a summary of a Working Paper entitled "Law Reform? An Invitation for Views—Divorce in the Early Years of Marriage" in order to attract views from the widest possible public. The main questions on which

the Commission invites comments are set out in the following terms—

(i) *Should any change be made* in the existing rule restricting divorce in the first three years of marriage?

(ii) *If so, what form should the change take?*
In the Paper are discussed three options:

1. *abolition of the time restriction*
2. *retention of a time restriction, but giving the court power to permit divorce within the restricted period in certain cases.*
   If you favour this option, please also say:
   (a) *What should be the length of the restricted period?*
   Our provisional view is that a period of two years might be appropriate. *Do you agree?*
   (b) *What are the circumstances in which the court should have power to permit divorce within the restricted period?*
   Our provisional preference is that the court should have power to grant a decree if the judge is satisfied not only that one or more of the "facts" on the basis of which a divorce can be granted has been established, but also that the marriage has broken down irretrievably.
   Do you agree?
   If not, do you support one of the other proposals considered in the Paper? Those are:
   (a) the court would be given a general discretion to grant a decree within the period;
   or (b) the court would have power to grant a decree within the period provided that the parties had gone through a compulsory reconciliation procedure.
3. *a bar on the presentation of divorce petitions within one or two years from the date of marriage, with no power for the court to permit earlier divorce. Do you favour this option?* If so, should the period be one year, two years, or some other period?

(iii) Do you agree that *the availability of divorce in the early years of marriage should not depend on whether or not the marriage is childless?*

(iv) Do you have any other proposal to make?

UNITED KINGDOM - SCOTLAND

Occupancy of the matrimonial home and domestic violence

The Scottish Law Commission has published a 148-page report entitled "Report on Occupancy Rights in the Matrimonial Home and Domestic Violence" (Scot. Law Com. No. 60), which incorporates a draft Bill.

The two subjects dealt with interact, as the Scottish legal system at present denies any right of occupancy to a spouse as such and so may indirectly encourage toleration by one spouse of violence by the other. To overcome this, a statutory right of occupancy is

recommended, together with powers to exclude a violent spouse from the home in the hope that this may help resolve the disquieting problem of toleration of domestic violence. This basic recommendation would confer such a right as an automatic incident of marriage, not as one which might be conferred where marital breakdown made its absence critical.

Subsidiary rights are also recommended to ensure that the basic right of occupancy can be enjoyed effectively.

As far as domestic violence itself is concerned, recommendations are designed to improve civil remedies. The major recommendation is that the court be empowered to make an exclusion order suspending a violent spouse's own right of occupancy in the matrimonial home. Also of concern is to ensure that the police can be involved in the enforcement of matrimonial interdicts, including the conferring of a power of arrest without warrant in the event of breach. The position of unmarried persons who are cohabiting in a relationship with characteristics similar to that of spouses is also discussed, and the suggestion is made that the court be empowered to grant occupancy rights and make exclusion orders of limited duration.

The Report notes that Scots common law on the subject of occupancy rights contrasts sharply with the provision of other Commonwealth legal systems, where a spouse generally has at common law a personal right of occupancy enforceable against the owner spouse, and where some jurisdictions already have legislation protecting a spouse's occupancy against third parties.

The question of the sharing of title to the home is to be considered in a future review of family property law.

(C.L.B. October 1980 pp.1318-1321)

UNITED KINGDOM

Financial relief after foreign divorce

Under English Law a man is legally liable to maintain his wife, but in the absence of a court order he is under no obligation to maintain a *former* wife. In most cases this gives rise to no practical problems, since the courts in the United Kingdom have extensive powers on granting decrees of divorce (or nullity or judicial separation) or at any time thereafter to make financial provision and property adjustment orders. Where the marriage has been dissolved or annulled abroad, a maintenance order made by a foreign court is often enforceable in the United Kingdom. Nevertheless, a gap exists in the law where the marriage has been terminated by a foreign divorce in which no financial order has been made, since in such cases English courts have no power to make financial orders.

In a Working Paper (No. 77), the Law Commission has made a detailed analysis of the present law in relation to the recognition of foreign

divorce, separation and annulment and the financial and property consequences of such recognition. It has discussed the problems of reform and put forward provisional proposals (on which it seeks comment) for giving the English courts power to hear applications for financial relief notwithstanding a foreign divorce, nullity or legal separation.

The following is a summary of its provisional recommendations—

(i) English courts should be given power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of a prior foreign divorce which is recognised by the courts.

(ii) There should be no bar on the court hearing an application for financial relief on the ground that a foreign court could have made, or has made, a financial order.

(iii) The English court should have jurisdiction if one or more of the following tests is satisfied—

(a) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective or the date when application is made for financial relief; or

(b) if either party was habitually resident in England and Wales throughout the period of twelve months before the foreign divorce became effective or before the date of the application for relief.

(iv) An applicant should be required to obtain the leave of a judge to apply for financial relief; in deciding whether or not to grant leave, the court should have regard to detailed guidelines.

(v) The High Court should have exclusive jurisdiction to hear such applications.

(vi) There should be no special time or other restrictions on applications for financial relief.

(vii) English law should govern the principles on which a court grants financial relief under these recommendations.

(viii) The court should be able to make any financial order that it might have made in English divorce proceedings and should exercise its powers in accordance with the guidelines laid down in s. 25 of the Matrimonial Causes Act 1973.

(ix) There should be no statutory bar preventing the court making orders relating to foreign assets.

(x) The court should be required to be satisfied that the foreign decree should be recognised here.

(xi) The Inheritance (Provision for Family and Dependents) Act 1975 should be amended in order to enable a person divorced abroad to be treated as a "former spouse" for the purpose of applications under the Act.

(xii) The same rules should apply after a foreign decree of nullity or legal separation as after a foreign divorce decree.

(xiii) There should be no right to apply to the English court for financial relief after a decree of divorce, nullity or judicial separation has been obtained elsewhere in the British Isles.

(C.L.B. April 1981 pp.675-676)

Aliment and financial provision

In their report on *Aliment and Financial Provision* (Scot. Law Com. No. 67) the Scottish Law Commission criticise the existing law on the financial consequences of divorce and recommend reforms. The present law is criticised on several grounds. First, it contains no clear statement of the purpose of financial provision on divorce but merely leaves it to the court to make such an award as it thinks fit. Second, it gives the court an inadequate range of powers in relation to property adjustments on divorce. The Scottish courts, for example, unlike the English courts, have no power to order the transfer of property on divorce. Third, it leaves too much scope for awards of periodical allowance which can continue indefinitely after divorce.

The Commission regard it as unsatisfactory that this question of social policy, which has very important financial consequences for individuals, should be left to the discretion of single judges to such an extent that, provided a judge does not overtly exclude potentially relevant factors from his consideration, there is very little prospect of a successful appeal against his decision. In the Commission's view the law should provide a clear set of principles and these should be readily ascertainable. Any solicitor in Scotland should be able to look up the relevant Act of Parliament and find a set of rules on the basis of which he can advise his client and attempt to negotiate a settlement. This is not possible under the present law. The Commission accept that any law on the financial consequences of divorce must leave adequate scope for the exercise of judicial discretion to cater for the different circumstances of different cases. This discretion, however, should be exercised within a framework of principles.

The Report examines the possible objectives of financial provision, among which are the following—

(a) *A penalty for fault*

The Commission reject the view that financial provision on divorce should be seen as a penalty for fault. Such a view would be difficult to reconcile with the policy of the present divorce law and would have serious practical disadvantages. The Commission do not think, however, that fault should be totally irrelevant to financial provision on divorce.

(b) *A continuing obligation of support*

The Commission received especially strong criticism of lifelong periodical allowances, especially where the marriage has been short and the person claiming financial provision has no young children to look after and is not incapacitated in any way. Although their recommendations provide for periodical allowances after divorce in certain prescribed circumstances, the Commission firmly reject the idea that the purpose of financial provision on divorce should be the continuation of the obligation of support which existed during the marriage. The whole point of divorce is to terminate a marriage.

(c) *Equitable adjustment of the economic advantages and disadvantages arising from the marriage*

This was the objective provisionally favoured in Memorandum No. 22 (on which the Commission carried out consultation). It would provide for a spouse who had given up work to look after children or an older spouse who had interrupted, or never taken up, a career because of the marriage. It would also provide for the sharing of property accumulated during the marriage. However, some commentators thought it would be unacceptable to deny financial provision in all cases where the need for financial provision did not arise from the marriage; others thought the objective was too vague and would not provide sufficiently clear guidance to the courts and the legal profession. It would be difficult, too, to determine in retrospect what would have been a person's career pattern if he or she had not married. In the light of these comments the Commission no longer recommend that this should be the sole objective of financial provision on divorce.

(d) *Other objectives*

Other objectives considered by the Commission include "rehabilitation", division of property, reward for past contributions and provision for children. All are, in the Commission's view, reasonable or even essential objectives in certain situations. All are too narrow to serve as the sole objective of financial provision on divorce.

The Report concludes that no single objective will suffice, but that a combination of principles should be included in any future statutory scheme; the scheme should aim to strike a balance between principle and judicial discretion. The courts should therefore be directed to make an order for financial provision if, and only if, (a) the order is justified by an applicable principle (described below), and (b) the order is reasonable having regard to the resources of the parties. The second requirement is intended to ensure that the court will not be bound to make an economically unrealistic award, particularly in the light of the payer's resources.

In deciding which principles should be included in the new law the Commission applied the following criteria—

> First, the system must be such as could be justified to reasonable husbands and reasonable wives: it must be non-discriminatory as between men and women. Second, it must be capable of applying to many different types of marriage—whether long or short, with children or without children, with property or without property, whether housewife marriages or two-career marriages, whether entered into one year ago or forty years ago. Third, it must be capable of applying to cases where the marriage was ended because of the fault of the person applying for financial provision, or the fault of the other party, or the fault of both, or the fault of neither.

The principles which, the Commission recommend, should govern the new law of financial provision on divorce are as follows—

(i) *Fair sharing of matrimonial property*

A public opinion survey carried out for the Commission revealed strong public support for the view that property acquired by a married couple during their marriage (otherwise than by gift or inheritance) should be shared equally on divorce. The first principle recommended by the Commission reflects this support for the idea of equal partnership in marriage. It defines matrimonial property basically as property belonging to either party or to both parties at the date of final separation which was acquired (otherwise than by gift or inheritance) during the marriage. Property acquired after the parties had separated would therefore be excluded. So would property owned at the time of the marriage. To this last rule there would, however, be one exception. People often buy a house and furniture before their marriage with a view to their marriage. It would be unrealistic to exclude such property from the definition of matrimonial property and the Commission recommend that it should be included.

The Commission recommend that the net value of the matrimonial property should be shared equally or, if there are special circumstances justifying a departure from equal sharing, in such other proportions as may be fair in those circumstances. Special circumstances would include the parties' agreement, or the source of the funds or assets used to acquire the property. If, for example, property bought during the marriage had been bought partly with funds owned by one of the parties before the marriage, that could be taken into account. Special circumstances justifying a departure from equal sharing would also include the nature of the property and the use made of it. A person's capital might, for example, be tied up in a business or a farm or a private company in such a way that it would be unreasonable to expect it to be used as a source of funds for the payment of financial provision. This type of circumstance is taken into account by the courts under the existing law and could continue to be taken into account under the Commission's proposals. The fact that property was required for use as a family home for the children of the marriage could also be taken into account. The courts would be able to take into account, as under the present law, any destruction, dissipation or alienation of matrimonial property by one of the parties.

(ii) *Fair recognition of contributions and disadvantages*

In many divorce cases there is little or no matrimonial property as defined above. Nevertheless one party may have made substantial contributions to the other party's economic benefit or may have suffered economic disadvantages in the interests of the other party or of the family. A wife, for example, may have given up her career to enable the husband to advance his, or may have worked for years, unpaid, to build up a business owned by the husband at the date of the marriage. A husband may have spent months extending and improving a house inherited by his wife from her father. The Commission recommend that one of the principles of the new law should be due recognition of such contributions or disadvantages.

(iii) *Fair sharing of the economic burden of child care*
In many divorce cases one of the parties (usually the wife but sometimes the husband) has the care of young children of the marriage. There can be no question of a "clean break" in this type of case. The children remain the joint responsibility of the parties. The Commission accordingly recommend that one of the governing principles of the new law should be that the economic burden of caring for a dependent child of the marriage after the divorce should be shared fairly between the parties to the marriage.

(iv) *Fair provision for adjustment to independence*
Both parties to a divorce are often economically independent by the time of the divorce. In other cases an award of financial provision under one of the above principles will be sufficient to provide for any necessary adjustment to independence. Cases remain, however, where some provision for a period of adjustment (which might include retraining) after divorce will be reasonable. The Scottish Law Commission recommend that this should be included in the principles of the new law. The adjustment period should be a maximum of three years from the date of the divorce.

(v) *Relief of grave financial hardship*
The comments received by the Scottish Law Commission on their consultative memorandum showed that many people would find unacceptable a system which made no provision for the innocent spouse who, perhaps because of age or illness, would be liable to suffer grave financial hardship on divorce. The Commission wished to provide for this situation but were anxious on the other hand not to provide a gateway to support after divorce in all cases just as if the marriage had not been dissolved. They did not think, for example that a man or woman who suffered hardship on becoming unemployed at the age of 52 should be able to claim support from a former spouse whom he or she had divorced 30 years before. The principle should be that after divorce each party bears the risk of *supervening* hardship without recourse against the other. The Commission therefore recommend that where it is established *at the time of the divorce* that one party is likely to suffer grave financial hardship in consequence of the divorce that party should receive such financial provision as is fair and reasonable in the circumstances to relieve that hardship.

Another criticism levelled against the present law is that it gives the court an inadequate range of powers in relation to property adjustments on divorce. Under the Commission's scheme the court would have a wide range of additional powers, e.g. to order the transfer of property of any kind, to order the payment of a capital sum by instalments or at a future date, to order the sale of property, to regulate the occupation of the matrimonial home and the use of the furniture in it, and to order security to be provided. These powers would enable the Scottish courts to do many things that the courts in England and Wales are at present able to do. In particular they would be able to make orders regulating the use of the matrimonial home after the divorce as a home for the children of the family.

Under the Commission's recommendations the court would not be able to make an order for a periodical allowance unless satisfied that an order for payment of a capital sum (whether by instalments or otherwise) or transfer of property would not by itself be appropriate and sufficient to give effect to the applicable principles; and a periodical allowance would not be awarded for more than three years from the date of divorce unless it was for the purpose of principle (iii) (fair sharing of economic burden of child care) or (v) (relief of grave financial hardship). If the court wished to award a sum, spread over a longer period than three years, in recognition, say, of economic contributions made or disadvantages sustained by one party it could award a capital sum payable by instalments. Both parties would know where they stood with such a sum. The amount would be fixed at the time of the divorce and could not be varied.

On the question of conduct, a broad distinction is drawn between those principles which seek to recognise what has been or will be "earned"—i.e. a share of the value of matrimonial property, or a claim based on contributions made or disadvantages sustained, or a claim based on the need to look after young children—and those which are based on the relief of short- or long-term difficulty or hardship. With regard to the first category, the Commission conclude that conduct should not be taken into account except where it has affected the economic basis of the claim. The principle of fair sharing of matrimonial property, for example, is based on the idea of partnership in marriage, and the Commission regard matrimonial misconduct which has not affected the extent or value of matrimonial property as irrelevant. A partner in an ordinary partnership does not lose his share of the partnership assets merely because he has behaved badly during the partnership. Similarly, the principle of fair sharing of the economic burden of child care after divorce is based on the continuing joint responsibility for the children of the marriage. The conduct of the spouses during the marriage is irrelevant. With regard to claims based on the relief of transitional difficulty or long-term hardship, conduct should be taken into account if it would be manifestly inequitable to leave it out of account. The "manifestly inequitable" formula is intended to discourage the raking up of petty incidents from the past—a process which can only increase expense and delay and lead to unnecessary bitterness. On the other hand the Commission believe that it would be seen as unjust if a man or woman could simply walk out of a marriage and yet successfully claim that his or her short- or long-term difficulties should be met by the other spouse without any regard to conduct.

At present the courts, when granting decree of nullity, have no power to award financial provision of any kind to either party. The Commission recommend that the court should have the same powers in relation to nullity as to divorce. No distinction would be drawn between void and voidable marriages.

The obligation of aliment is the obligation of support which exists between certain family members—for example, between parent and child, or between husband and wife *so long as the marriage lasts*. In the part of the Report dealing with aliment the Commission are dealing, so far as married couples are concerned, with the position *before* divorce. Until now there has been no systematic examination of the law of aliment in modern times. The present law recognises legally enforceable obligations

of support not only between husband and wife and parent and dependent child, but also between remoter ascendants and descendants, and between parents and adult children. There are many such obligations which are no longer enforced by action in the courts. The law discriminates against a father, in that it imposes on him the primary obligation to aliment his legitimate child, no matter how wealthy the mother may be. The Commission recommend that many of the present alimentary obligations should be swept away, although they stress that they do not intend to diminish in any way the force of a moral obligation. The only legal obligations in future would be (a) a reciprocal obligation between husband and wife; and (b) an obligation on the part of either parent to support a legitimate child, an illegitimate child, an adopted child or a child accepted into the family. The obligation to support a child would only last until the child reached the age of 18 or, if he was receiving education or training, a maximum age of 25. All differences in the law between legitimate and illegitimate children in this area would be removed.

The present law recognises a complicated hierarchy of liability for aliment. The proposed restriction of the categories of obligation would permit the hierarchy to be swept away and the law to be greatly simplified.

The Commission make various recommendations for reforms of a more technical nature in the law on aliment and financial provision. Many of these are designed to increase the courts' powers to do justice between the parties. The Commission recommend, for example, that the courts should have new or increased powers:—

(a) to order either party to furnish information about his or her financial affairs;
(b) to backdate awards of aliment or financial provision;
(c) to grant divorce and continue the action to enable financial provision to be dealt with later;
(d) to order that interest should run on any sum awarded as financial provision;
(e) to counteract transactions designed to defeat claims for aliment or financial provision;
(f) to vary, on a change of circumstances, agreements for the payment of aliment;
(g) to vary, at the time of the divorce, any agreement on financial provision, if it was not fair and reasonable at the time it was made.

The Commission also recommend changes in relation to aliment which would remove various technicalities and restrictions in the present law. The distinction between actions for interim aliment and actions for permanent aliment would, for example, be abolished. The title of various people to sue for aliment for a child would be clarified: it would not be necessary to claim legal custody in order to claim aliment. This would enable parties, for example, to agree that they should continue to have equal rights to legal custody of a child and to bring only the question of aliment before the court. It would be possible under the Commission's proposals for a person to claim aliment even if living in the same household as the defender, although the defender might in such a case have the defence that he was fulfilling and would continue to fulfil, his alimentary obligation. Under the present law the courts in Scotland, in assessing a

person's ability to pay aliment or financial provision, cannot take into account his responsibilities to members of his household who are not *legally* dependent on him. This can give rise to unrealistic results, particularly as the supplementary benefit rules are different. The Commission recommend that the court should be able to take such responsibilities into account.

Under the present law the legal expenses of a wife in divorce and similar litigation are regarded as "necessaries" for which the husband is liable. The Commission regard this rule as an anachronism and recommend its abolition.

(C.L.B. January 1982 pp.188-194)

UNITED KINGDOM - SCOTLAND

Husband and Wife: some obsolete and discriminatory rules

The Scottish Law Commission has issued a Consultative Memorandum (No. 54) entitled *Some Obsolete and Discriminatory Rules in the Law of Husband and Wife* which contains proposals for the reform of the law of husband and wife and in particular the abolition of rules which may have had a useful function in the middle of the last century but which are now inconsistent with the legal and social position of women in the modern world. Several of these proposals would remove rules which discriminate against women or men on the grounds of sex.

Following is the summary of the propositions and questions for consideration followed by a relevant extract of the United Nations Convention on the Elimination of All Forms of Discrimination against Women—

Breach of promise of Marriage

(i) (a) actions for breach of promise should be abolished, or
(b) the damages recoverable in such actions should be restricted to certain types of pecuniary loss and, if so, which?

Property Disputes on Termination of Engagement to Marry

(ii) (a) Is any special statutory rule necessary on the ownership or return of an engagement ring on the termination of an engagement?
(b) If so, should there be a rebuttable presumption that the gift of an engagement ring is an unconditional gift?

Actions of Adherence

(iii) It should no longer be competent to crave, or conclude for, a decree of adherence.

Protection Orders Under the Conjugal Rights (Scotland) Amendment Act 1861

(iv) It should no longer be competent for a deserted wife to apply for a protection order.

Curatory of Married Minors

(v) Whether the present rule that a husband of full age and capacity is the curator of his minor wife should be replaced by (a) a rule that marriage frees a person, whether male or female, from the curatory of his or her parents or (b) some other rule, and if so what?

Husband's Liability for Wife's Antenuptial Debts

(vi) Whether the husband's residual liability for his wife's antenuptial debts should be abolished.

Antenuptial Marriage Contracts

(vii) Whether it should continue to be the law that the marriage itself is consideration for provisions in an antenuptial marriage contract.

(viii) Whether it should, or should not, continue to be possible for a woman, by antenuptial marriage contract, to create an alimentary liferent of her own funds in her own favour.

Husband's Right to Choose the Place of the Matrimonial Home

(ix) (a) Whether the rule that, as between husband and wife, the husband may choose the place of the matrimonial home should be abolished and (b) if so, whether that rule should be replaced by some new statutory rule in relation to desertion and (c) what that new statutory rule should be.

Contracts for Household Necessaries

(x) Should the law on a married person's liability for household debts continue to be based on a presumption that a married women living with her husband has been placed by him in charge of his domestic affairs (*praeposita negotiis domesticis*)?

(xi) If not, it is our provisional view that liability for household debts should be left to depend on the general law and that there should be no new statutory rule (such as, for example, a rule imposing joint and several liability for household debts).

(xii) If, however, it is thought that there should be a new statutory rule we invite suggestions on its content and on whether it should apply to unmarried couples living together as man and wife.

(xiii) Should the law on inhibitions of wives be (a) abolished (b) retained without modification or (c) retained with modifications and, if so, what?

Husband's Liability for Expenses of Litigation by Wife Against Third Party

(xiv) Without prejudice to any liability as *dominus litis* or otherwise there should be no special rule whereby a husband is liable for the expenses of litigation between his wife and a third party merely because he has actively participated in the litigation.

United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
   (a) The same right to enter into marriage;
   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
   (c) The same rights and responsibilities during marriage and at its dissolution;
   (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
   (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
   (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the child shall be paramount;
   (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
   (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

(C.L.B. April 1982 pp.760-763)

Illegitimacy

In a Consultative Memorandum (No. 53) entitled *Family Law: Illegitimacy,* the Scottish Law Commission examines ways and means of improving the legal position of illegitimate children and the removal of anomalies in the law. The Commission consulted widely and the response is reflected in the provisional proposals and questions for consideration found in the Memorandum.

The following is the Commission's summary of provisional proposals and questions for consideration—

Establishment of Paternity

(i) It should be made clear that the presumptions (a) that the husband is the father of a child conceived by his wife during their marriage and (b) that the husband is in certain circumstances the father of a child born to his wife during their marriage but conceived before the marriage, apply in the case of an irregular or void marriage.

(ii) Where a man has been registered in any United Kingdom register of births as the father of a child and neither of the presumptions mentioned in Proposition (i) apply, that man should be presumed to be the child's father.

(iii) Views are invited as to whether the standard of proof required to rebut the presumptions mentioned in Propositions (i) and (ii) above should be proof on a balance of probabilities.

Registration of Birth

(iv) The mother of an illegitimate child should be entitled to register a man as the father on production of a court decree finding him to be the father.

(v) Either parent of an illegitimate child should be entitled to register the child's birth and have the father registered on production to the registrar of (a) a declaration made by the mother naming the man as father and (b) a declaration made by the man acknowledging that he is the father. The registering parent's declaration would be in prescribed form while the absent parent's declaration would be a statutory declaration.

(vi) Where the birth has been registered without the father's particulars, either parent of an illegitimate child should be entitled to apply to the Registrar General for the father's name and surname to be recorded in the Register of Corrections Etc. on production of the declarations referred to in Proposition (v).

(vii) We invite views on the question whether there should continue to be a time limit of 12 months from the date of birth for the purposes of s. 18(2)(b) and (c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (statutory declaration of paternity by father of illegitimate child or application to sheriff for recording father's name in the Register of Corrections Etc.).

(viii) An application to the sheriff under s. 18(2)(c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (for recording the name of the father of an illegitimate child in the Register of Corrections Etc.) should be competent not only where the mother is dead (as under the present law) but also where the mother cannot be found or is incapable of making a declaration under s. 18(2)(b) of the Act.

(ix) (a) The law on the re-registration of the birth of an illegitimate child under s. 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be clarified. (b) Where the child is under the age of 16 re-registration should be possible on the application of (i) the mother or (ii) the father with the consent of the mother or the sanction of the sheriff.

Guardianship

(x) The mother of an illegitimate child should, by operation of law, be the tutor and curator of the child.

(xi) The mother of an illegitimate child should be entitled to appoint testamentary tutors and curators to the child.

(xii) Views are invited on the following questions—(a) whether the father of an illegitimate child should be entitled to apply to the court to be appointed tutor or curator to his child; (b) whether the father's application should be competent only if the mother consents; and (c) whether in deciding such applications the court should be directed by statute to regard the welfare of the child as the first and paramount consideration.

(xiii) The father of an illegitimate child should not be the child's tutor or curator merely by virtue of cohabitation with the mother.

(xiv) Views are invited on the desirability of enabling joint tutory and curatory to be conferred upon the father of an illegitimate child otherwise than by application to the court, whether by virtue of joint registration of the child's birth or by agreement between the parents or otherwise.

(xv) An appointment of testamentary tutors or curators to an illegitimate child by the father of the child should be valid if the father, at the date of his death, had custody of the child by virtue of a court decree or was the child's tutor or curator.

(xvi) Where the parents of an illegitimate child were his joint tutors or curators immediately before the death of one of them, the surviving parent should become the child's tutor or curator solely or jointly with any tutors or curators appointed by the deceased parent.

(xvii) The father of an illegitimate child should on the mother's death become the child's tutor or curator, either solely or jointly with any testamentary tutors or curators appointed by the mother, if he was immediately before her death entitled to the custody of the child (either solely or jointly with any other person) by virtue of a court decree.

(xviii) The court should have power to appoint a tutor or curator to act jointly with a surviving parent who becomes sole tutor or curator in the circumstances described in Proposition (xvi) and (xvii).

(xix) Where the surviving parent of an illegitimate child is a tutor or curator, he or she should have the same right to object to acting jointly with a testamentary tutor or curator appointed by the other parent as has the surviving parent of a legitimate child.

(xx) It should be made clear that s. 4(2A) of the Guardianship of Infants Act 1925 (which enables the court to appoint a tutor to any child having no parent, tutor or other person having parental rights) applies to illegitimate children. The mother of an illegitimate child should, but the father should not, be regarded as a "parent" for this purpose.

(xxi) Where a dispute relating to the welfare of the child arises between joint tutors or curators of an illegitimate child the court should have power, on application by either party, to make such order regarding the matters in dispute as it thinks proper.

(xxii) The court should, on application, have power to make an order

(xxiii) The powers referred to in Propositions (xii), (xviii), (xx), (xxi) and (xxii) above (appointment and removal of tutors and curators to illegitimate children and resolution of disputes between joint tutors or curators) should be exercisable by the Court of Session or by the sheriff courts.

Custody and Access

(xxiv) In any proceedings before any court in which the custody or upbringing of, or access to, an illegitimate child is in question the court should be required to regard the welfare of the child as the first and paramount consideration.

(xxv) Views are invited on the question whether there are any circumstances in which custody rights should be conferred on the fathers of illegitimate children by operation of law without the need for any application to a court.

Other Parental Rights

(xxvi) It should be made clear by statute that, except as otherwise provided, the mother of an illegitimate child has to the exclusion of the father all the parental rights possessed by the mother of a legitimate child.

(xxvii) The father of an illegitimate child should be entitled to apply to the court for any of the parental rights possessed by the father of a legitimate child.

(xxviii) We invite views on the question whether there are any circumstances in which, without the need to apply to a court, the father of an illegitimate child should have all the parental rights possessed by the father of a legitimate child.

(xlv) Should any provision be made (a) to require the Lord Advocate to be called as a defender in any action for declarator of legitimacy, illegitimacy or parentage or (b) to entitle the Lord Advocate to intervene in such actions?

(xlvi) We invite views on the question whether Rules of Court should provide for intimation of an action of declarator of legitimacy, illegitimacy or parentage to be made to such persons with an interest as the court may require.

(xlvii) We invite views on the question whether actions for declarator of parentage should be brought within the category of actions in which no decree in favour of the pursuer will be granted without proof.

(xlviii) We invite views on the question whether there should be any restrictions on the right to seek or obtain a declarator of legitimacy, illegitimacy or parentage of a person not of full age and capacity and, if so what?

(xlix) Should actions for declarator of legitimacy, illegitimacy or parentage be competent only in the Court of Session?

(l) The Court of Session should have jurisdiction to entertain an action for declarator of legitimacy, illegitimacy or parentage if (and only if) either the alleged mother, the alleged or presumed father, or the child—
   (a) is domiciled in Scotland on the date when the action is begun; or
   (b) was habitually resident in Scotland throughout the period of one year ending with that date; or
   (c) died before that date and either
      (i) was at death domiciled in Scotland, or
      (ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

(li) Section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that a finding of paternity in an action of affiliation and aliment or in affiliation proceedings elsewhere in the United Kingdom is sufficient evidence of paternity in subsequent civil proceedings unless the contrary is proved. Should this provision (a) be left as it is (b) be repealed or restricted or (c) be extended to other incidental findings of paternity or maternity?

Miscellaneous Matters

(lii) For the purposes of the Mental Health (Scotland) Act 1960 a person should be treated as a relative of another person if (i) he would be a relative if he were related legitimately to that other person and (ii) he is caring for that other person or was so caring immediately before that other person was admitted to hospital or was received into guardianship under the Act.

Possible Changes in Definition of Legitimacy

(liii) We invite views on the question whether the child of a void marriage should be legitimate.

(liv) Should the law make provision for legitimation by court decree on the application of both parents?

(lv) Should it be provided by statute that the child of an unmarried woman is deemed to be the legitimate child of both parents where they both appear on a Scottish Register of Births at their joint request?

(C.L.B. July 1982 pp.1080-1087)

The financial consequences of divorce

The Law Commission for England and Wales has had its report *Family Law: The Financial Consequences of Divorce* (No. 112: HMSO £2.80) laid before Parliament. A Discussion Paper [noted at (1981) 7 CLB 231] preceeded the Report, which was widely discussed in the press and on radio and television. Because of the level of public concern over the issue, the Commission proceeded with a Report in general terms rather than delay publication pending a detailed report with draft legislation annexed.

In the Discussion Paper the Commission pointed out that the duty imposed on the court "so to exercise [its] powers as to place the parties...in the financial position in which they would have been if the marriage had not broken down..." seemed to make it the primary objective of the law that the financial position of the parties be so far as possible unaffected by their divorce. The vast majority of those who commented on the Discussion Paper took the view that this policy was no longer appropriate. Not only did it impose on the courts a task which was rarely possible of attainment; but it was, in the great majority of cases, undesirable that it should be attained. These views were expressed not only by the overwhelming majority of the private individuals who wrote from their own experience, but also by those professionally concerned with the administration of the law. The Commission concluded that the duty now imposed by statute to seek to place the parties in the financial position in which they would have been if the marriage had not broken down is not a suitable general criterion and it should be removed from the law.

The simplest solution to the criticisms of the present law would be for Parliament to repeal the specific direction at the end of s. 25(1) of the Matrimonial Causes Act 1973 but otherwise to leave the section intact. This would enable the courts to adopt a flexible approach, taking into account the individual circumstances of the parties, changing economic factors, and changing attitudes to the proper purpose of financial provision; it would also reflect the current practice of the appellate courts, which seems primarily concerned to achieve a result which is "just in all the circumstances"; and it would remove from the court the necessity to pursue an objective which (because of the insufficiency of one income to support two households) it is usually impossible to attain. However, there would be serious disadvantages in such an approach, which might be said to "involve an abdication of responsibility by Parliament in favour of the judiciary. Individual judges would be left to achieve whatever they subjectively regarded as "just" without any guidance as to the principles by which the justice of the case should be determined. It is arguable that such an uncontrolled (and perhaps uncontrollable) discretion would inevitably exacerbate the divergence of practices between different tribunals, as well as leaving individual judges and registrars with no real guidance about the important issues of policy involved".

The formulation of policy in this and other areas of the law involves the resolution of two objectives, each intrinsically desirable, but perhaps mutually inconsistent. The first is that the law should be certain and predictable in its results. This objective is not only consistent with the popular concept or justice; it also means that it is easier for lawyers to

advise their clients on the likely outcome of a dispute, so promoting the conclusion of reasonable settlements, and minimising recourse to contested trials. The second objective is that the law should achieve justice and fairness between the parties; and it is said that this necessarily involves considerable flexibility of approach by reason of the widely varying facts of each case.

In this context, the Report refers to the contrast between the views of the Family Division judges and the views put forward by the Association of County Court and District Registrars (whose members are, in practice, responsible for the routine administration of this area of the law). The Judges considered that any satisfactory solution to the problem necessarily involved the court retaining a wide discretion so as to be able to take account of the factual circumstances which present themselves. The Registrars, on the other hand, pointed out that it was difficult to find a just solution if there were no guiding principles, and urged that "to remove the guiding light is to allow flexibility to go mad". They were one of the few supporters of the retention of the present statutory guidelines.

The Commission did not think it possible altogether to reconcile these two objectives of certainty and flexibility. Nevertheless, it was of the view that it would be undesirable to limit any reform to a removal of the specific direction at the end of s. 25(1); and it believes that a reasonable balance between the two objectives can be attained by adjustment of the other provisions of the section.

The response to the Discussion Paper indicated a substantial consensus that what was required was a change of attitude or emphasis in the law rather than a radical restructuring involving a wholly novel statutory framework. In this view (which the Commission accepts) a change in the law would be evolutionary rather than revolutionary. The change would best be carried into effect by retaining the direction to the court to "have regard to all the circumstances of the case" (including certain specified matters), but adding certain provisions designed to give a clear indication of how the discretion—which should be retained as a central feature of the law—should be applied to the facts of individual cases.

The first matter on which there was a wide measure of agreement was that the law should seek to emphasise as a priority the necessity to make such financial provision as would safeguard the maintenance and welfare of the children. It is true that the existing law directs the court to exercise its powers to make financial orders for the benefit of a child of the family so as to place the child, so far as it is practicable and (having regard to the spouses' means and obligations) just to do so in the financial position in which he would have been had the marriage not broken down, and each spouse had properly discharged his or her financial obligations and responsibilities towards that child. Moreover, there is evidence that in practice some Registrars will allocate a larger proportion of the available monies to the children, and a smaller proportion to the wife. Nevertheless, the impression that the making of provision for the children is regarded as a matter of secondary importance to the making of provision for the former spouse is widespread. There would be important advantages if the legislation were clearly to embody the principle that the interests of the children should be seen as a matter of overriding importance. Such a provision cannot increase the amount of money

available for the custodial parent and child. The financial position of the custodial parent and the children is inextricably interlinked; and provision will necessarily be made for the wife to enable her properly to minister to the children's needs. The court would be directed to take account of the interests of the children in deciding what support would be appropriate for the custodial parent. For example, the court might well decide that it would be inappropriate to make an order which would require the wife to work full-time while the children were still at school. The advantages which it considers would flow from making the children's position avowedly a priority would, it thinks, be two. First, adequate recognition would be given to the value of the custodial parent's role, whilst discouraging the belief that such payments may be regarded as an automatic life-time provision intended for the benefit of the custodial parent (usually, of course, the wife) perhaps for many years after the children have ceased to live with her. Secondly, it is often the case that the allocation of a larger proportion of the overall maintenance provision for the children's benefit makes the maintenance obligations more acceptable to the payer (usually, of course, the father).

In this connection the courts should have available adequate data about the actual costs of providing for the needs of children. The best way of providing such data as an administrative measure is a matter for discussion. It was suggested that the figures based on information drawn from the family expenditure survey and other sources, produced by the National Foster Care Association, and accepted by many local authorities as a basis upon which to calculate fostering allowances, might be used for this purpose; but it would perhaps be preferable for the guidance to be more specifically directed to the special circumstances of children living in a one-parent family.

The existing law requires the court to consider the income and earning capacity of both husband and wife, and (as reported cases indicate) the courts do take account of a wife's earning potential. There was, however, a widespread feeling amongst those who commented on the Discussion Paper that greater weight should be given to the importance of each party doing everything possible to become self-sufficient, so far as this is consistent with the interests of the children and the statutory provisions should contain a positive assertion of this principle.

The court has, under the existing law power to make orders for a limited term, and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not or should not expect to rely on continuing support from her husband. It would be desirable to require the court specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, given the increased weight which should be attached to the desirability of the parties becoming self-sufficient.

The expression "a clean break" is in danger of being indiscriminately used to express different and sometimes contradictory ideas. Moreover, it must be accepted that the occasions on which it is possible for the parties to arrive at a final, once for all settlement, on the occasion of their divorce will be comparatively few, and almost non-existent where there are young children. To seek to attain a "clean break" in many—perhaps the majority of cases—would simply be to drive divorced wives onto

supplementary benefit. That (it has been said) is not the policy of the present legislation; nor should it become the policy of the reformed legislation which the Commission now envisages. Nevertheless, the response to the Discussion Paper showed strong support for the view that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between a husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division.

At the moment, there is a technical difficulty in imposing such a "clean break", even in those cases where the court would wish to do so because the Court of Appeal has held that the court has no jurisdiction to dismiss a wife's claim for periodical payments without her agreement. The court should have such a power available for use in those, perhaps rare, cases where to use it would be appropriate. It is desirable that this fetter on the court's power should be removed; and that this should be done whether or not any other change in the substance of the law is made in the near future.

The response to the Discussion Paper indicated wide support for the view that the courts should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit—as distinct from periodical payments made to her to enable her to care for the children—should be primarily directed to secure wherever possible a smooth transition from marriage to the status of independence. This general objective should be embodied in the legislation.

The Discussion Paper pointed out that under most pension schemes, in the event of the pensioner's death, entitlement to a widow's pension is restricted to the person to whom the deceased was married at the time of his death. The effect is thus to exclude divorced wives from any entitlement. In consequence, in order to put the wife in the financial position in which she would have been had the marriage not broken down, the husband may have to make alternative arrangements, perhaps at very heavy cost.

There might well be a case for giving the court power to direct that the wife's contingent pension expectations be preserved, on the lines suggested in Chapter 13 of the Report of the Occupational Pensions Board entitled "Equal Status for Married Women in Occupational Pension Schemes". However, the Commission thought that whether or not this would be desirable must inevitably be influenced by the approach which the law adopted to the whole question of obligations between husband and wife.

It would anticipate that, as a result of the evolution which it expects to see away from the concept of life-long support for divorced wives, the circumstances in which it would be thought desirable to exercise any such power to preserve the wife's contingent pension expectations might be less common than in the past. Nevertheless, there could well still be some cases—particularly where there has been a long marriage, and the parties are near pensionable age—in which it might be appropriate for the courts

to be able to have recourse to what may well be an exceedingly valuable asset; and indeed the parties may both wish them to do so. Sometimes, of course, the wife's position could be dealt with by making other provision for her; but this will not always be possible. Early consideration should be given to the introduction of legislation empowering the courts to deal with the problem of occupational pensions. It was not necessary that the reforms which we propose should, however, be delayed in the meantime.

The law governing the circumstances in which a divorce may be obtained is now virtually identical in Scotland and England and Wales. The law of Scotland governing the financial consequences of divorce was not, however, remodelled (as was English law) contemporaneously with the change in the law governing the ground for divorce. The courts in Scotland do not at present enjoy the wide powers over both income and capital contained in s. 25 of the Matrimonial Causes Act 1973, nor are there set out in the Scottish legislation any detailed guidelines such as those contained in that section to govern the exercise of the discretion. The Scottish Law Commission have recently delivered to the Lord Advocate a final Report on this matter, containing detailed proposals for the reform of the law of Scotland, together with draft legislation; and the Commission had been furnished with a draft.

It is clearly desirable that the laws of these two parts of the United Kingdom should be based on similar principles; but it does not necessarily follow that the English and Scottish laws governing the financial consequences of divorce should be couched in identical terms.

There were two matters on which the Commission received a considerable body of conflicting comment. The first relates to the extent to which conduct should be taken into account by the courts in determining financial provision. The Discussion Paper said that it "would impose an impossible burden on the courts to require them to apportion blame for the breakdown of the marriage in each individual case." Nevertheless, the response to the Discussion Paper showed quite clearly that many of the individuals who had themselves been involved in divorce proceedings felt a considerable sense of injustice because the court had not been prepared to take account of the other spouse's behaviour, especially as this was for the parties the most important single factor in assessing financial provision.

Two separate, if related and perhaps often confused, issues are involved here. The first relates to what the legal system can and cannot reasonably expect to achieve. The courts as now constituted cannot reasonably be expected to apportion responsibility for breakdown in any save exceptional cases. This is because (in the words of Ormrod J.) "the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality."

It would be quite wrong to require the court to hear the parties' mutual recriminations at enormous expense to the individuals involved (or, if they have legal aid, to the taxpayer) in those cases where such findings as the court could make would have little effect on the order made. To expose the parties to this kind of remorseless investigation into the, sometimes distant, past would not be helpful in encouraging them to come to terms with their new situation. Indeed, one of the uses to which conciliation might most helpfully be put is to encourage the parties to come to terms with their, often deep-seated, feelings of resentment and anger, rather than to seek an unattainable catharsis in a judicial forum.

The second issue relates to the question of identifying those exceptional cases in which the court can not only identify responsibility for the breakdown of the marriage, but should also allow that assessment to influence the financial orders that are to be made. The Discussion Paper referred to the different emphasis sometimes to be detected in defining such cases; and there was a feeling amongst some commentators that uncritical and indiscriminate use of the expression "obvious and gross" conduct had served, not only to fetter the exercise of the court's discretion in some cases, but to influence professional advisers in adopting too narrow a view of the law. The courts are now well aware of the dangers of treating the phrase "obvious and gross" as if it were a statutory formula; and that it is increasingly being realised that the court needs to examine sufficient of the matrimonial history to enable the judge to "get a feel of the case", and thus be in a position to carry out its duty to take account of conduct in those cases where to do otherwise would offend a reasonable person's sense of justice.

The Commission would accordingly propose to preserve a reference to the conduct of the parties as one of the specified list of circumstances to which the court should have regard in those cases where it would be inequitable to do otherwise. Any further elaboration can best be left to case law development.

In the Discussion Paper the Commission noted that particular resentment about the present law seemed often to be felt by men who had remarried after a divorce, and by their second wives. The response to the Discussion Paper confirmed that such feelings are indeed widespread. To some extent, however, they are based on a misunderstanding of the law. The court has no power to make orders against the second wife; and it is never appropriate to make orders against the husband which effectively have to be paid out of his new partner's income (or capital). However, the fact that the partner has income or capital of her own *may* sometimes be relevant in assessing the amount of the order against the husband, because (it has been said) the availability of those means releases resources for the upkeep of his family. In effect, the husband is *not* allowed in such a case to say that he needs to retain all or most of his income in order to provide for the needs of his new family.

The layman may find such an approach oversubtle; and it has to be admitted that the practical effect will sometimes be that a husband is ordered to pay more by way of periodical payments for his first wife if his second wife has financial resources of her own than he would if she did not. Nevertheless it seems to be not only logical but just that, *if* the order in favour of the first wife (and her children) is of an appropriate amount,

courts now look at the matter afresh, and seek to make whatever order is reasonable in the circumstances of the case as they are at that time, untrammelled by the existence of the previous order. It would be wholly artificial to require the court to exclude from consideration changes in legislative attitudes to such matters as the wife's earning potential. On the other hand, the court should take into account the circumstances in which and the basis on which the order was originally made. In particular, it should give weight to the circumstances in which the order was made (for example, that the wife was given a large maintenance award and a small lump sum). It will be necessary to consider whether these matters should be left to the exercise of the court's discretion; or whether a statutory guideline is required.

In summary, the recommendations are that—

(i) Any future legislation dealing with the financial consequences of divorce should be subject to continuous monitoring and periodical reports to Parliament.

(ii) The Government should consider making an investigation into the overall cost of supporting those affected by divorce by means of welfare benefit payments and tax relief, so that the cost of any changes in the private law of financial obligations could properly be estimated.

(iii) The availability and scope of conciliation and similar services should be systematically investigated; everything possible should be done to encourage recourse to conciliation rather than litigation.

(iv) The procedures of the courts handling matrimonial cases should be systematically considered with a view to reform.

(v) The provisions of s. 25 of the Matrimonial Causes Act 1973 should be amended in the following respects—

  (a) to seek to place the parties in the financial position in which they would have been had the marriage not broken down should no longer be the statutory objective,

  (b) the guidelines contained in s. 25(1) of the Matrimonial Causes Act 1973 should be revised, to give greater emphasis to the following matters—

    (1) the provision of adequate financial support for children should be an overriding priority. (Administrative steps should also be taken to ensure that the courts have adequate and reliable information about the current cost of maintaining children);

    (2) the importance of each party doing everything possible to become self-sufficient should be formulated in terms of a positive principle: and weight should be given to the view that in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence.

(vi) Whether or not legislation is introduced to give effect to the policy set out above, the court should be given power in appropriate cases to dismiss a wife's claim for periodical payments without her consent.

(vii) Fresh consideration should be given to empowering the court to make orders reallocating the rights of former spouses under an occupational pension scheme.

(C.L.B. April 1982 pp.664-672)

Polygamous marriages
A man comes to the UK as an immigrant from Pakistan intending to live here permanently. Later, in accordance with a custom common among immigrants from the Indian subcontinent, he returns to Pakistan on a visit where he marries a local woman. Neither of them has previously been married but, since they are both Muslims, the ceremony is celebrated in a mosque in the form appropriate to their religion, under which the man is free subsequently to take additional wives. He then returns with her to live in this country.

Until very recently, it was generally accepted that, in a case like this, the marriage would not be treated by either English or Scots law as valid in this country. The Law Commission and the Scottish Law Commission, in a joint consultative paper, *Polygamous Marriages; capacity to contract a polygamous marriage and the concept of the potentially polygamous marriage* (Working Paper No. 83; Consultative Memorandum No. 56; HMSO £3.50), provisionally recommend that such a marriage ought to be regarded as valid in England and Wales and in Scotland. They propose that where a person, whether a man or a woman, permanently living in this country, marries abroad in a form appropriate for polygamous marriages, that fact should not invalidate the marriage, provided it is not actually polygamous. This will certainly clarify, and probably change, the law of Scotland. In England and Wales the law has in fact been significantly, and indeed unexpectedly, changed, in the direction proposed by the two Commissions, by a very recent decision of the Court of Appeal (*Hussain v Hussain*, 24 June 1982). Notwithstanding this development, the Commissions believe that it is still desirable to make proposals for law reform so as to ensure that the law on this matter in the two jurisdictions will be exactly the same and to avoid any uncertainties stemming from the recent Court of Appeal decision. Indeed, urgency has been added by the fact that many bodies and individuals have, until very recently, proceeded upon a quite different view of the law and it is desirable, in the Commissions' view, that Parliament should provide a clear statutory basis for the law in this area.

The rule governing such marriages was, it was thought, that a person regarded by the law as having his or her permanent home (or, in legal phraseology, as being "domiciled") here, on either side of the Border, lacked capacity in law to contract not only an actually polygamous marriage but, as in the example, even one created by a ceremony *appropriate* for a polygamous marriage. Moreover, this rule was thought to have been embodied in an Act of Parliament so far as marriages celebrated after July 1971 were concerned, though the Act related only to English law. It might well be that neither party had previously been married, that neither of them contemplated that the man should be free to take an additional wife, and that they intended to live together in this country. None of these considerations affected the application of the supposed rule. The marriage, although in fact and intention monogamous, was classified as being "potentially polygamous" in character and it was therefore invalid. By contrast, if the marriage had taken place in England or Wales in compliance with the formalities required by English law, or in Scotland in accordance with those laid down by Scot- law, it would have been valid,

because all marriages properly celebrated here are automatically regarded as monogamous.

In 1979 the Law Commission conducted a preliminary consultation on the question of invalid "potentially polygamous" marriages among a range of organisations and persons who seemed likely to possess detailed knowledge of any problems arising in practice. Those consulted included, for example, government departments such as the Immigration and Nationality Division of the Home Office and the Department of Health and Social Security on the one hand, and bodies with practical experience of the difficulties encountered by members of immigrant communities in this country, like the Commission for Racial Equality, on the other. The comments received in response to the request for information, as well as the results of certain limited surveys concerning immigrant communities that had been conducted by others, clearly indicated that the law was perceived by everyone concerned to be as stated in the previous paragraph and that, in a number of significant areas, it gave rise to practical difficulties.

In the light of these indications the Law Commission and the Scottish Law Commission accordingly prepared for publication this joint consultative paper in which they comprehensively review both the law and the practice as to actually and potentially polygamous marriages and put forward provisional proposals for reform, on which they invite comment and information. The Commissions do not favour any change in the law relating to marriages that are actually polygamous. However, they provisionally recommend the enactment of legislation which would provide that potentially polygamous marriages should be regarded as valid under both English and Scots law, and indeed that the concept of the "potentially polygamous" marriage should be removed from our law.

On 24 June 1982, the day on which the consultative paper was to be sent to HMSO for publication, the two Commissions were presented with a problem. On that day the Court of Appeal gave judgment in *Hussain v Hussain*, in which, contrary to the view of the law that had previously prevailed, the court held that a marriage in polygamous form contracted by a man having an English domicile was in fact valid, provided that it was not actually polygamous. However, the court explained that this approach did not extend to a marriage in a country whose law permitted the parties to marry in polygamous form between a woman domiciled in England and a man who was domiciled in that country or any other country which permitted him to have more than one wife. In that situation the marriage, in accordance with the general principle that had previously been thought to apply, would be invalid as being potentially polygamous in character. This decision, being one of an English court, does not directly affect the law of Scotland.

This decision resolves most of the practical difficulties in England and Wales identified by those who assisted the Law Commission in its preliminary investigation. To that extent the decision is welcomed by the two Commissions. It does, however, bring other problems in its wake.

Confronted by this very recent development, the two Commissions had to decide what course to follow. For several reasons, which the Commissions have explained in the first Part of their consultative paper, they have thought it right to publish the paper in substantially its original form, with the addition of an analysis and discussion of *Hussain v Hussain*.

They refer to the possibility that a different view of the law might be taken by the House of Lords, the highest court for both England and Scotland, should a case subsequently be taken there. They point out that, as *Hussain v Hussain* turned on a statutory provision applying only in England and Wales, a Scottish court could not readily adopt the same approach; and that the matter is one on which the law ought to be the same on both sides of the Border. They take the view that it may appear anomalous that a different rule should apply according to whether the person domiciled here is a man or a woman. The Commissions also point to the practical importance of the question whether or not marriages of many members of immigrant communities permanently living in this country are valid according to our law. They consider that the present position calls for the certainty and the desirable uniformity between English and Scots law that only the reform of the law by legislation can provide.

The following is the Commissions' summary of their provisional recommendations—

A *The law of England and Wales*

(1) Reform of the law relating to the capacity of a person domiciled in England and Wales to contract a marriage in polygamous form is desirable, notwithstanding the recent decision of the Court of Appeal in *Hussain v Hussain* (1982). We do not, however, favour a change in the law to permit an English domiciliary to contract an actually polygamous marriage.

(2) Section 11 of the Matrimonial Causes Act 1973 should be amended so that it would apply only to actually polygamous marriages, with the consequence that a person domiciled in England and Wales would have capacity to contract a marriage that, though polygamous in form, was only potentially polygamous in fact.

(3) No marriage should be regarded as polygamous, irrespective of the form of the relevant marriage ceremony and of the effect of such marriage under the law of the place where it is celebrated, unless it is actually polygamous.

(4) Recommendations (2) and (3) should apply to marriages celebrated both before and after any legislation implementing our proposals comes into force.

(5) We raise the question of the effect upon a first marriage (which is either monogamous or only potentially polygamous) of a later valid marriage contracted by the husband. As to this issue—

  (i) we do not favour the adoption of a principle whereby the first wife should in every case have the rights of a wife under a monogamous marriage, irrespective of the nature of the ceremony and the domicile of the parties;

  (ii) we are undecided whether any change in the present law is desirable in this respect and whether it is desirable to regulate this matter by legislation;

  but if such change is thought to be desirable

  (iii) we tentatively propose a limited rule whereby a marriage contracted by a person having an English domicile should be regarded as having a legally monogamous character, until that person should acquire a domicile in a country whose law permits polygamy. We should particularly welcome evidence as to whether this issue is, or is likely to be, significant in practice.

B *The law of Scotland*

(6) A person domiciled in Scotland should not be regarded as lacking legal capacity to enter into a marriage outside the United Kingdom by reason only of the fact that the marriage is, or is to be, celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy, provided that the marriage is not actually polygamous.

(7) The fact that a marriage was entered into outside the United Kingdom under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy should not preclude the marriage being regarded in Scots law as having the incidents of a monogamous marriage if it is not and does not become actually polygamous.

(8) We raise the question of the effect upon a first marriage (which is either monogamous or only potentially polygamous) of a later valid marriage contracted by the husband. As to this issue—

(i) we do not favour the adoption of a principle whereby the first wife should in every case have the rights of a wife under a monogamous marriage, irrespective of the nature of the ceremony and the domicile of the parties;

(ii) we are undecided whether any change in the present law is desirable in this respect and whether it is desirable to regulate this matter by legislation;

but if such a change is thought to be desirable

(iii) we tentatively propose a limited rule whereby a marriage contracted by a person having a Scottish domicile should be regarded as having a legally monogamous character, until that person should acquire a domicile in a country whose law permits polygamy. We should particularly welcome evidence as to whether this issue is, or is likely to be, significant in practice.

C *General matters*

(9) Further consideration of the choice of law rules relating to the capacity of parties to contract a polygamous marriage should be carried out in the context of a general review of the choice of law rules relating to marriage.

(10) A review of the law of domicile in general would now be opportune; and any practical problems relating to domicile to which s. 11(d) of the Matrimonial Causes Act 1973 gives rise should be examined in that context.

(C.L.B. October 1982 pp.1446-1450)

Illegitimacy

In a Report, under the above title, a further part of their family law reform programmeme, the Scottish Law Commission makes recommendations for reform of the law on illegitimacy. The Report, with draft Bill annexed, follows a consultative memorandum issued in 1982 which was generally supported on consultation.

It is estimated that over a quarter of a million people in Scotland, or about 5 per cent of the population, are illegitimate. These people are subject to legal rules on matters such as inheritance and guardianship which are different from those governing the rest of the population. The Commission considers that it is unjust to discriminate against people on the basis of the marital status of their parents. It recommends

that the law should be amended to remove legal differences between legitimate and illegitimate children without, however, conferring parental rights automatically on fathers of illegitimate children, as it is recognised that these fathers may not always have a continuing relationship with their children.

Under the present law, an illegitimate child has no legal guardian unless one has been appointed by a court. Neither parent can appoint a guardian by will. The Commission recommends that the mother of an illegitimate child should have full parental rights of guardianship, custody etc., and that she should be able to appoint by will guardians to look after the child on her death. The father should be able to acquire parental rights, which may be exercised alone or jointly with the mother, only by court order.

In making these recommendations, the Commission has taken the opportunity to recommend simplification and modernisation of the existing Guardianship legislation which generally applies only to legitimate children and which the Commission believe is incoherent and outdated. It is recommended that the Guardianship Acts be replaced with provisions applying to both legitimate and illegitimate children, based on the principle of legal equality for all children. This principle would be subject to a few exceptions, the most important of which being that the father of an illegitimate child would not automatically be his or her guardian or have other parental rights. The courts should have a general power to make orders as to parental rights and, when dealing with these matters, should be directed to regard the welfare of the child as the paramount consideration. The Commission also recommends that terms denoting legitimacy and illegitimacy should cease to be used in legislation and express the hope that, with the elimination of the major legal distinctions between legitimate and illegitimate persons, such terms will eventually cease to be used altogether.

The rights of an illegitimate person in relation to inheritance are restricted under the present law. An illegitimate child cannot inherit from his grandparents or brothers and sisters if they die without having made a will. The only people who can inherit from an illegitimate person dying without a will are his spouse, his children and their issue, and his parents. The Commission recommends that, for the purposes of inheritance, an illegitimate relationship should be treated as legitimate.

The Commission makes recommendations to improve and clarify the law on court procedures for determining the paternity of a child and also makes recommendations to facilitate the use of blood test evidence to establish paternity in civil proceedings. It recommends introduction of a legal presumption of paternity arising out of registration of a man in the Register of Births as the father of an illegitimate child.

In addition, the Commission proposes minor amendments to the procedures for registering births in order to facilitate registration of the birth of an illegitimate child and the recording of the father's name after registration of the birth.

(C.L.B. April 1984 pp.779-785)

Matrimonial property

In a Report (Scot. Law Com. No. 86) on *Matrimonial Property* as a further part of the family law reform programme, the Scottish Law Commission makes recommendations for reform of the law on the property of married persons. The Report, with draft Bill annexed, follows a consultative memorandum issued in 1983 which was generally supported on consultation.

Under the present law, there is no special property regime for married couples. With only minor exceptions—for example, the right of a non-owner spouse to occupy the matrimonial home, introduced by the Matrimonial Homes (Family Protection) (Scotland) Act 1981—legal rules for sharing property between husband and wife only come into operation on dissolution of the marriage by death or divorce.

The Commission makes recommendations for reform which will introduce an element of sharing of household goods during marriage. Under the present law, household goods in the matrimonial home belong to whichever of the spouses acquired them. This can operate unfairly against the non-earning spouse and can produce unrealistic and artificial results. The Commission therefore recommends the introduction of a presumption that household goods in the matrimonial home which have been acquired during the marriage belong equally to the husband and the wife. This presumption would be rebuttable by proof of actual ownership—for example, that one spouse had inherited the goods—but it would not be sufficient to rebut the presumption merely to show that the goods were purchased by one spouse alone. Without this qualification, ownership could still be determined by arbitrary factors, such as which spouse had time to go into the shop to purchase the item in question. Household goods would be defined as goods within the home and garden which are used for the joint domestic purposes of the husband and wife.

Under the present law, savings from a housekeeping allowance made by a husband are jointly owned but this does not apply to an allowance made by a wife. The Commission considers that this rule is discriminatory and recommends that it apply to both spouses equally.

The Commission has also considered ways in which to encourage voluntary co-ownerhsip of the matrimonial home. It recommends that a transfer by one spouse to the other of a share in the home should be exempt from stamp duty and that the fees for registering such transfers should be chargeable at a fixed low rate, and not according to the value of the property transferred.

In making these recommendations, the Commission has taken the opportunity to recommend simplification and modernisation of the existing legislation on the property and legal capacity of married persons, which is framed in terms of concepts which have become obsolete. It is recommended that the current statutory provisions be replaced with a single provision restating the general principle of separate property during marriage and independent legal capacity of both parties to the marriage.

(C.L.B. October 1984 pp.1701-1702)

Health, Education and Social Welfare

Ante-natal injury

Ante-natal injury was specifically included in the Commission's terms of reference because of the thalidomide tragedy. It was often impossible, however, to distinguish the results of ante-natal injury from other congenital defects. Congenital defects account for 90 per cent of all severe disability among children.

As the cause of congenital malformation could rarely be established it was not practical to devise a separate scheme for those cases which were within the terms of reference. Children who may have been injured before birth should be considered as part of the problem of compensation for all children who are severely handicapped.

The introduction of strict liability for products would provide a remedy for ante-natal injury if it could be proved to have been caused by "defective" drugs.

The tort action provided under the Congenital Disabilities (Civil Liability) Act 1976 should be retained but its operation should be restricted because there are grave objections to the tort action within the family in the sphere of ante-natal injury.

The child should not normally be allowed to sue either of its parents.

The liability for pre-conception injury in Scotland — where there had been no legislation on ante-natal injury — should be limited to the same extent as the rest of the United Kingdom.

Children

It is estimated that there are about 100,000 severely handicapped children — 90,000 suffering from congenital disability; 1,000 to 2,000 disabled through post-natal injury and 8,000 who have suffered from disabling diseases acquired after birth such as meningitis, leukaemia and epilepsy.

As all children who are severely handicapped should be treated in the same way, no matter the cause of their handicap, the Commission recommends that a special benefit for severely handicapped children should be introduced. There is no obvious source of finance related to the causes of handicap so that the cost would have to be borne by the Exchequer.

Those children with a severe disability needed all possible assistance if they were to achieve maximum potential later in life and the whole family may suffer if support was not available.

The "no-fault" provision at present available was not adequate and it is recommended that an addition to child benefit should be paid to parents and guardians of all severely handicapped children.

The new benefit
The new allowance would be at the rate of £4 a week (at January 1977 levels), tax free, for severely handicapped children from the age of two. For preference it could be paid to the mother as an addition to child benefit. It would not be a substitute for local authority services.

The allowance would cease when the child became eligible for non-contributory invalidity pension at the age of 16, or at age 19 if receiving full-time education. It should be reviewed as the child grows as there may be some change in his condition.

Assessment of "severe handicap" should not depend solely on medical certification by doctors but should include assessment by members of other health care professions.

The Department of Health and Social Security should administer the benefit and lay down detailed procedure. There should be no avoidable delay in determining entitlement. There should be an appeal procedure of which parents should be told.

Mobility allowance
Attendance allowance and mobility allowance would still be payable where applicable.

The Commission recommends that the mobility allowance, now payable to children from the age of five, should be paid from the age of two.

It notes that the conditions of eligibility for the mobility allowance exclude substantial numbers of children with serious mobility problems such as uncontrolled epilepsy; severe asthma or cystic fibrosis; blind and deaf; overactive mentally handicapped children who require constant supervision.

It also understands that recent decisions on the award are in effect extending entitlement. It recommends that the conditions of eligibility for mobility allowance should be reviewed so as to help those children who may be technically mobile but whose mobility is subject to special difficulties.

Cost
The cost of the new allowance would be some £15m a year plus administration costs of £2m a year. To make mobility allowance payable at the age of two would cost £1m a year.

Even if compensation is available to all severely handicapped children on these lines it should still be possible to bring tort actions — subject to the off-setting of social security benefits.

(C.L.B. July 1978 pp.653-654)

Human fertilisation and embryology

The much-awaited *Report of the Committee of Inquiry into Human Fertilisation and Embryology,* (HMSO: £6.40) under the Chairmanship of Dame Mary Warnock, DBE, has now been published. The Inquiry was set up to examine, among other things, the ethical implications of new developments in the field.

As perhaps to be expected the task set the Inquiry was not an easy one. The issues raised reflected fundamental moral, and often religious, questions over which there are serious differences and a wide range of view points. No doubt reflecting these differences, the Committee itself was divided; and the report carries three formal expressions of dissent focussing (as the report points out) on the very subjects—surrogacy and research on human embryos—which, to judge from the evidence put before the Committee, aroused the greatest public anxiety.

The recommendations of the Committee, as listed in the report, are as follows—

A *The licensing body and its functions*

1. A new statutory licensing authority be established to regulate both research and those infertility services which we have recommended should be subject to control.

2. There should be substantial lay representation on the statutory authority to regulate research and infertility services and that the chairman must be a lay person.

3. All practitioners offering the services we have recommended should only be provided under licence, and all premises used as part of any such provision, including the provision of fresh semen and banks for the storage of frozen human eggs, semen and embryos should be licensed by the licensing body.

4. AID should be available on a properly organised basis and subject to the licensing arrangements described in Chapter Thirteen, to those infertile couples for whom it might be appropriate. The provision of AID services without a licence for the purpose should be an offence.

5. The service of IVF should continue to be available subject to the same type of licensing and inspection as we have recommended with regard to the regulation of AID (see Chapter Four)

6. Egg donation be accepted as a recognised technique in the treatment of infertility subject to the same type of licensing and controls as we have recommended for the regulation of AID and IVF.

7. The form of embryo donation involving donated semen and egg which are brought together *in vitro* be accepted as a treatment for infertility, subject to the same type of licensing and controls as we have recommended with regard to the regulation of AID, IVF and egg donation.

8. The technique of embryo donation by lavage should not be used at the present time.

9. The use of frozen eggs in therapeutic procedures should not be undertaken until research has shown that no unacceptable risk is involved. This will be a matter for review by the licensing body.

10. The clinical use of frozen embryos may continue to be developed under review by the licensing body.

11. Research conducted on human *in vitro* embryos and the handling of such embryos should be permitted only under licence.

12. No live human embryo derived from *in vitro* fertilisation, whether frozen or unfrozen, may be kept alive, if not transferred to a woman beyond fourteen days after fertilisation, nor may it be used as a research subject beyond fourteen days after fertilisation. This fourteen day period does not include any time

during which the embryo may have been frozen.

13. Consent be obtained as to the method of use or disposal of spare embryos.

14. As a matter of good practice no research should be carried out on a spare embryo without the informed consent of the couple from whom the embryo was generated, whenever this is possible.

15. Where trans-species fertilisation is used as part of a recognised programme for alleviating infertility or in the assessment or diagnosis of sub-fertility it should be subject to licence and that a condition of granting such a licence should be that the development of any resultant hybrid should be terminated at the two cell stage.

16. The licensing body be asked to consider the need for follow-up studies of children born as a result of the new techniques, including consideration of the need for a centrally maintained register of such births.

17. The sale or purchase of human gametes or embryos should be permitted only under licence from, and subject to, conditions prescribed by the licensing body.

B *Principles of provision*

18. As a matter of good practice any third party donating gametes for infertility treatment should be unknown to the couple before, during and after the treatment, and equally the third party should not know the identity of the couple being helped.

19. Counselling should be available to all infertile couples and third parties at any stage of the treatment, both as an integral part of NHS provision and in the private sector.

20. In the case of more specialised forms of infertility treatment the consent in writing of both partners should be obtained, wherever possible, before treatment is begun, as a matter of good practice. Any written consent should be obtained on an appropriate consent form.

21. The formal consent in writing by both partners should, as a matter of good practice, always be obtained before AID treatment begins. A consent form should be used and thoroughly explained to both partners.

22. For the present, there should be a limit of ten children who can be fathered by one donor.

23. In cases where consultants decline to provide treatment they should always give the patient a full explanation of the reasons.

24. The NHS numbers of all donors be checked by the clinics where they make their donations against a new centrally maintained list of NHS numbers of existing donors, which is to be held separately from the NHS donor register.

25. There should be a gradual move towards a system where semen donors should be given only their expenses.

26. In relation to egg donation the principles of good practice we have already considered in relation to other techniques should apply, including the anonymity of the donor, limitation of the number of children born from the eggs of any one donor to ten, openness with the child about his genetic origins, the availability of counselling for all parties and informed consent.

27. It should be accepted practice to offer donated gametes and embryos to those at risk of transmitting hereditary disorders.

28. All types of "do-it-yourself" sex selection kits should be brought within the ambit of control provided by the Medicines Act with the aim of ensuring that such products are safe, efficacious and of an acceptable standard for use.

29. The use of frozen semen in artificial insemination should continue.

30. There should be automatic five-yearly reviews of semen and egg deposits.

31. There should be a maximum of ten years for the storage of embryos after which time the right to use or disposal should pass to the storage authority.

32. When one of a couple dies the right to use or dispose of any embryo stored by that couple should pass to the survivor. If both die that right should

pass to the storage authority.

33. Where there is no agreement between the couple the right to determine the use or disposal of an embryo should pass to the storage authority as though the ten year period had expired.

C *Service provision*

34. Funding should be made available for the collection of adequate statistics on infertility and infertility services.

35. Each health authority should review its facilities for the investigation and treatment of infertility and consider the establishment, separate from routine gynaecology, of a specialist infertility clinic with close working relationships with specialist units, including genetic counselling services, at regional and supra-regional level.

36. Where it is not possible to have a separate clinic, infertility patients should be seen separately from other types of gynaecological patient, wherever possible.

37. The establishment of a working group at national level made up of central health departments, health authorities and those working in infertility, to draw up detailed guidance on the organisation of services.

38. Consideration be given to the inclusion of plans for infertility services as part of the next round of health authority strategic plans.

39. IVF should continue to be available within the NHS.

40. One of the first tasks of the working group, whose establishment we recommend, should be to consider how best an IVF service can be organised within the NHS.

D *Legal limits on research*

41. The embryo of the human species should be afforded some protection in law.

42. Any unauthorised use of an *in vitro* embryo would in itself constitute a criminal offence.

43. Legislation should provide that research may be carried out on any embryo resulting from *in vitro* fertilisation, whatever its provenance, up to the end of the fourteenth day after fertilisation, but subject to all other restrictions as may be imposed by the licensing body.

44. It shall be a criminal offence to handle or to use as a research subject any live human embryo derived from *in vitro* fertilisation beyond that limit (i.e. fourteen days after fertilisation).

45. No embryo which has been used for research should be transferred to a woman.

46. Any unlicensed use of trans-species fertilisation involving human gametes should be a criminal offence.

47. The placing of a human embryo in the uterus of another species for gestation should be a criminal offence.

48. The proposed licensing body promulgates guidance on what types of research, apart from those precluded by law, would be unlikely to be considered ethically acceptable in any circumstances and therefore would not be licenced.

49. Unauthorised sale or purchase of human gametes or embryos should be made a criminal offence.

E *Legal changes*

50. The AID child should in law be treated as the legitimate child of its mother and her husband, where they have both consented to the treatment.

51. A change in the law so that the semen donor will have no parental rights or duties in relation to the child.

52. Following the English Law Commission, that it should be presumed that the husband has consented to AID, unless the contrary is proved.

53. The law should be changed so as to permit the husband to be registered as the father, (subject to 4.17).

54. Legislation should provide that when a child is born to a woman following donation of another's egg the woman giving birth should, for all purposes, be regarded in law as the mother of that child, and that the egg donor should have no rights or obligations in respect of the child.

55. The legislation proposed should cover children born following embryo donation (see recommendations 53 and 54).

56. Legislation should be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organisations.

57. Legislation should be sufficiently wide enough to render criminally liable the actions of professionals and others who knowingly assist in the establishment of a surrogate pregnancy.

58. It be provided by statute that all surrogacy agreements are illegal contracts and therefore unenforceable in the courts.

59. Legislation should provide that where a person dies during the storage period or cannot be traced at a review date the right of use of disposal of his or her frozen gametes should pass to the storage authority.

60. Legislation be introduced to provide that any child born by AID who was not *in utero* at the date of the death of its father shall be disregarded for the purpose of succession to and inheritance from the latter.

61. Legislation be enacted to ensure there is no right of ownership in a human embryo.

62. For the purposes of establishing primogeniture the date and time of birth and not the date of fertilisation shall be the determining factor.

63. Legislation be introduced to provide that any child born following IVF, using an embryo that had been frozen and stored, who was not *in utero* at the date of the death of the father shall be disregarded for the purpose of succession to and inheritance from the latter.

(C.L.B. October 1984 pp.1705-1708)

Torts

AUSTRALIA - SOUTH AUSTRALIA

Fatal accidents provisions of the Wrongs Act 1936

In its 56th report, the Law Reform Committee of South Australia considers the width of the class of persons who may claim under the Wrongs Act 1936 and the heads of damages which may be subsumed in their claims.

In addition to those at present entitled to claim, the Committee suggests that—

(a) the position of the posthumous child be put beyond doubt by the statute;

(b) divorced wives in receipt of maintenance be entitled to claim;

(c) an adopted child supported by his natural parent whose natural parent has given reason to think that help would be forthcoming should have a right to claim in times when increasing numbers of adopted children are getting to learn of the identity of their natural parents;

(d) claims should also lie where (i) the deceased was *in loco parentis* to a child, (ii) where a *de facto* adoption had taken place, and (iii) where there were children of a *de facto* relationship accepted as children of the household.

As to heads of damage, claims should lie for—

(i) services gratuitously rendered to a widow or children by reason of the death of a husband or child;

(ii) the loss by a child of the advantages, financial or otherwise, which it would have enjoyed had its parent, step-parent, grandparent with whom it lived, or the person *in loco parentis* had not been killed by a tortfeasor.

The solatium law should remain as it is, without any solatium allowance for a child while there is one for a parent who loses a child.

(C.L.B. January 1982 p.237)

CANADA-BRITISH COLUMBIA

Interspousal immunity in tort

In its Working Paper No. 34 under the above title, the Law Reform Commission of British Columbia expresses the tentative view that "the law in this regard is anachronistic, complex and riddled with anomalies," and that interspousal immunity in tort should be abolished in British Columbia.

In 1887 a Married Women's Property Act was enacted in British Columbia which was largely based on the English legislation. That Act remains in substantially the same form today.

The key sections of the current Married Women's Property Act are ss. 3 and 10. Section 3 provides—

May bind her separate estate by contracts, and may sue and be sued.

S. 3. (1) A married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a single woman, and her husband need not be joined with her as plaintiff or defendant, or be made a party to an action or other legal proceeding brought by or taken against her.

(2) Damages or costs recovered by a married woman in an action or proceeding are her separate property and damages or costs recovered against her in an action or proceeding are payable out of her separate property and not otherwise.

This action effectively abolishes the common law procedural rule, allowing a married woman to sue or be sued in her own name without her husband being a party to the litigation.

Section 10 provides—

Remedies of married women for protection and security of property.

S. 10. (1) Every married woman shall have in her own name against all persons, including her husband, the same remedies for the protection and security of her own separate property as if the property belonged to her as a single woman.

(2) In proceedings under this section it is sufficient to allege that the property referred to in subsection (1) is the property of the married woman.

(3) Except as aforesaid, no husband or wife is entitled to sue the other for a tort.

(4) In proceedings under this section a husband or wife is competent to give evidence against each other.

This section modified the substantive rule to the extent that it gives a married woman the same remedies as an unmarried woman for the protection of her separate property. Subject to this exception, however, s. 10(3) reaffirms the common law by the unequivocal declaration that "no husband or wife is entitled to sue the other for a tort." It is this rule that is addressed in this Working Paper.

Although, as a general rule, a husband or a wife is not entitled to sue the other in tort, a married woman may, during the marriage, sue her husband in tort for the protection and security of her separate property. The Working Paper notes that no such exception is created in favour of married men. On the whole, the courts have been disinclined to give a generous interpretation to this exception. Thus a wife cannot sue her husband for false imprisonment and malicious prosecution, for deceit, for fraudulent conspiracy, for libel, assault or for personal injuries occasioned by her husband's negligence. On occasion, however, the courts have given "a fair, large and liberal" interpretation to s. 10. In *Allen v Nolet,* for example, the British Columbia Court of Appeal held that a claim for indemnity by a wife against a husband is maintainable, because a judgment against the wife would affect her separate property and the indemnity claim would therefore be for the protection and security of that property. In British Columbia it also appears that although a husband is not liable to his wife for her general damages occasioned by his negligent driving, he is liable for her special damages.

Property is defined in the Act as including a "thing in action" so a wife may, during her marriage, sue her husband for injury caused to her by his negligence before marriage.

It would also appear to be settled in British Columbia that a former wife whose marriage is terminated by divorce or annulment may sue her former husband for damages sustained as a result of a tort committed by him during the marriage.

It has also been held that if a husband, while acting as a servant or agent of a third party, commits a tort resulting in injury to his wife, the wife can recover against the third party.

The Paper notes that the traditional arguments in support of interspousal tort immunity have not persuaded the Commission that it should be retained. It therefore tentatively concludes that the immunity should be abolished. Nor should the court be given a discretion to stay what are essentially trivial or frivolous actions, as has been done in England. Such a discretion has been rejected in several jurisdictions where the immunity has been examined. Under the current law the court cannot restrain proceedings by a wife for the protection of her separate property or proceedings in an action between spouses for breach of contract. The Commission sees no reason to treat actions in tort any differently.

The Commission proposes that s. 10(3) of the Married Women's Property Act RSBC 1979, c. 252 be repealed and replaced by provision comparable to the following—

> Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.

Section 5 of the Negligence Act provides—

Negligence of spouse
S. 5. In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of that spouse, and the portion of the loss or damage caused by the fault or negligence of that spouse shall be determined although that spouse is not a party to the action.

This section was originally enacted to overrule the decision in *Ferguson v Macdonald.* If spousal immunity in tort is abolished, s. 5 would therefore no longer be necessary and it should be repealed.

The Commission further proposes that s. 5 of the Negligence Act, RSBC 1979, c. 298 be repealed.

Dealing with *Statutory Exclusions* in insurance legislation, the paper notes that s. 240 of the Insurance Act provides—

Exceptions from liability
S. 240. The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability
(b) resulting from bodily injury to or the death of
(i) the daughter, son, wife or husband of any person insured by the contract while being carried in or on or entering or getting on to or alighting from the automobile; or

A similar provision exists or existed in the insurance statutes of other Provinces, and it has been adversely commented upon by those agencies that have considered interspousal immunity. The Manitoba Law Reform Commission pointed out—

To leave this provision intact after abolishing spousal immunity would leave one of the most significant sources of spousal litigation unaltered in a practical sense. There is no point reforming the law of spousal immunity in automobile accident cases if the effect of the change is nullified by "The Insurance Act". The Ontario Law Reform Commission recognised this fact, and proposed that the equivalent section in the Ontario insurance legislation be repealed. Such a change would go somewhat beyond the realm of spousal immunity, since it would also wipe out the exclusion of children from coverage, but there seems no reason to treat children differently from spouses.

Similar views were expressed by the Law Reform Commission of Saskatchewan. Repeal of such provisions has therefore been recommended in Ontario, Manitoba and Saskatchewan. The Ontario equivalent of s. 240(b) of the Insurance Act was repealed at the same time as the abolition of interspousal tort immunity. In Manitoba, however, the equivalent section in the Manitoba Insurance Act was not repealed at the time that interspousal immunity in tort was abolished.

The Commission is of the view that s. 240(b) of the Insurance Act should be repealed.

The Commission further proposes that a provision be added to the Insurance Act, and the Insurance (Motor Vehicle) Act, prohibiting the exemption from liability, under motor vehicle insurance policies, for personal injuries to members of the insured's family.

The Working Paper is confined to an examination of that part of the

Married Women's Property Act that relates to interspousal immunity in tort. The Commission cautions that this does not mean that it regards all other aspects of the Act as satisfactory. It is its provisional view that the Act could undergo substantial revision to simplify it and to bring it more into line with the expectations of married persons today. The current Act has remained substantially unaltered since 1887. Other jurisdictions in Canada, however, have adopted the Uniform Married Women's Act, a simplified version of the Act promulgated by the Uniform Law Conference. Furthermore, both Ontario and Prince Edward Island have repealed their respective Married Women's Property Acts, replacing them with provisions which establish, more concisely, that each spouse has a legal personality separate and distinct from that of the other spouse. Indeed, in British Columbia, a Bill was introduced in 1973 which would have been of similar effect. This Bill, however, never received second reading.

In view of the Commission's current commitments, however, it cannot at this time give priority to a wider project on the Married Women's Property Act.

(C.L.B. October 1982 pp.1443-1446)