

A DECADE OF WOMEN AND THE LAW IN THE COMMONWEALTH



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A DECADE OF WOMEN AND THE LAW in the COMMONWEALTH

Prepared by MARGARET ROGERS

for

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Legal Division

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FOREWORD

This work was made possible by a generous grant from the Hubert Humphrey Institute of Public Affairs in the University of Minnesota and the printing and publishing resources of the Commonwealth Secretariat. My sincere thanks to both.

It is based on materials contained in 45 issues of the Commonwealth Law Bulletin 1974-1985 published by the Legal Division of the Commonwealth Secretariat. The work is not comprehensive; it could not be. It is already 350 pages long. However, it draws on materials from 35 Commonwealth countries in various stages of development and discloses many interesting trends.

Australia is in the forefront in legislating to enhance the status of women; this is not unexpected in the country of origin of Germaine Greer. It is also not unexpected to find that enhancement of the status of women follows closely on economic development. Development of the economy enables more women to enter employment and to become more economically independent. A buoyant economy means that the fear of unemployment recedes and equal wages for women doing the same jobs as men is politically more readily acceptable.

From Australia to Cyprus to Saint Vincent and the Grenadines there is much concern with the status of children born out of wedlock. This is the area of law in which there has been the most widespread legislation.

Domestic violence is another topic on which many countries including Canada, the United Kingdom and Papua New Guinea are all actively trying to find legal solutions. Legislation is not always a sufficient answer until women are prepared to come forward and prosecute their partners. The less developed the economy the more dependent are women on men for the support of themselves and their children and the less likely they are to make criminal accusations against their partners. However, it is not clear that the problem is a serious one in the less developed jurisdictions and it may be that domestic violence goes hand in hand with the stresses of more complex societies.

The case of D.P.P. v Morgan (1975) 2 All E.R. 347, a House of Lords decision, has given rise to many questions in regard to the nature and proof of consent of a woman in a rape charge. In D.P.P. v Morgan the defendant stated that he believed that consent had been given because the woman's husband agreed to the defendant having sexual intercourse with his wife. The husband at that time had immunity against prosecution for the rape of his wife. In many jurisdictions this decision has been challenged and in the Scottish case of H.M. Advocate v Duffy 1983 S.L.T. 7, the court held that this immunity could not be taken as a matter of principle in view of the fact that the status of women to-day was very different to that when the principles of the law governing rape were laid down. The court held that it must be a matter of degree but could not be affirmed as a matter of principle that the law in Scotland to-day is that a husband can in no circumstances be guilty of the crime of rape upon his wife. The question of whether to introduce legislation to remove the husband's immunity from prosecution for the rape of his wife is being considered in Australia and New Zealand.

Abortion is one of the most controversial areas of law with ethical, religious and social attitudes varying from country to country. An

allied topic is that of family planning and the International Agreement on the Promotion of Family Planning as a Human Right is very largely ignored in many countries in which contraception is unacceptable for religious, ethnic and demographic reasons.

Exercising the minds of women's groups in many jurisdictions is the question of what are now commonly called de facto relationships. The Christian concept of a Hyde v Hyde-type marriage has become inappropriate in many societies and national governments have had to face up to the fact that many couples are choosing to live together and have children without formalising their union by a form of marriage. This has led to a spate of legislation and judicial decisions on the rights and duties of the partners and the rights of children of such a union. One of the interesting aspects to emerge from a brief look at the law in this regard is that the courts, in looking at a de facto relationship in say New Zealand or the United Kingdom, are reaching decisions in regard to the rights and duties of both parties and their children which are very similar to those being reached in, for example, Swaziland where courts are adjudicating upon the rights of parties and children under a customary law marriage.

Some work has been done recently in both Australia and New Zealand on the phenomenon of the increase in the numbers of women offenders before the Courts. What is not clear is whether women are in fact committing many more offences or whether there is what is called a "masked" factor. This theory is that women are not in fact committing a greatly increased number of offences but because of the change in the role of women in society there is no longer any reluctance to prosecute women offenders. It is said that the "mask" has been lifted and women committing offences are now just as likely to be prosecuted as men. This does not, however, take into account one other point that is clear from the statistics which is that women are offending in areas of crime which were previously the domain of male offenders; viz. robbery, burglarly and fraud offences.

It is good to see the promulgation in India of the Suppression of Immoral Traffic in Women and Girls Act 1978 and in Bangladesh the Dowry Prohibition Act 1980 and the Cruelty to Women (Deterrent Punishment) Ordinance 1983 although it is sad to learn that the Dowry Prohibition Act is not being observed.

This work forms only a stepping-stone on the way to further analysis and research which needs to be carried out into the law governing the status of women in the Commonwealth. There are two ways in which this could be done. The first method is to take one topic, for example "women and violence" which has been done by Jane Connors for the Women and Development Division of the Commonwealth Secretariat and research it on a Commonwealth-wide basis; this was also done by Rebecca Cook on abortion laws in the Commonwealth. The other is for a researcher in any one region to produce a comprehensive work on women and the law or the legal status of women in South Asia or East and Central Africa or the South Pacific. Regional researchers might be in a better position to say whether or not laws which have been passed are in fact being enforced. Let us get on with it!

My grateful thanks go to Betty Mdoe, Valerie Hoare and my daughter Flora for their execution of the daunting task of typing and putting together this material.

Margaret Rogers,
Legal Division, Commonwealth Secretariat.

Contents

LEGISLATION

Page No.

Constitutional Law and Human Rights

Australia - New South Wales	- Anti-Discrimination Act 1977	1
Australia	- Sex Discrimination Act 1984	1
Australia	- Australian Citizenship Amendment Act 1984	2
Canada	- Citizenship Act 1974-75-76	3
New Zealand	- Human Rights Commission Act 1977	3
New Zealand	- Citizenship Act 1977	4
Sierra Leone	- Sierra Leone Citizenship (Amendment) Act 1976	6
Solomon Islands	- Citizenship Ordinance 1978	7
Trinidad and Tobago	- Citizenship of the Republic of Trinidad and Tobago Act 1976	7
Trinidad and Tobago	- Citizenship of the Republic of Trinidad and Tobago (Amendment) Act 1978	7

Courts - Practice and Procedure

Australia - New South Wales	- Juries (Amendment) Act 1977	8
Australia - New South Wales	- Jury Act 1977	9
Australia - A.C.T.	- Juries (Amendment) Ordinance 1979	9
Bahamas	- Juries (Amendment) Act 1980	9
Bermuda	- Matrimonial Causes Act 1974	10
	Matrimonial Proceedings (Magistrates' Courts) Act 1974	10
Canada - Prince Edward Isle	- Jury (Amendment) Act 1980	11
Canada - Alberta	- Reciprocal Enforcement of Maintenance Orders Act 1980	11
Canada - Manitoba	- Reciprocal Enforcement of Maintenance Orders (Amendment) Act 1983	12
Cyprus	- Maintenance Orders (Facilities for Recovery) Law 1981	12
India	- Family Courts Act 1984	12
New Zealand	- Juries Amendment Act 1976	12
New Zealand	- Family Courts Act 1980	13
St. Vincent and the Grenadines	- Recognition of Divorces and Legal Separations Act 1983	13
Trinidad and Tobago	- Jury (Amendment) Act 1975	14

Criminal Law

Australia - Queensland	- Pregnancy Termination Control Bill 1980	14
Australia - New South Wales	- Crimes (Sexual Assault) Amendment Bill 1981	15
"	Child Welfare (Amendment) Bill 1981	15
Australia - New South Wales	- Prostitution (Amendment) Bill 1983	16
Bermuda	- Criminal Law (Amendment) Act 1980	16
India	- Suppression of Immoral Traffic in Women and Girls (Amendment) Act 1978	17
India	- Criminal Law (Second Amendment) Act 1983	17
New Zealand	- Contraception, Sterilisation and Abortion Act 1977	17

		<u>Page No.</u>
New Zealand	- Crimes Amendment Act 1978	19
New Zealand	- Suppression of Names of Complaints in Specified Sexual Cases Bill 1980	19
New Zealand	- Sexual Offences (Amendment) Act 1976	21
United Kingdom	- Marital Rape Bill 1983	21
Vanuatu	- Penal Code Act 1981	22

Evidence

Australia	- Evidence Act (Amendment) Act 1976	22
Canada	- Criminal Code (Amendment) Act 1978	23
New Zealand	- Evidence Amendment Act 1977	23

Family Law

Australia - Queensland	- Description of Women (Reference to Condition in Life) Act 1975	23
Australia	- Family Law Amendment Act 1976	24
Australia	- Family Law Act Regulation 1976	24
	Australian Marriage Act (Amendment) Bill 1976	25
Australia	- Family Law Act Regulations 1978	25
Australia - New South Wales	- Children (Equality of Status) Amendment Act 1979	25
Australia - Victoria	- Status of Children (Artificial Insemination) Bill 1981	26
Australia - New South Wales	- Adoption of Children (Amendment) Act 1982	27
Australia - Victoria	- Domicile (Amendment) Bill 1982	27
Australia - Western Australia	- Stamp Amendment Act 1982	28
Barbados	- Family Law Act 1981	29
Belize	- Status of Children Bill 1980	30
Bermuda	- Law Reform (Husband and Wife) Act 1977	31
	Law Reform (Miscellaneous Provisions) Act 1977	31
Canada	- Extra-Provincial Custody Acts 1976	32
Canada - Ontario	- Family Law Reform Act 1978	32
Canada - Alberta	- Matrimonial Property Act 1978	36
Canada - Manitoba	- Marital Property Act 1978	38
Canada - New Brunswick	- Family Law Jurisdiction Act 1978	38
Canada - New Brunswick	- Marital Property Act 1980	39
Canada - Nova Scotia	- Matrimonial Property Act 1980	39
Canada - Manitoba	- Survivorship (Amendment) Act 1983	41
Cyprus	- Legitimation of Children Born out of Wedlock (Temporary Provisions) Law 1977	41
Gibraltar	- Inheritance (Provisions for Family and Dependants) Ordinance 1977	42
Ghana	- National Council of Women and Development Decree 1975	42
Guyana	- Dependants' Pension (Amendment) Act 1978	42
Guyana	- Children Born out of Wedlock Act 1981	43
India	- Child Marriage Restraint (Amendment) Act 1978	43

		<u>Page No.</u>
India	- Hindu Widows' Remarriage (Repeal) Act 1983	44
Jamaica	- Status of Children Act 1976	44
Malta	- Marriage (Amendment) Act 1981	44
Mauritius	- Divorce and Judicial Separation (Amendment) Act 1978	44
Montserrat	- Matrimonial Causes for Foreigners Ordinance 1978	45
New Zealand	- Domestic Actions Act 1975	45
New Zealand	- Estate and Gift Duties Amendment Act 1976	45
New Zealand	- Matrimonial Property Act 1976	46
New Zealand	- Status of Children Amendment Act 1978	46
New Zealand	- Family Proceedings Act 1980	47
New Zealand	- Domestic Protection Act 1982	47
St. Christopher and Nevis	- Status of Children Act 1983	48
St. Vincent	- Status of Children Act 1980	48
St. Vincent and the Grenadines	- Recognition of Divorces and Legal Separations Act 1983	48
St. Vincent and the Grenadines	- Matrimonial Homes Act 1984	48
St. Vincent and the Grenadines	- Domestic Violence and Matrimonial Proceedings Act 1984	49
Trinidad and Tobago	- Married Persons Act 1976	49
Trinidad and Tobago	- Status of Children Act 1981	50
Uganda	- Affiliation (Amendment) Bill 1984	50
United Kingdom	- Inheritance (Provision for Family and Dependants) Act 1975	50
United Kingdom	- Legitimacy Act 1976	50
United Kingdom	- Domestic Violence and Matrimonial Proceedings Act 1976	50
United Kingdom - Scotland	- Marriage (Scotland) Act 1977	51
United Kingdom	- Domestic Proceedings and Magistrates' Courts Act 1978	51
United Kingdom	- Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979	51
United Kingdom	- Marriage (Steparents and Stepchildren) Bill 1981	51
United Kingdom - Scotland	- Matrimonial Homes (Family Protection) (Scotland) Act 1981	51
" "	- Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983	52
United Kingdom	- Matrimonial Homes Act 1983	52
United Kingdom	- Marriage Act 1983	52

Industrial Relations

Guyana	- Factories (Amendment) Act 1983	52
New Zealand	- Equal Pay Amendment Act 1976	52

Health, Education and Social Welfare

Bangladesh	- Dowry Prohibition Act 1980	53
Bangladesh	- Cruelty to Women (Deterrent Punishment Ordinance) 1983	53
Barbados	- Medical Termination of Pregnancy Act 1983	54
Hong Kong	- Offences against the Person (Amendment) Bill 1980	54
Jamaica	- National Insurance (Amendment) Act 1979	54
Malawi	- Decency in Dress (Amendment) Bill 1982	55
Papua New Guinea	- Baby Feed Supplies (Control) Act 1977	55
Seychelles	- Termination of Pregnancy Act 1981	55
Uganda	- National Council of Women Decree 1978	56

Industrial Relations

Jamaica	- Maternity Leave Act 1979	56

Private International Law

Australia - South Australia	- Domicile Act 1980	56
Australia - Western Australia	- Domicile Act 1981	57
Canada - Ontario	- Reciprocal Enforcement of Maintenance Orders Act 1982	57
New Zealand	- Domicile Act 1976	57

JUDICIAL DECISIONS

Administrative Law

New Zealand	- Review of decision of certifying consultants allowing abortion	58

Bankruptcy and Insolvency

Australia	- Execution by wife of bankrupt of mortgage over joint property	59

Constitutional Law

Australia	- Whether Family Law Act 1976 constitutional	61
Australia - New South Wales	- Cancellation of promotions in employment - all women teachers - whether discriminatory	61
" - Queensland	- Scope of the "marriage power" contained in s.51 (xxi) Australian Constitution	63
" - New South Wales	- Sex discrimination complaint	65
Bermuda	- Person deemed to belong to Bermuda - whether "child" includes illegitimate child	67

		<u>Page No.</u>
Canada - Ontario	- Abortion clinic - whether in breach of the criminal code - whether code unconstitutional	68
Cyprus	- Constitutionality of tax law providing for aggregation of wife's income with that of husband	68
Cyprus	- Application for a certificate of non-citizenship - Whether being an illegitimate child alters position	69
Guyana	- Prohibited immigrant entering on a false passport - marriage to Guyanese women - right to Guyanese citizenship	71
India	- Discrimination on grounds of sex - women in public service - require permission to marry	71
Mauritius	- Right to be registered as a citizen	72
New Zealand	- Alleged discrimination against women workers	73
United Kingdom	- Refusal of entry as an immigrant to wives of "patrials" from India and Bangladesh	74
United Kingdom	- Sex discrimination in bank pension scheme	75
United Kingdom	- Sex discrimination for women workers to leave factory five minutes before men	75
United Kingdom	- Discrimination - women at wine bar not allowed to stand and drink at bar.	76

Courts Practice and Procedure

Mauritius	- Trial by jury - whether exclusion of women constitutional	77
United Kingdom	- Appeal costs in matrimonial proceedings	78
	- Limitation of actions	78
Australia - Queensland	- Rape complainant giving evidence as to limited experience with men - cross examination as to credibility questioned	79

Criminal Law and Procedure

Australia - Western Australia	Keeping premises for the purposes of prostitution	81
" - South Australia	- Money received in respect of prostitution	82
" "	- Confession by woman charged with rape	83
" "	- Prostitution - whether money "received"	83
" "	- Trial of rape by jury - newspaper referring to defendant by last initial - whether prejudicial	84
" Western Australia	Rape and attempted rape - intention or belief	84
" New South Wales	- Rape - proof of consent	85
" South Australia	- Rape of mentally deficient - whether capable of consent	86
" Victoria	- Rape - discharge after committal proceedings - whether Crown prevented from presenting the accused for trial	87
" "	- Rape and assault with intent to rape	88
" "	- Rape of wife by husband - whether sustainable conviction	88
" Tasmania	- Rape of five year old child	90
Botswana	- Indecent assault on female	91
Ghana	- Custody - father kidnapping son - order in favour of mother	91

		<u>Page No.</u>
Ghana	- Rape - identification in issue	93
Jamaica	- Rape - imposition of maximum penalty	94
Hong Kong	- Indecent assault - forcing woman to remove clothes and then taking photographs	95
Malta	- Voluntary homicide of child under 12 months by mother	96
New Zealand	- Abortion - meaning of "unlawfully"	97
"	- Keeping a brother	97
"	- Rape - whether knowledge of absence of consent	98
"	- Costs in rape trial where defendant discharged	99
"	- Rape - belief in consent - continuation after realising that woman unwilling	100
Swaziland	- Disposal of a child's body by mother - intent to conceal birth	101
"	- Carnal relations with girl under 14 years - marriage under Swazi law and custom - repugnancy test	102
United Kingdom	- Incitement of foster parents to take white children only	103
"	- Consent in rape case - R v Morgan	103
"	- Rape - adoption of statement of co-defendant	103
"	- Cross-examination of rape victims	104
"	- Sexual offences - masseuses providing services not amounting to sexual intercourse	106
"	- Scotland - Rape - whether husband can be guilty of rape of wife	107
"	- England and Wales - Procuring or attempting to procure a woman to become a prostitute	107

Evidence

Australia - Victoria	- Rape - corroboration	108
" - Western Australia	- Compellability of spouse as a witness	109
" - South Australia	- Rape - admissibility of police testimony	109
" - Queensland	- Rape - evidence of distress - weight to be given to such evidence	111
" - Victoria	- Rape - visual identification - direction jury	111
" - South Australia	- Rape - several counts with different victims	112
" - South Australia	- Rape - unsworn statement by accused - criticised as a practice by newspaper - discharge of jury	114
" - Victoria	- Rape - whether reasonable belief as to consent	114
Botswana	- Rape - corroboration	115
"	- Attempted rape - test to be applied	115
"	- Rape - corroboration	115
Canada	- Rape - whether evidence of similar acts admissible	116
Malta	- Admissibility of evidence of attempted murder of wife by husband - wife a compellable witness	117
New Zealand	- Spouse as a compellable witness	117

		<u>Page No.</u>
New Zealand	- Entrapment - police activities and proper police conduct	118
New Zealand	- Rape - corroboration - distressed condition of the complaint	118
Swaziland	- Evidence of spouse - technical defect in marriage ceremony	119
Uganda	- Circumstantial evidence - strange behaviour of accused after death of his wife	119
<u>Family Law</u>		
Australia - New South Wales	- Position of the de facto wife after the death of the de facto husband	121
Australia	- Marriage according to Jewish religious ceremony undertaking by husband to give his wife a bill of divorcement	122
Australia	- Matrimonial property - bankruptcy of husband	123
" - New South Wales	- Surname of child unmarried parents	124
" - New South Wales	- Custody of illegitimate children	125
Australia	- Alteration of property interest - antenuptial contract	126
"	- Dissolution of marriage - marriage in fact bigamous	127
" - New South Wales	- Custody - expert evidence on psychology of child	128
Belize	- Husband and wife - contributions to property by wife	129
Botswana	- Affiliation proceedings	130
Cyprus	- Marriage solemnised at registrar's office - no religious ceremony	131
Cyprus	- Parties members of Greek Orthodox Church - whether religious ceremony essential to valid marriage	131
"	- Separation agreement providing for maintenance - whether contrary to public policy	132
"	- Application for dissolution of marriage on ground of adultery - standard of proof	133
"	- Wife sole beneficiary under will - unsound testamentary capacity alleged	134
Ghana	- Wife sues husband over joint ownership of three properties	135
"	- Arrears of maintenance - right to levy immovable property	136
Hong Kong	- Maintenance - jurisdiction to vary consent order	137
"	- Maintenance - lump sum payment for son injured	138
"	- Divorce - irretrievable breakdown of marriage	138
Jamaica	- Joint savings account - death of one signatory	138
Malta	- Nullity of marriage - homosexual tendencies of husband	140
New Zealand	- Enforcement of separation deed vesting home in husband	141
"	- Variation of deed of separation - possession of home by wife after children leave	142
"	- Extra-marital co-habitation - residential property	142

St. Vincent	- Nullity - marriage performed in private house - whether time and place of marriage mandatory	143
Sri Lanka	- Marriage - parents' gift of property to son-in-law	144
Swaziland	- Adultery - husband's claim for damages	145
"	- Illegitimate child - whether Swazi law and custom applicable	145
United Kingdom	- Chaudry v Chaudry	146
"	- Family home jointly owned - wife remaining in home after divorce	146
"	- Lump sum payment on divorce - assets to be taken into account	147
"	- Name of child - change of name by mother by deed	147
"	- Injunction - domestic violence	148
"	- Injunction - abortion - whether husband can restrain wife	148
"	- Divorce - marriage dissolved by talaq	149
"	- Disposition of estate - no provision for mistress	150
"	- Trust for sale - family home	150
"	- Administration of estates - wife convicted of husband's manslaughter	151
Zimbabwe	- Customary law - seduction of daughter	152

Finance Trade and Economic Development

Cyprus	- Income tax assessment - incomes of husband and wife aggregated	153

Health Education and Social Welfare

Canada	- Mentally defective young woman - power of court to authorize sterilization	154
United Kingdom	- Abortions - nurses' participation lawful	155

Industrial Relations

Australia - New South Wales	- Complaint of sexual harassment	156
India	- Air hostess - retirement on first pregnancy - whether discriminatory	159
United Kingdom	- Concession given to wives of retired employees not extended to husbands	160
"	- Discrimination in employment	161
"	- Discrimination in rail travel facilities	162
"	- Discrimination on sex on retirement age	164

Land

Australia - Western Australia	Joint tenants - action by wife to sell	165

Private International Law

Belize	- Petition for divorce - domicile	166

Torts

Australia	- Damages for death of wife	166
Hong Kong	- Fatal accident - claim for lost years	168
United Kingdom	- Conspiracy - whether husband can be sued in tort	168
"	- Damages - public policy - child born after sterilization	169
"	- Damages - break-up of marriage because of injuries	169

LAW REFORMCourts Practice and Procedure

Australia - New South Wales	- Women as participants in the criminal justice system 1976	171
Australia - New South Wales	- Juries 1976	171
Australia - New South Wales	- Report of the Royal Commission on the Courts 1976	171

Criminal Law and Procedure

Australia - New South Wales	- Criminal liability in relation to a spouse 1975	173
Australia - New South Wales	- Rape and Other Sexual Offences 1976	174
Australia - Tasmania	- Discrimination on ground of sex 1978	175
Australia - South Australia	- Prostitution 1980	177
Canada	- Committee on the operation of the abortion law 1977	179
Canada	- Sexual Offences 1979	182
New Zealand	- Law of rape - D.P.P. v Morgan 1980	183
United Kingdom - England and Wales	- Sexual offences 1981	183
United Kingdom - Scotland	- Incest 1982	188
United Kingdom	- Prostitution and allied offences 1983	189
United Kingdom	- Prostitution in the street 1984	193

Evidence

Australia - Western Australia	- The competence and compellability of husband and wife to give evidence in criminal proceedings 1977	194
Australia - South Australia	- Spouse witnesses in prosecutions for causing death or serious injury to children 1979	196
Canada - Manitoba	- Evidence of adultery 1980	198
United Kingdom - Scotland	- Law of Evidence in Scotland 1981	198
United Kingdom - Scotland	- Evidence in cases of rape and other sexual offences 1983	199

Family Law

Australia - Tasmania	- Illegitimacy 1976	200
" "	- Obligations and de facto relationships 1978	201
" - Western Australia	- Class of claimants under fatal accidents legislation 1978	203
" - New South Wales	- De facto relationships 1982	204
"	- Aboriginal customary law 1983	210
"	- A Maintenance Agency 1984	210
"	- Domestic violence 1985	212
Bangladesh	- Population control 1977	216
Barbados	- Report of the National Commission on the Status of women in Barbados 1979	216
Barbados	- Family Law Act 1981 (No.29 of 1981) 1981	221
Canada	- Family Law 1976	222
" - Saskatchewan	- Matrimonial property 1976	223
" - Ontario	- Impact of divorce on existing wills 1977	225
" - British Columbia	- Proof of marriage 1977	226
Canada - New Brunswick	- Matrimonial property 1979	226
Canada - Saskatchewan	- Interspousal tort immunity 1980	228
Canada - Manitoba	- Use of term 'illegitimate' 1980	229
Canada - Saskatchewan	- Equality of status for married persons 1982	229
Canada - Saskatchewan	- Enforcement of maintenance orders 1982	230
Canada - Manitoba	- Succession to property 1983	233
Canada	- Wife battering 1983	235
Canada - British Columbia	- Breach of promise of marriage 1983	235
Canada - British Columbia	- Interspousal immunity in tort 1983	236
Canada - British Columbia	- Intentional interference with domestic relations 1984	236
Canada - Saskatchewan	- Matrimonial property 1985	239
Fiji	- Abortion 1977	240
Ghana	- Intestate Succession 1975	240
Ghana	- Intestate Succession 1976	242
India	- Age of Marriage 1978	244
India	- Hindu marriage and divorce 1978	244
India	- Failure to pay maintenance or alimony 1979	245
Jamaica	- Family Law 1976	246
Jamaica	- Illegitimate and legitimate children 1976	247
Jamaica	- Maintenance 1976	247
Jamaica	- Divorce and matrimonial causes 1980	248
Kenya	- Adoption 1976	252
New Zealand	- Publication of proceedings in divorce and matrimonial property proceedings 1977	252
New Zealand	- Royal Commission on Contraception, Sterilisation and Abortion reports 1977	253
New Zealand	- Review of Matrimonial Law 1978	254
Nigeria	- A new Marriage Act 1982	255
Papua New Guinea	- Customary marriage and divorce 1978	256
Papua New Guinea	- Family law 1978	257
Papua New Guinea	- Succession 1978	258
Papua New Guinea	- Adultery and enticement 1977	258
Papua New Guinea	- Domestic violence 1983	260
Trinidad and Tobago	- Wardship 1975	261

United Kingdom - England and Wales	- Injuries to unborn children 1975	261
" - Scotland	- Occupancy rights in the matrimonial home and domestic violence 1978	262
" - England and Wales	- Illegitimacy 1979	266
" - England and Wales	- Divorce proceedings - extension of time in nullity proceedings 1979	270
" - England and Wales	- Divorce in the early years of marriage 1979	271
" - Scotland	- Occupancy of the matrimonial home and domestic violence 1980	272
United Kingdom	- Financial relief after foreign divorce 1981	273
" - Scotland	- Aliment and financial provision 1982	275
" "	- Husband and Wife: some obsolete and discriminatory rules	281
" "	- Illegitimacy 1982	283
" - England and Wales	- The financial consequences of divorce 1982	287
" "	- Polygamous marriages 1982	294
" "	- Illegitimacy 1984	297
" - Scotland	- Matrimonial property 1984	299

Health, Education and Social Welfare

United Kingdom	- Ante-natal injury 1978	300
"	- Human fertilisation and embryology 1984	302

Torts

Australia - South Australia	- Fatal accidents provisions of the Wrongs Act 1936 1982	305
Canada - British Columbia	- Interspousal immunity in tort 1982	306

INTERNATIONAL DEVELOPMENTS

International	U.N. Convention on the Elimination of Discrimination Against Women - 1979	310
"	Intensifying the Promotion of Family Planning as a basic Human Right - 1982	311
"	International Code of Marketing of breastmilk substitutes - 1983	311
Australia	Convention on the political rights of women 1975	312
"	Convention concerning Equal Remuneration for Men and Women - 1975	312
"	United Nations Convention on the Elimination of Discrimination against Women - 1980	312
"	The Hague Convention on Celebration and Recognition of the Validity of marriage - 1980	312
"	Convention on the Recovery Abroad of Maintenance - 1983	313

		<u>Page No.</u>
Cyprus	European Convention on the Legal Status of Children Born out of Wedlock - 1979	313
"	Convention on the Recognition of Divorces and Legal Separations - 1982	313
India	Indian National Code for Protection and Promotion of Breast-feeding - 1983	313
Kenya	Convention on the Elimination of Discrimination against Women - 1984	313
Mauritius	Convention on Discrimination as above - 1984	314
New Zealand	Convention on Discrimination as above - 1984	314
Papua New Guinea	Convention on the Political Rights of Women - 1982	314
St. Lucia	Convention on the Discrimination against Women - 1982	315
United Kingdom	Convention on the Recovery Abroad of Maintenance - 1975	315
"		
"	European Convention on the Legal Status of Children Born out of Wedlock - 1981	315

LEGAL PROFESSION

Other Developments

International	International Association of Young Lawyers Congress 1980	316
"	Women Lawyers as Partners - 1980	316
Australia	Women Judges - 1983	317
Canada - Ontario	Women seek admission in greater numbers - 1982	317
New Zealand	Discrimination in legal profession - 1984	317

Articles

United Kingdom	Barristers and gentlemen - 1980	318
"	The law as a sex-typed profession - 1982	318
"	Husband and wife as clients - 1983	318

MISCELLANEOUS

Some Notes

Commonwealth	Survey of abortion laws in the Commonwealth	319
Africa	Vesectomy in the polygamous marriage	320
Australia	Discrimination in industry	320
"	Family Law Council	321
" - Western Australia	Rape penalties	321
" - New South Wales	Countering sexual offences	321
" - New South Wales	Family law - de facto relationships	322
" - New South Wales	Family law	322
" - Victoria	Discrimination against women	322
" - Victoria	Rape law reform	323
" - A.C.T.	Prosecution of husbands	324
" - New South Wales	Rape and sexual assaults	324

		Page No.
Australia - New South Wales	Property rights of husbands and wives	325
" - Victoria	Women prisoners increase dramatically	325
" - Victoria	Human rights - status of women	326
" - N.S.W.	Sexual discrimination	326
" - N.S.W.	Test-tube babies	327
" - South Australia	Women discriminated against in the police force	327
" "	Passports - abolition of consent of spouse	328
" "	Discrimination in employment and occupation	328
" "	Guidelines on sexual harrassment	328
" "	Prostitution and human rights	329
Bangladesh	Late marriage in Bangladesh	329
Barbados	Survey of abortion law attitudes	329
Canada	Abortion	330
"	Tax and the family	330
"	Family law and the native people	330
"	Major amendment to the divorce law	330
" - Ontario	Legal specialists in domestic violence	331
Ghana	Ghana Branch of the International Federation of Women Lawyers	332
India	Family Courts	332
New Zealand	Reform of maintenance and property linked	333
"	Proposed matrimonial proceedings changes	333
"	Female offending	333
"	Exemption of Women's clothing from price freeze discriminatory	334
"	Rape - submissions on the rape study	334
Trinidad and Tobago	Abortion law and public opinion	335
United Kingdom	Laws to protect women can work against them	335
"	Equality in benefits for women	336
"	"Morning after" pill	336
"	"Rent-a-womb" schemes should be avoided	337

Reviews

Commonwealth	Three studies of abortion laws in the Commonwealth - 1979	338
"	Family in the Commonwealth Caribbean - 1981	338
Australia	The position of ex-nuptial children in Victoria - 1976	338
"	Women and Crime - 1982	338
"	Sex discrimination in Australia - 1984	338
Canada	The Morgentaler case: criminal process and abortion law - 1977	338
Jamaica	Current trends in social legislation - 1976	338
New Zealand	Family law 1981	338
United Kingdom	Women and Crime - 1982	339
"	Matrimonial proceedings in magistrates' Courts - 1982	339

Recent Articles

A list of articles published between 1974-1985	339-242

Legislation

Constitutional Law and Human Rights

AUSTRALIA - NEW SOUTH WALES

Anti-Discrimination Act 1977

This Act provides individuals and groups with more rights against discriminatory practices when dealing with both private and governmental bodies. The Act will make it illegal for such bodies to discriminate against a person on grounds of race, sex or marital status but, due to substantial amendments in the State's Legislative Council, the effect of the Act will be confined, by and large, to employer-employee, seller-buyer, and government-taxpayer types of relationships.

The underlying principles behind the Act is equality of opportunity and for the most able person to succeed. Its main areas of impact will therefore be in the areas of employment, accommodation, goods and services, and access to public places. The Act makes exceptions in the cases of education, aged persons, physically and mentally handicapped persons, homosexuals, and non-members of trade unions.

July 1977 C.L.B. p.352-353

AUSTRALIA

Sex Discrimination Act 1984

This Act prohibits discrimination on the grounds of sex, marital status or pregnancy. It passed the House of Representatives nine months after the Bill was first introduced in Parliament.

More than half the 50-strong Opposition voted against the Bill, but the legislation was overwhelmingly passed by 86 votes to 26. The Leader of the Federal Opposition was among Opposition Members who voted for the Bill with Government Members.

The Act prohibits discrimination in the areas of employment, education, the provision of goods, facilities and services, accommodation, the disposal of land, the activities of clubs and the administration of Federal laws and programmes.

It also prohibits sexual harassment in the workplace and in educational institutions, although there are exemptions, such as single-sex schools.

The Act gives effect to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which was signed by the Australian Government in 1981, and ratified by the present Government in July 1983.

The Australian Human Rights Commission will administer the legislation, determining complaints and hearing applications for exemptions.

The Australian Government's legislation complements anti-discrimination legislation in South Australia, New South Wales and Victoria.

It will be followed by a programme of affirmative action legislation to ensure elimination of discrimination which the Government will introduce the package in about two years time.

The Minister assisting the Prime Minister on the Status of Women, who was responsible for the Bill, said that it would be some months before the legislation was proclaimed because the Government had to appoint a Sex Discrimination Commissioner. She said that regulations exempting the Australian Defence Force from the operation of the legislation over combat and combat-related duties also had to be approved.

July 1984 C.L.B. pp.1061-1065

Australian Citizenship Amendment Bill 1984

This Bill, which seeks to amend the Australian Citizenship Act 1949, would -

1. reduce the qualifying period for citizenship by grant from three to two years;
2. relax the continuous residence requirement from 12 months, immediately preceding the application, to 12 months' residence in the previous two years;
3. provide for an application for a grant of citizenship to be deferred to periods of up to 12 months, to enable the applicant to meet one or more requirements;
4. amend the requirement that an applicant for citizenship demonstrate an adequate knowledge of the English language. The requirement will now be that an applicant demonstrates a "basic" knowledge of English, and applicants over 50 years of age will be exempted altogether;
5. consistent with the Government's reform of the Migration Act 1958, repeal of the definition of British subject status;
6. provide a new pledge of Australian citizenship, which can be taken in either a religious or secular form;
7. provide a right of determinative appeal to the Administrative Appeals Tribunal on a number of grounds, for denial or deprivation of citizenship;
8. remove discrimination on the basis of sex or marital status; for example, a mother will have equal rights with a father in determining their child's citizenship; and
9. provide automatic acquisition of citizenship by adopted children.

Speaking on the introduction of the Bill, the Federal Minister for Immigration and Ethnic Affairs stated, inter alia: "These are the most significant changes to the Australian Citizenship Act since it came into force in 1949. Australian society has changed dramatically since that time, both in values and perceptions and in ethnic mix which has produced a diverse multicultural society. The Amendment Bill redresses obvious anomalies in the original Citizenship Act, and removes unreasonable impediments to the acquisition of citizenship by those 1.1 million permanent residents in Australia who are eligible to do so." He also added: "The package of reforms proposed in the Amendment Bill will ensure that all permanent residents and citizens of Australia will be treated equally, and will enjoy increased democratic rights in a wide range of areas."

January 1985 C.L.B. p.384

CANADA

Citizenship Act 1974-75-76

This Act, which received royal assent on 16 July 1976, revises the law respecting citizenship. The Act specifies the right to citizenship, the circumstances under which citizenship is lost and when it may be resumed. Among the important changes introduced by the Act are the following -

- (i) children born abroad, whether in or out of wedlock, derive citizenship from either parent. Citizenship is automatic for the first generation, and for the second generation requires only a declaration of retention and the establishment of a substantial connection with Canada before the age of 28;
- (ii) citizenship can be resumed as a right by former citizens who have been admitted for permanent residence and have resided in Canada for a period of one year;
- (iii) women who lost citizenship through marriage to foreign nationals prior to 1947 when the Canadian Citizenship Act was enacted, can recover it automatically upon notice to the Minister;
- (iv) applicants for naturalization are treated alike, regardless of sex or country of origin. The Minister shall grant citizenship to applicants who are at least 18 years old and have accumulated three years residence in Canada. Previously applicants had to be 21 years of age and 5 years residence was required;
- (v) Application for the grant, retention, resumption or renunciation of citizenship is made to a citizenship judge, a new office created by the Act. The Governor-in-Council may appoint any citizen to be a citizenship judge and may make regulations regarding the duties and procedures of the office. An appeal from the citizenship judge's decisions lies to the Federal Court, whose decision is final and conclusive. A citizenship judge may make recommendations for the exercise of discretion by the Minister or Governor-in-Council. The Minister may waive requirements for compassionate reasons. The Governor-in-Council has absolute discretion to grant citizenship to alleviate hardship or reward services to Canada;
- (vi) subject to specified limitations, the Lieutenant Governor-in-Council is authorized to restrict the acquisition of any interest in real property located in the province by persons who are not Canadian citizens or by corporations not controlled by Canadian citizens.

October 1976 C.L.B. p.340

NEW ZEALAND

Human Rights Commission Act 1977

The Act establishes the Human Rights Commission and seeks to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.

Part II of the Act outlaws discrimination on the grounds of sex, marital status, or religious or ethical belief in the field of employment (which includes a provision that it is unlawful for a firm comprising six or more partners to refuse or to omit to offer a person admission to the firm "by reason of the colour, race, ethnic or natural origins, sex, marital status,

or religious or ethical belief of that person" or of his relatives or associates). A similar provision applies to industrial unions, professional and trade associations, qualifying bodies and vocational training bodies.

Discrimination in the access of the public to places, vehicles and facilities, to the provision of goods and service, to land, housing and other accommodation, and to educational arrangements is also made unlawful.

Further provisions deal with victimisation, advertisements, and agency, and some necessary exceptions are made which inter alia permit positive discrimination which favours the disadvantaged.

Part III provides remedies against unlawful discrimination. Complaints are to be investigated by the Commission, which may also act of its own motion. After investigation, where the Commission is of the opinion that a breach of the Act has occurred, it is to use its best endeavours to secure a settlement between the parties concerned. Where it is unable to do so, it may take proceedings before the Equal Opportunities Tribunal, which is also established under this Act. The Tribunal may in appropriate cases make a declaration, issue an order restraining repetition of the breach, award damages, order the defendant to perform any act specified with a view to redress any loss or damage other than by the grievred person, grant relief under the Illegal Contracts Act 1970, or declare that any contract entered into or performed in contravention of Part II of this Act is an illegal contract.

The functions of the Tribunal are to adjudicate proceedings brought under the Act and to exercise any other such functions, powers or duties as may be conferred upon it. The Tribunal is to act "according to equity, good conscience, and the substantial merits of the case, without regard to technicalities". The ordinary rules of evidence, also, are not to apply. It is to sit in public other than in special circumstances.

April 1978 C.L.B. pp.229-230

Citizenship Act 1977

The Act consolidates and amends existing provisions in respect of the status of New Zealand citizenship. Every person born in New Zealand on or after 1 January 1949 is deemed to be a New Zealand citizen by birth - unless his father or mother was a person protected under diplomatic or consular immunity or in some other way and neither of his parents was a New Zealand citizen, or unless his father and mother were enemy aliens and the birth occurred in a place then under occupation by the enemy. The proviso is made that every person born in New Zealand on or after 1 January 1978 shall be a New Zealand citizen by birth if he would otherwise be stateless.

Persons born outside New Zealand on or after 1 January 1978 shall be New Zealand citizens "by descent" if at the time of their birth their father or mother was a New Zealand citizen otherwise than by descent. Citizenship by descent is to lapse two years after a person acquires "his majority" unless his birth has been registered in accordance with regulations to be made under the Act.

New Zealand citizenship may be granted by the Minister to anyone 18 years and above who satisfies the Minister that he meets each of the following requirements -

(a) that the applicant was, throughout the period of three years

immediately preceding the date of his application, ordinarily resident in New Zealand;

- (b) that the applicant is entitled, in terms of the Immigration Act 1964, to reside in New Zealand permanently;
- (c) that the applicant is of good character;
- (d) that the applicant has sufficient knowledge of the responsibilities and privileges attaching to New Zealand citizenship;
- (e) that the applicant has sufficient knowledge of the English language;
- (f) that the applicant intends, if he is granted New Zealand citizenship, either -
 - (i) to continue to reside in New Zealand; or
 - (ii) to enter into or continue in Crown service under the New Zealand Government, or service under an international organisation of which the New Zealand Government is a member, or service in the employment of a person, company, society or other body of persons resident or established in New Zealand.

The Minister may also grant citizenship in special cases, to any person -

- (a) who is a minor;
- (b) who is or has been married to a New Zealand citizen, and satisfies the Minister that -
 - (i) he meets each of the requirements specified in paragraphs (c) to (e) (above); and
 - (ii) he has established and will maintain some association with New Zealand (other than his marriage to a New Zealand citizen);
- (c) whose father or mother was, at the time of that person's birth, a New Zealand citizen by descent;
- (d) if, because of exceptional circumstances of a humanitarian or other nature relating to the applicant, the Minister is satisfied that granting a certificate of New Zealand citizenship to the applicant would be in the public interest.

The Minister is also empowered by order to deprive a person of his New Zealand citizenship if he is satisfied that the person has, while a New Zealand citizen and while of and over the age of 18 years and of full capacity -

- (a) acquired the nationality or citizenship of another country by any voluntary and formal act, other than marriage, and acted in a manner that is contrary to the interests of New Zealand; or
- (b) voluntarily exercised any of the privileges or performed any of the duties of another nationality or citizenship possessed by him in a manner that is contrary to the interests of New Zealand.

Orders depriving a person of citizenship may be reviewed by a Supreme Court.

Special provisions relate to parentage. A person, in the absence of evidence to the contrary is presumed to be the father of another person if he was married to that other person's mother at the time of his confinement of birth or where his paternity has been established in terms of the Status of Children Act 1969. Adopted children are treated as though they were the natural children of the adopting parents and are "deemed to have been born when and where the adoption order was made".

April 1978 C.L.B. pp.231-232

SIERRA LEONE

Sierra Leone Citizenship (Amendment) Act (No. 13 of 1976)

This Act amends Part III of the Sierra Leone Citizenship Act No. 4 of 1973. Part III of Act No. 4 of 1973 provides for the acquisition of Sierra Leone citizenship by naturalisation. The Act made it available on application to three categories of persons. They are -

- (i) married women who are not Sierra Leoneans and who are or have been married to Sierra Leone citizens;
- (ii) persons of negro African descent born in Sierra Leone after 18 April 1971;
- (iii) persons of full age and capacity of negro African descent resident in Sierra Leone and who have been continuously so resident for a period of not less than eight years.

The grant of the certificate of naturalisation in all these cases is subject to an apparently unfettered ministerial discretion.

The Act also imposes two limitations on the grant of naturalisation to such persons. Firstly, if at the time of the applicant's birth neither of his parents was a citizen of Sierra Leone and his father possessed such immunity from suit and legal process as is accorded to any envoy of a foreign sovereign power accredited to Sierra Leone, he would be refused citizenship by naturalisation. Secondly, naturalisation would also not be granted where at the time of the applicant's birth his father was an enemy alien and the birth occurred in a place then under occupation of the enemy.

The amending legislation extends the categories of persons eligible for citizenship by naturalisation to include -

- (i) persons of full age and capacity, either of whose parents are of negro African descent and who are resident in Sierra Leone and have been continuously so resident for a period of not less than eight years;
- (ii) persons of full age and capacity, neither of whose parents are persons of negro African descent who are resident for a period of not less than 21 years and whose fathers or mothers were citizens of Sierra Leone by naturalisation;
- (iii) persons under the age of 21 years born outside Sierra Leone on or after the date on which their fathers or mothers became citizens.

However, persons who acquire citizenship by naturalisation are precluded from holding the following public offices -

- (i) President of the State of Sierra Leone;
- (ii) Members of any Commission established under the Sierra Leone constitution;
- (iii) Ambassador or diplomatic representative of Sierra Leone in any foreign country;
- (iv) Members of the army or navy or air force or police force of Sierra Leone;
- (v) Permanent Secretary, Provincial Secretary, Secretary to the President, Secretary to the Vice-President, Secretary to the Prime Minister, Secretary to the Foreign Minister, the Financial Secretary, the Secretary to the Cabinet or the Establishment Secretary; and
- (vi) Members of Parliament or of a local authority.

Finally, a naturalised citizen is not exempted from the payment of rates, taxes, fees, charges and impositions under the Business Registration Act 1972, the Non-Citizens (Registration, Immigration and Expulsion) Act 1965,

the Pay Roll Tax Act 1972, the Business Names Registration Act, the Income Tax Act, and the Alluvial Diamond Mining Act.

October 1976 C.L.B. p.341

SOLOMON ISLANDS

Citizenship Ordinance 1978 (No. 7 of 1978)

The Ordinance supplements the provisions of the Constitution which relate to citizenship. A Citizenship Commission is established. The Commission comprises not less than five nor more than seven members (including the Chairman) who shall be appointed by the Minister.

The Ordinance provides for the acquisition of citizenship by adoption and naturalization and the loss, renunciation and regaining of citizenship.

The Ordinance charges the Commission with the responsibility of granting citizenship by naturalization on application and on being satisfied of the matters set out in the Ordinance. The Commission also has power to grant applications for the regaining of citizenship by a woman citizen who married a foreign national and became a national of her husband's country, where the Commission is satisfied that her marriage has broken down.

The Ordinance also provides that the Minister may give the Commission directions (not inconsistent with the Ordinance) of a general nature with respect to the exercise of a power or the performance of a duty of the Commission, and the Commission is required to comply with the direction. The Minister may also require the Commission to advise him on any matter relating to or concerning citizenship.

October 1978 C.L.B. p.776

TRINIDAD AND TOBAGO

Citizenship of the Republic of Trinidad and Tobago Act 1976 (Act No. 11 of 1976)

The new Act came into force on 31 July 1976. The comments to the Act as noted at (1976) 2 C.L.B. 195 apply to the Act as assented to. One significant feature of this Act is section 11(3) which allows dual citizenship in certain cases. For example, under the former Constitution many citizens of Trinidad and Tobago who acquired citizenship of another country were required to renounce within one year of the acquisition of that other citizenship, such other citizenship. Failure to do so would have entailed the loss of the Trinidad and Tobago citizenship. Section 11(3) now provides that where such other citizenship was acquired involuntarily or by marriage, a citizen of Trinidad and Tobago shall be deemed not to have ceased to be a citizen of Trinidad and Tobago by reason of such failure to renounce. A person in such circumstances thus retains the other citizenship as well as his Trinidad and Tobago citizenship. The section operates retrospectively.

October 1976 C.L.B. p.342

Citizenship of the Republic of Trinidad and Tobago (Amendment) Act 1978

Two principal features of this amending Act are -

- (i) a child born outside of Trinidad and Tobago of a citizen by descent is now entitled to be granted a certificate of citizenship of

Trinidad and Tobago if the prescribed application is made -

- (a) by the responsible parent or guardian of such child before the child attains full age, that is, 18 years, or

- (b) by the child within one year of his attaining his majority according to the law of the country of which he is a citizen or on his attaining full age.

[A child born outside of Trinidad and Tobago of a person granted a certificate of citizenship of Trinidad and Tobago under these provisions would not, however, similarly qualify for a grant of such a certificate of citizenship.]

- (ii) the entitlement of a former citizen of Trinidad and Tobago by birth or descent who acquired the citizenship of another country voluntarily to be granted a certificate of citizenship upon the making of the prescribed application therefor to the Minister.

October 1978 C.L.B. p.777

Courts Practice and Procedure

AUSTRALIA - NEW SOUTH WALES

Juries (Amendment) Act 1977

As a result of the amending legislation, which came into operation on 1 July 1977, women and public servants are no longer automatically exempt from jury service in New South Wales. The only public servants now ineligible for jury service are judges and Masters of the Supreme Court and their spouses; coroners; stipendiary magistrates; employees of the Department of Corrective Services; police officers and their spouses; employees of the Attorney-General's and Justice Departments; Permanent Heads of Departments of State; members of the Public Service Board; firemen; State Emergency Services employees; and ambulance staff.

Occupations no longer exempt include pilots; masters of ships; servants of the state Governor; commercial travellers; and managing directors, managers, cashiers and tellers of banks.

Those persons who now may claim exemption from jury service as of right are clergymen; practising dentists; doctors and chemists; people over the age of 65 years; those living with and caring full-time for an ill or aged person; members and secretaries of statutory corporations; and mining managers.

Members and officers of the Legislative Assembly, Legislative Council and Executive Council, and their spouses, are ineligible to serve as jurors, as are barristers and solicitors. Responsibility for compiling the jury lists

has been transferred from the police to the Sheriff's Office, and persons who fail to appear on the issuing of a jury summons or who make false representations in order to evade jury service are now liable for fines up to, respectively, \$A100 and \$A500.

January 1978 C.L.B. p.5

Jury Act 1977

The New South Wales computer jury selection system will become fully operational in April 1978.

Under the new system, which came into operation as a result of the enactment of the Jury Act 1977, the old means of selecting jury panels by means of the police keeping a jury roll has been abandoned and juries will in future be based on electoral rolls, selecting names at random.

Most people, such as public servants, bank officials and school teachers who were previously exempted from jury service are now eligible to serve. Similarly, women are equally liable to serve as men.

The Attorney-General stated that under the old method of selecting jurors some people were called on repeatedly to serve whereas others were hardly ever or never called. The Attorney-General emphasised the need for a person to be tried by a jury of his peers, or equals, and not merely by a jury consisting only of males, who were middle-aged, middle-class, white Australians.

April 1978 C.L.B. pp.234-235

AUSTRALIA - A.C.T.

Juries (Amendment) Ordinance 1979

This Act amends the Juries Ordinance 1967 (A.C.T.) so as to abolish the right which women formerly possessed of having their names omitted from a jury list simply by writing to the Sheriff of the Supreme Court of the Australian Capital Territory requesting that their names be removed from the list. The effect of the amending Ordinance will be to put men and women on the same footing as regards potential jury service.

October 1979 C.L.B. pp.995-996

BAHAMAS

Juries (Amendment) Act 1980 (No. 2 of 1980)

The principal effect of this Act is to amend the Juries Act 1967 (No. 30 of 1967) in two important respects -

- (i) procedures are provided whereby any woman who so desires may now remove her name from the jury list: the new subsections (2), (3) and (4) of s. 3 are in the following terms -

- (2) Any female person between the ages of twenty-one and sixty years resident in a sessions district may apply in the manner prescribed by subsection (3) of this section to have her name entered upon the jury list and thereupon she shall be qualified for jury service.

(3) Any woman who desires to be enrolled for jury service may, on or before the first day of November in any year, apply in writing to the Registrar, stating her full name and address and her date of birth; and upon receipt of any such application, the Registrar shall, subject to subsection (4) of this section, cause it to be taken into account by the revising panel in the preparation of the jury list.

(4) Any woman who desires to have her name removed from the jury list for any year may on or before the first day of December of the preceding year apply in writing to the Registrar and upon receipt of any such application, the Registrar shall cause it to be taken into account by the revising panel in the preparation of the relevant jury list for the next ensuing year.

- (ii) it repeals s. 28 (dealing with separation of jurors during adjournment) and replaces it with new sub-sections (1) and (2) in the following terms -

28. - (1) In every case on the criminal side of the court and in every civil case triable by jury, the judge may, if he thinks fit, permit jurors sworn and empanelled upon the trial thereof to separate and depart from the court during any adjournment of such trial before they have retired to consider their verdict upon each such juror taking the oath prescribed by section 13(3) of the Oaths Act.

(2) The following provisions shall apply whenever the jury have not been permitted to separate -

- (a) a proper provision shall be made for preventing the jury from holding communication with any person;
- (b) the judge may allow one or more of the jurors to separate from the other jurors;
- (c) jurors who are allowed to separate from the other jurors shall not hold communication with other persons except with the leave of the Court;
- (d) jurors who are allowed to separate shall remain in the charge of the officer of the court who has charge of them.

October 1980 C.L.B. pp.1122-1123

BERMUDA

Matrimonial Causes Act 1974 (No. 74)

Matrimonial Proceedings (Magistrate's Courts) Act 1974 (No. 75)

The first Act amends the law, at the same time dealing in full with divorce, nullity and other matrimonial suits (providing for divorce on breakdown of the marriage), financial relief, children etc. The second Act amends and consolidates the enactments relating to matrimonial proceedings in magistrates' courts.

January 1975 C.L.B. p.

CANADA - PRINCE EDWARD ISLAND

An Act to Amend the Jury Act (1980)

This Act, when proclaimed, will amend the Jury Act, R.S.P.E.I. 1974, Cap. J-S, to -

- (a) remove the upper age limit (70) for liability to jury service, while allowing a person over that age to apply for exemption;
- (b) make new provision [following the Uniform Jurors (Qualifications and Exemptions) Act approved by the Uniform Law Conference of Canada at its 1976 proceedings] extending the range of disqualified persons;
- (c) disqualifying persons who do not understand the language in which the trial is to be conducted;
- (d) replace the list of exemptions in the principal Act by provision for exemption on religious or hardship grounds - women will no longer be automatically exempt;
- (e) raise the per diem allowance, and make provision for a travel allowance.

July 1980 C.L.B. pp.763-764

CANADA - ALBERTA

Reciprocal Enforcement of Maintenance Orders Act 1980

The Act was passed to address certain problem areas which have been ongoing for several years.

The new Act makes provision for mobility. Under the old Act, once a final order from another Province was registered in Alberta, it could not be forwarded to another Province for enforcement if the respondent moved. Section 18 of the new Act permits the Alberta Court to forward documents to the Courts of another Province for enforcement, simply upon the request of the claimant, the Attorney-General, or the Court which made the order.

The new Act also makes it possible for final orders to be varied. The old Act did not allow for a mechanism which would permit changes in circumstances of either of the parties to be taken into consideration. Under s. 7 of the new Act, jurisdiction has been given to the registration court in Alberta to make provisional and confirmation orders to vary or rescind final orders of reciprocating States.

The new Act also clarifies whether the law of Alberta or the law of the reciprocating State shall apply to the proceedings. Prior to the passage of this Act, the question was subject to widely differing judicial interpretation.

The new Act further contains provision for a State or Province to be subrogated to the rights of a person entitled to maintenance. Where, under the old Act, it was not possible to extend this right to other jurisdictions when the respondent moved out of the Province, the new Act will now place the State in the shoes of a claimant under the Act.

Section 12 of the new Act has been included to cure problems such as have arisen with respect to orders from the State of California. In the past, due to the wording of certain California orders, reciprocity could not be affected. Due to the liberal interpretation which may now be given, such foreign orders can now be registered and enforced in Alberta.

October 1980 C.L.B. pp.1125-1126

CANADA - MANITOBA

Reciprocal Enforcement of Maintenance Orders (Amendment) Act 1983

This Amendment expands the scope of the Act by allowing Manitoba residents to apply to Manitoba Courts for variation of maintenance orders (except orders made under the Divorce Act) originating from reciprocating jurisdictions. If, however, the other party resides outside Manitoba, that party must be given the opportunity to present evidence in his or her home jurisdiction. Further, where one party still resides in the jurisdiction of the original order, only that jurisdiction has the power to make final decisions on the variation.

April 1984 C.L.B. p.1064

CYPRUS

Maintenance Orders (Facilities for Recovery) Law 1981 (Law 43 of 1981)

This Law adapts the law to the provisions of the Convention on the Recovery Abroad of Maintenance (Ratification) Law 1978 (Law 50 of 1978) and the enactment of the necessary procedural mechanism for the effective application of the provisions of the abovementioned Convention in Cyprus.

It is based on the UK Maintenance Orders Reciprocal Enforcement Act 1971 which was enacted to make possible the application of the provisions of the same Convention to the United Kingdom.

April 1982 C.L.B. p.459

INDIA

Family Courts Act 1984

This Act, also noted at (1984) 10 C.L.B. 1932, provides for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs.

January 1985 C.L.B. p.8

NEW ZEALAND

Juries Amendment Act 1976

This was noted as a Bill at (1976) 2 C.L.B. 317. It has since been enacted so that men and women now have equal obligations in respect of jury service and equal rights to exemption from jury service.

April 1977 C.L.B. p.191

Family Courts Act 1980

This Act, which comes into force on 1 October 1981, except for the section providing for the appointment of the Principal Family Court Judge, which came into force immediately, provides for the establishment of Family Courts as divisional courts of District Courts. District Court Judges will be eligible for appointment as Family Court Judges if they are, by reason of their training, experience and personality, suitable persons to deal with matters of family law. The number of District Court Judges is to be increased to enable the Family Courts to handle the work assigned to them. One of the Family Court Judges will be appointed Principal Family Court Judge.

Counselling supervisors, counsellors and other officers are to be appointed. An officer of the Justice Department will be appointed to be responsible to the Secretary for Justice for ensuring the proper functioning of the Family Courts and of counselling and related services.

The statutes under which the Family Courts are to have jurisdiction are the Adoption Act 1955, Marriage Act 1955, Guardianship Act 1968, Domestic Actions Act 1975, Matrimonial Property Act 1976, Family Proceedings Act 1980, and the provisions in the Social Security Amendment Act (No. 2) 1980 which establish a scheme for child support contributions.

General matters of procedure are covered. Two sections are worthy of mention. First, it is provided that Family Court proceedings shall be conducted in such a way as to avoid unnecessary formality. Wigs and gowns are not to be worn. Second, there is provision for the transfer of complex proceedings to the High Court for determination.

April 1981 C.L.B. p.448

ST VINCENT AND THE GRENADINES

Recognition of Divorces and Legal Separations Act 1983 (No. 19 of 1983)

This Act makes fresh provision for the recognition of divorces and legal separations granted outside St. Vincent and the Grenadines - i.e. divorces and legal separations which have been obtained by means of judicial or other proceedings in any country outside St. Vincent and the Grenadines, and are effective under the law of that country.

The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained (a) either spouse was habitually resident in that country, or (b) either spouse was a national of that country. It is provided that in appropriate cases to accommodate the concept of domicile, the reference to "habitual residence" includes a reference to domicile.

The Act also provides for the recognition of cross-proceedings and divorces following legal separation; for the proof of facts relevant to recognition; recognition as affected by existing common law and statutory rules; and the refusal of recognition or exceptions from recognition.

It is provided that where the validity of a divorce obtained in any country is entitled to recognition under the Act, neither spouse shall be precluded from re-marrying in St. Vincent and the Grenadines on the ground that the validity of the divorce would not be recognised in any other country.

April 1984 C.L.B. pp.526-527

TRINIDAD AND TOBAGO

Jury (Amendment) Act, 1975, No. 20 of 1975

The Act increases the property qualifications of jurors, and provides for married women to qualify for jury service if their husbands are qualified, and for wives of certain persons exempt from jury service to be themselves exempt. The Chief Election Officer will be responsible for the preparation and compilation of jury lists instead of the former wardens of County Councils. The Act makes it an offence for an employer to dismiss, threaten to dismiss or in other ways adversely affect an employee summoned for jury service.

January 1976 C.L.B. p.6

Criminal Law and Procedure

AUSTRALIA - QUEENSLAND

Pregnancy Termination Control Bill 1980

This Bill was introduced by the State Minister of Health, who said he firmly believed the decision of the Government to tackle the abortion issue was in the interests of all Queenslanders, particularly the unborn -

In introducing the Bill, I am conscious of the fact that it will place the Queensland Parliament under the closest scrutiny, both in Australia and overseas. We will never be able to legislate on this issue to satisfy everyone. But at least we can make a genuine and honest attempt to protect the unborn child.

The Bill provides for -

- (i) imprisonment with hard labour for 14 years for a person attempting to procure miscarriage;
- (ii) a woman attempting to procure her own miscarriage would be liable to imprisonment for three months;
- (iii) a person supplying drugs or instruments to procure a miscarriage would be liable to three years' imprisonment; and
- (iv) a lawful abortion is defined.

The Bill also seeks to provide for the necessity to prove that an emergency situation exists involving the serious risk of death of the woman with the continuation of the pregnancy. Two medical practitioners are each required to issue a certificate that they have each examined her and that an abortion is necessary to avoid the risk of her death.

The approval of the State Director-General of Health is required before any prosecution can be proceeded with under the Act.

"Pregnancies resulting from rape and incest and those exposing a woman to a serious risk of death, a potential suicide or self-inflicted grievous bodily harm, are cases where an abortion may be performed", the Minister

said. "Serious risk of major foetal abnormality or disease also provides legal ground for a termination of pregnancy. However, the Bill, in these instances, provides built-in conditions."

The rape must have been reported to police within seven days and the abortion will have to be performed within 60 days of the report. Also a legally qualified medical practitioner must have examined the woman and be satisfied the pregnancy was a result of rape, by obtaining police verification. These conditions also applied to incest-induced pregnancy.

For a foetal abnormality abortion, a serious risk of major foetal abnormality or disease must be clearly demonstrated.

A person making a false statement to a doctor on the cause of pregnancy, and in order to obtain an abortion, will be liable to three years' imprisonment.

(Note: The Bill aroused considerable controversy, and was defeated.)

July 1980 C.L.B. pp.765-766

AUSTRALIA - NEW SOUTH WALES

Crimes (Sexual Assault) Amendment Bill 1981

Child Welfare (Amendment) Bill 1981

These two Bills seek to substantially affect the State's laws relating to rape: the Crimes (Sexual Assault) Amendment Bill 1981, to amend the Crimes Act 1980 so as to abolish the crime of rape, to create three new offences of sexual assault, and to make certain provisions relating to those and other offences, including provisions relating to evidence in sexual assault proceedings; and the Child Welfare (Amendment) Bill 1981, a cognate Bill to amend the Child Welfare Act 1939 with respect to the committal of children and young persons to trial.

When introducing the Crimes (Sexual Assault) Amendment Bill 1981, the Premier of New South Wales said that the objects of the Bill were to protect the victims of rape from further victimisation over the legal process; to encourage victims of rape to report their offences to the authorities; to facilitate the administration of justice and the conviction of guilty offenders; to preserve the rights of the accused; and to serve an educative function in further changing community attitudes towards sexual assaults.

The Premier explained that under the Bill four categories of sexual assault would be established, graded according to the seriousness of the offence, and to which different levels of penalties would apply. He added that the thrust of the new proposals was, first, to impose criminal liability on "persons", rather than people who were "males" and "females" and, secondly, to abolish a husband's immunity from prosecution for raping his wife.

The Premier added that although the present maximum penalty for rape in New South Wales is imprisonment for life, statistics for 1979 had shown that only 46 persons had been convicted and sentenced for the maximum penalty. In fact, 85 per cent of those who had been convicted had been sentenced to ten years imprisonment or less. The Bill sought to rectify this problem by providing for maximum penalties of seven, 12 and 20 years imprisonment for the three major categories of sexual assault.

Speaking later on the Bills, the Attorney-General for New South Wales told Parliament that nearly 50 per cent of rapes in the State took place

in the homes of the victims and that 70 per cent of all such crimes were committed by men who know their victims. He added that "the view that a husband should have a legal right to compel his wife by force to submit to sexual intercourse is intolerable".

Among the various other amendments sought to be made to the existing law by the Bill are -

- (i) introduction of an extended definition of the phrase "sexual intercourse";
- (ii) power on the part of a trial judge to warn the jury that there may well have been a good reason for the delay that was occasioned on the part of a victim in complaining about a sexual assault;
- (iii) abolition of the practice whereby the victim of a sexual assault is required to give evidence of the assault and undergo cross-examination at committal proceedings in cases where the accused pleads guilty;
- (iv) abolition of the rule requiring a trial judge to warn the jury that it is unsafe to convict the accused of sexual assault upon the uncorroborated evidence of the alleged victim; and
- (v) prohibition of irrelevant questioning of victims of sexual assault about their prior sexual conduct.

The Bill to amend the Child Welfare Act is intended to allow a person charged in the State's Child Welfare Court with an indictable offence to have the option of trial by jury. The Bill provides that only a person under 18 years of age who is charged with what will become the most serious offence of sexual assault must in future be charged in the Supreme Court of New South Wales before a jury.

July 1981 C.L.B. pp.845-847

Prostitution (Amendment) Bill 1983

The Bill, which was tabled in Parliament, but which has not yet received its Second Reading Speech, seeks to amend the Prostitution Act 1979 (NSW) so as to make it an offence for a person in a public street to solicit another person for the purpose of prostitution or in a dwelling, school, church or hospital.

The Bill also seeks to provide that its provisions are in addition to, and do not derogate from, the provisions of any other law of the State, including s. 5 of the Offences in Public Act 1979 (NSW).

The Bill, which was introduced in an effort to deal effectively with the growing incidence of prostitution in Sydney, defines the words "building", "church", "dwelling", "hospital", "prostitution", "public street", and "school".

July 1983 C.L.B. p.776

BERMUDA

Criminal Law Amendment Act 1980 (No. 39 of 1980)

Several very significant reforms in the criminal law are effected by this Act.

Special provision is made in regard to evidence at a trial for an offence of rape. Except with the leave of the court, no question may be asked in cross-examination nor any evidence adduced about any sexual experience of

the complainant with a person other than the defendant in the case. After a person has been arrested and charged with a rape offence, no material likely to lead members of the public to be able to identify the complainant or the man against whom the accusation has been made, may be published except upon a direction from the Court.

January 1981 C.L.B. p.7

INDIA

Suppression of Immoral Traffic in Women and Girls (Amendment) Act 1978 (No. 46 of 1978)

This Act amends the principal Act of 1956 in relation, inter alia, to -

- (a) living on the earnings of prostitution, controlling a prostitute and acting as a tout or pimp;
- (b) carrying on prostitution in certain places and within certain areas;
- (c) probation, admonition or detention in a corrective institution;
- (d) powers of entry and search;
- (e) rescue of women and girls, and their intermediate custody;
- (f) power to establish Special Courts.

July 1978 C.L.B. p.619

Criminal Law (Second Amendment) Act 1983

This Act amends the Indian Penal Code, the Code of Criminal Procedure and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to, and ill-treatment of married women by the husband and his people. The Act provides for imprisonment to the husband and the relatives for three years and also fine for cruelty to a married woman which drives her to commit suicide. The offence has been made cognisable. The Act also provides for compulsory inquest by an Executive Magistrate in all cases where a woman has within seven years of her marriage, committed suicide or died in circumstances raising a reasonable suspicion that some other persons has committed an offence. If it is shown that her husband or any relative of her husband had subjected her to cruelty, the court may presume that such suicide has been abetted by her husband or such relative of her husband.

January 1985 C.L.B. p.10

NEW ZEALAND

Contraception, Sterilisation and Abortion Act 1977

In recent and controversial legislation following in the wake of the report of the Royal Commission on Contraception, Sterilisation and Abortion (noted at (1977) 3 C.L.B. 472) the New Zealand Parliament has enacted new laws, the procedural elements of which are designed to ensure that abortions are available only in strict compliance with the law.

Although rejecting the Royal Commission's recommendation that panels consisting of two doctors and a social worker be set up to consider each request for an abortion, Parliament in the Contraception, Sterilisation and

Abortion Act 1977 has provided an alternative but similar procedure. Under the new procedure a woman seeking an abortion must have her case referred to by her doctor to two certifying consultants. To establish a list of medical practitioners who will be certifying consultants (half the total number of such persons are to be practising obstetrician or gynaecologists) and to otherwise administer the new procedure under the Act an Abortion Supervisory Committee consisting of a Chairman (the first chairman is a Magistrate) and two medical practitioners has been established. There is an interesting point that in appointing certifying consultants the Supervisory Committee is to have regard to the desirability that their assessment of cases "will not be coloured by news in relation to abortion that are incompatible with the tenor" of the Act.

If the certifying consultants agree, a certificate authorising the abortion must be forwarded to the hospital where the operation is to take place. There is provision in the case where two certifying consultants disagree for a third such consultant's opinion to be sought.

An amendment to the Crimes Act 1961 passed at the same time as the Contraception, Sterilisation and Abortion Act gives for the first time statutory grounds to be applied in the case of a woman seeking an abortion. Hitherto it was an offence for a person to unlawfully procure a miscarriage, the word "unlawfully" being interpreted in the light of R v Bourne [1939] 1 K.B. 687.

The feature of the new Crimes Act provisions that has caused the greatest difficulty is the meaning to be ascribed to the words, forbidding the performance of an abortion if the danger to the women can be averted by other means. The Crimes Amendment Act 1977 defines "unlawfully" as follows -

- (1) The carrying out of an abortion is unlawful unless in the case of a pregnancy of not more than 20 weeks gestation, the person doing the act believes -
 - (a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl, and that the danger cannot be averted by any other means; or
 - (b) that the pregnancy is the result of sexual intercourse between -
 - (i) A parent and child; or
 - (ii) A brother and sister, whether of the whole blood or of the half blood; or
 - (iii) A grandparent and grandchild; or
 - (c) that the pregnancy is the result of sexual intercourse that constitutes an offence against section 131(1) of this Act; or
 - (d) that the woman or girl is severely subnormal within the meaning of section 138(2) of this Act.
- (2) The following matters, while not in themselves grounds for an abortion may be taken into account in determining whether the continuance of the pregnancy would result in serious danger to the woman's life or to her physical or mental health -
 - (a) the age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years;
 - (b) the fact (where such is the case) that there are reasonable grounds for believing that the pregnancy is the result of rape.
- (3) In the case of a pregnancy of more than 20 weeks gestation, the person doing the act must believe that the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her

physical or mental health.

The ground for abortion of foetal abnormality recommended by the Royal Commission was struck out of the bill during its Committee stages.

April 1978 C.L.B. pp.239-241

Crimes Amendment Act 1978

The New Zealand Parliament has again been wrestling with the vexed question of abortion, despite its earlier hopes that last year's legislation had settled the matter.

Following the implementation of the Crimes Amendment Act 1977 [noted at (1978) 4 C.L.B. 239] considerable uncertainty was felt as to the meaning of s. 187A subsection (1)(a) -

(1) The carrying out of an abortion is unlawful unless in the case of a pregnancy of not more than 20 weeks gestation, the person doing the act believes -

(a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health of the woman or girl, and that the danger cannot be averted by any other means.

Because of the uncertainty, which specifically related to the words "and that the danger cannot be averted by any other means", the Abortion Supervisory Committee which administers the provision of abortion in New Zealand, recommended that these words in question be deleted. This now leaves the law as it was recommended by the Royal Commission on Contraception, Sterilisation and Abortion.

The Crimes Amendment Act 1978 also makes foetal abnormality a ground for an abortion. That, too, had been recommended by the Royal Commission, but a provision to that effect in the Contraception, Sterilisation and Abortion Bill 1977 was struck out by Parliament. The Crimes Amendment Act 1978 now reverses that position.

October 1978 C.L.B. pp.787-788

Suppression of Names of Complainants in Specified Sexual Cases Bill 1980

A Private Member's Bill to restrict the publication of names of complainants in specified sexual cases has been introduced by a Government member. The Bill was introduced after considerable concern had been expressed over the publication of the name of the complainant in a rape case.

The Bill contains a general prohibition on the publication of the names or particulars likely to lead to the identification of complainants in a number of different sexual offences including rape, incest, sodomy, indecency between adults and minors of the same sex, sexual intercourse with a girl under 16 or a girl under care or protection. Similar provision was made in 1975 for the suppression of names of complainants under 16 in such cases. This would be replaced by the general prohibition set out in the Bill.

The Bill does provide that names may be published where the complainant is 16 or more and the Court by order permits publication. This is the reverse of existing law under which the names of complainants 16 or more in age can be published in such cases unless the Court directs otherwise.

The Bill was welcomed by Government and Opposition Members and has generally received public support. It was referred for study to a

Parliamentary Select Committee (the Statutes Revision Committee) which has yet to report on it.

July 1980 C.L.B. pp.768-769

Rape Law Reform Bill 1983

This Bill seeks to change the statutory definition of rape, abolish the rule that the Judge must warn the jury in the absence of corroboration, and regulate certain procedural matters at preliminary hearings and trials of rape cases.

The introduction of the Bill followed considerable public debate and concern over the incidence and seriousness of recent rape complaints. A Rape Study, prepared by the Department of Justice in collaboration with the Institute of Criminology, Victoria University of Wellington, was published in early 1983. The Government subsequently called for public submissions on the Study. The Bill as introduced to the House endeavours to respond to many rape complainants' experiences of the criminal justice process and accommodate special procedural problems which they encounter.

The Bill defines "sexual connection", the term used in the reformulation of the crime of rape. "Sexual connection" includes penetration of the vagina or anus by any part of the body or any object manipulated by another person; fellatio; cunnilingus; the continuation of any of these acts. The definition is wide enough to degender the crime of rape: it allows for male and female offenders and victims.

The Bill also substitutes a new definition of rape, the essential element of which is sexual connection with another person without that person's consent. The mens rea of the offence is refined to capture some of the recent developments in the law of recklessness and revise the rule in DPP v Morgan [1975] 2 All ER 347. The law providing that there can be no rape in marriage is restated, so that submissions can be made to the Select Committee on this controversial provision.

As to penalty, the Bill includes a provision that a convicted offender is to be sentenced to imprisonment unless special circumstances justify a departure from this rule.

The rule that the Judge must warn the jury that it is unsafe to convict on the uncorroborated evidence of the complainant is abolished. A Judge may still comment on such evidence but he must avoid using the present formula. Where the question of the complainant's delay in making a complaint of rape arises, the Judge may tell the jury that there may be good reasons for such a delay.

The Bill seeks to provide that at the preliminary hearing or trial of a rape case, only certain specified persons may remain in the courtroom while the complainant gives oral evidence. Furthermore, the Court may make an order prohibiting publication of any report of the criminal acts alleged to have been performed on the complainant. At the preliminary hearing, the complainant shall give evidence in written form unless the Judge orders that the evidence be given orally because the written statement is insufficient to put the accused on trial or it is "indispensable in the interests of justice" that the evidence be given orally. It is intended that these procedural amendments will ease the trauma many rape complainants experience in bringing a case to court.

The significant changes embodied in the proposed legislation are certain to spark considerable controversy. The Bill has been referred to the

Statutes Revision Committee for the presentation and consideration of submissions.

April 1984 C.L.B. p.537

UNITED KINGDOM

Sexual Offences (Amendment Act 1976)

The Act redefines rape as -

- (i) unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (ii) at that time the man knowing that she does not consent to the intercourse or being reckless as to whether she consents to it.

The Act further declares that the presence or absence of reasonable grounds for belief that a woman was consenting is a matter to which the jury is to have regard, in conjunction with any other relevant matter, in considering whether he so believed.

Restrictions are placed on the right of the defence to cross-examine a complainant as to previous sexual experience with a person other than the defendant. The publication of matter likely to lead to the identification of complainants is prohibited unless a judge orders otherwise, but then only in specified circumstances.

January 1977 C.L.B. p.16-17

UNITED KINGDOM - SCOTLAND

Sexual Offences (Scotland) Act 1976

The Act consolidates enactments relating to sexual offences in Scotland.

January 1977 C.L.B. p.16-17

UNITED KINGDOM

Marital Rape Bill 1983

This Bill, a Private Member's Bill, seeks to amend the Sexual Offences (Amendment) Act 1976 so as to make rape within marriage a criminal offence.

Prohibition of Female Circumcision Bill 1983

This Bill seeks to prohibit female circumcision. The penalty is a fine. Provision is made for the saving of certain necessary surgical operations.

July 1983 C.L.B. p.790

VANUATU

Penal Code Act 1981 (No. 17 of 1981)

On independence, Vanuatu inherited three separate parallel legal systems - common law, civil law and customary law. As a priority in reconstructing a unitary legal system, a new Penal Code has been enacted. The maximum penalty provided for (including that for the offence of treason) is life imprisonment. Among its other provisions are the following -

Prostitution

s.101 No person shall procure, aid or facilitate the prostitution of another person or share in the proceeds of such prostitution whether habitual or otherwise, or be subsidised by any person engaging in prostitution.

Penalty: Imprisonment for five years.

Duty to provide the necessities of life

s.104 (1) Every person who has charge of any other person unable, by reason of detention, age, sickness, insanity or other cause whatever to provide himself with the necessities of life, is (howsoever such charge arises) under a legal duty to supply that person with the necessities of life and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured by such omission.

(2) No person shall without lawful excuse neglect the duty specified in subsection (1) so that the life of the person under his charge is endangered, or his health permanently injured by such neglect.

Penalty: Imprisonment for seven years.

April 1982 C.L.B. pp.468-470

Evidence

AUSTRALIA

Evidence Act Amendment Act 1976

This Act provides that in the trial of rape offences (including indecent assaults), evidence of the complainant's sexual history, disposition and reputation is restricted. Leave of the Court must be obtained to introduce or cross-examine on any such matter and leave may only be granted where the material sought to be adduced is of substantial relevance.

October 1977 C.L.B. p.562

CANADA

Evidence of sexual offences

Amendments to the Canadian Criminal Code include the abolition of the requirement of a warning as to corroboration, and the limit of questions concerning the past sexual conduct of the complainant in certain criminal proceedings.

January 1978 C.L.B. p.18

NEW ZEALAND

Evidence Amendment Act (1977)

The Evidence Amendment Bill, noted at (1977) 3 C.L.B. 201, as being considered by the statutes Revision Committee has now been passed and came into effect on 29 August 1977.

The Act ensures that only relevant evidence is admitted in a prosecution for a rape offence by restricting the right of the defence to introduce evidence or ask questions relating to -

- (a) the complainant's sexual experience with persons other than the accused, or
- (b) her reputation in sexual matters.

Such evidence may be introduced only with leave of the trial judge and applications for leave are to be dealt with in the absence of the jury. Before the judge may grant leave he must be satisfied that the evidence to be given or the question to be put is of such direct relevance to facts in issue in the proceedings or to the issue of appropriate sentence, that to exclude it would be contrary to the interests of justice.

The Act further declares that evidence shall not be regarded as being of sufficient relevance to warrant its admission by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

January 1978 C.L.B. p.19

Family Law

AUSTRALIA - QUEENSLAND

Description of Women (Reference to Condition in Life) Act 1975

This Act abolishes any requirement that a woman shall describe herself or her calling by reference to her "condition in life", a term defined to mean "the condition of a woman in relation to whether she is or has been married".

October 1975 C.L.B. p.10

AUSTRALIA

Family Law Amendment Act 1976

Consequent on the decision of the High Court of Australia concerning the validity of certain provisions of the Family Law Act 1975, the Australian Parliament has enacted the Family Law Amendment Act 1976 in order to overcome, to the extent constitutionally permissible, some of the defects in the principal Act disclosed by that decision. As a result the latter Act amends the definition of "matrimonial cause" in the principal Act to confine the areas of custody and property to the degrees required by the decision. Also, in the areas of maintenance and injunctions, the definition has been confined to proceedings between the parties and, in the case of maintenance of a child, to proceedings by or on behalf of a child against one or both parents. The expression the "child of a marriage" in the principal Act has been amended to limit its operation to the natural or adopted children of both parties to the marriage. The jurisdiction of the State Supreme Courts over new proceedings under the principal Act has been terminated and special provision has been made for the State of Western Australia to enable it to establish and operate its own Family Court rather than have a Federal Family Court created under the Act. The requirement that proceedings under the Act be held in closed court has been retained notwithstanding the fact that, as a result of the High Court's decision, it can only validly affect the Family Court established under the Act and not State Courts vested with Federal jurisdiction.

Provision has also been made in the amending Act to make the maintenance and custody provisions contained in the principal Act more effective and to clarify the powers of a person to whom a warrant is addressed to enforce a custody or access order. To facilitate the determination of questions of law by the Full Court of the Family Court, a provision has been included in the principal Act to enable such questions that arise in any proceedings before the Family Court to be referred by way of a case stated procedure to the Full Court, thus enabling a decision to be obtained from that Court without the necessity for a full appeal.

July 1976 C.L.B. pp.183-184

Maintenance

The Australian Government has made regulations under the Family Law Act 1975 to make it easier for wives to enforce maintenance orders against their defaulting husbands. Under the regulations chamber magistrates are empowered to make maintenance orders against husbands who default on their maintenance payments, and such orders may be enforced against the husband's income and property.

Marriage

The Federal Attorney-General has introduced a Bill to amend the Australian Marriage Act 1961-1973. The amendments to the Act include the making of grants to approved organizations for purposes of pre-marital education and for enabling information about marriage to be furnished to intending parties by marriage celebrants, the increasing of the time of notice of intention of marriage from 7 days to 1 calendar month except in special circumstances, the requirement of pre-marital counselling for those under 18 years of age who seek to marry without parental consent, and the abolition of the action

of breach of promise of marriage.

July 1976 C.L.B. p.184

Family Law Act 1975

New Regulations made under the Act close certain loopholes associated with the enforcement of maintenance orders inter-state, add Hong Kong and California to the list of overseas territories from which maintenance orders can be sent to Australia for enforcement, provide improvements for appeal procedures in the Family Court of Australia and the Full Bench of that Court, and increase to \$A100 the fees payable to the Court on an application for a divorce and \$A150 on an appeal to the Full Bench.

The Bill also seeks to recognise the validity for purposes of state law the wills of deceased persons that are valid under foreign law but which do not otherwise conform to the state's laws relating to wills. Under the Bill, such foreign wills will be recognised in the state provided they conform with the legal requirements of the country where they are made.

Legal Representation of Infants Bill 1977

This Bill seeks to provide for the separate legal representation of Children in cases that affect their interests, including cases of custody, guardianship and adoption. The Bill gives effect to most of the recommendations of the state's Law Reform Committee (now the Law Reform Commission) on the need for separate legal representation for children who are not parties to an action but in respect of which their rights are affected.

The Bill also makes provision for the costs of a child's representation to be paid by a party to the proceedings, from any fund in which the child has an interest, or, failing these, from the Suitors' Fund.

January 1978 C.L.B. pp.19 and 20

AUSTRALIA - NEW SOUTH WALES

Children (Equality of Status) Amendment Act 1979

The Blood Tests Regulation 1979, made pursuant to the Children (Equality of Status) Act 1976 (N.S.W.), together with Part IV of that Act, relates to the use of blood tests in determining paternity and maternity. This Act amends Part IV of the Act, proclaimed to commence on 23 November 1979, as follows -

- (i) sub-sections (1) and (2) of s.19 of the Act authorise a court in civil proceedings to require the use of blood tests. Where two or more persons are to be tested, the blood samples must be taken by the same sampler, unless the Court otherwise directs;
- (ii) sub-section (11) of s.19 requires blood samples to be taken by a medical practitioner, a registered nurse or a person of a class of persons as prescribed. The class of persons is prescribed by clause 3 of the Regulation;
- (iii) clause 4 requires the parties to the proceedings to notify the Court of the name and address of the person who is to take the blood samples. Upon notification, the Court is to give written notice concerning the proceedings and other details as set out in the Regulation to the person in charge of the testing laboratory to which the blood samples are to be forwarded;

- (iv) clause 5 requires the person in charge of the testing laboratory to issue instructions and provide a container and labels to the person taking the blood samples;
- (v) clauses 6 and 7 set out the procedures to be observed by the person taking the blood sample;
- (vi) clause 8 requires a written report in or to the effect of Form 1 to be furnished by the person taking the blood sample to the testing laboratory;
- (vii) clauses 9 and 10 require the person to be tested, or in some instances a person on his behalf, to furnish prior to testing a declaration (Form 2) dealing with certain medical conditions and blood transfusions. A photograph of the person to be tested is also to be supplied with the declaration to the person taking the blood sample. The photograph is to be affixed to and signed in a prescribed manner on the report by the sampler;
- (viii) clause 11 provides for the Minister administering the Act to appoint persons to carry out blood tests and to appoint places at which such tests may be carried out;
- (ix) clause 12 requires the blood sample tester to record the results of his tests and to furnish to the Court a written report in or to the effect of Form 3, together with the sampler's report and the party's declaration;
- (x) sub-section (6) of s.20 provides for the costs of taking or testing of blood samples to be borne by the person being tested, unless the Court otherwise directs. Clause 13 prescribes an amount of \$A30 as the charge for a blood test;
- (xi) pursuant to s.20 the reports of the tester and the sampler are admissible as evidence in the court proceedings;
- (xii) section 21 deals with the failure of a person to comply with a direction for the use of blood tests and the inferences which the Court may draw as a result of the person's failure to comply;
- (xiii) Section 22 creates an offence for personating another person for the purpose of a blood test or for allowing the wrong child to be tested.

Pursuant to clause 11 of the Regulation, the Attorney-General has already appointed certain persons to carry out blood tests and has appointed certain places at which those blood tests may be carried out.

October 1980 C.L.B. pp.1146-1147

AUSTRALIA - VICTORIA

Status of Children (Artificial Insemination) Bill 1981

This Bill, which amends the State's Status of Children Act 1974, was introduced by two Private Members of Parliament. It seeks to provide for a new section, s.5A, to be inserted in the principal Act in the following terms -

S.5A. (1) A child born to a woman during her marriage or within ten months after the marriage has been dissolved by death or otherwise being a child conceived by her with the consent of her husband after artificial insemination with semen donated by a man not her husband shall be presumed to be the child of its mother and her husband or former husband, as the case may be.

(2) Without prejudice to any other mode of proof the production of a certificate filed with the Health Commission of Victoria purporting to be the certificate of a legally qualified medical practitioner who supervised the artificial insemination of a woman in the circumstances referred to in sub-section (1) that the insemination was performed in those circumstances with the consent in writing of the woman and her husband on the day and at the place referred to in the certificate shall be sufficient evidence of the facts stated in the certificate.

(3) Where the Health Commission of Victoria receives a certificate described in sub-section (2) the Commission shall cause it to be filed and kept confidential unless otherwise required by the order of a court.

July 1982 C.L.B. p.892

AUSTRALIA - NEW SOUTH WALES

Adoption of Children Act 1965

The New South Wales Parliament has repealed sub-section 46(2) of this Act in order to recognise foreign orders of adoption.

Before the repeal foreign orders of adoption could not be recognised in New South Wales because one of the conditions of recognition of a foreign adoption order was that "at the time at which the legal steps that resulted in the adoption were commenced, the adopter, or each of the adopters was resident or domiciled in that country".

Because of the repeal of the sub-section, foreign orders of adoption can now be recognised as valid by the Supreme Court of New South Wales. The Department of Youth and Community Services no longer is required to make application to that Court for a New South Wales Order of Adoption, and it is now possible for adopting parents to approach the Supreme Court direct to seek an order declaring that a foreign adoption order is a valid order pursuant to s.47 of the Adoption of Children Act (NSW).

After the Court makes a Declaration of Validity in respect of the child's Foreign Adoption Order, the Court will notify the Principal Registrar of Births, Deaths and Marriages, who in turn will cause an entry to be placed in his records of births which will show the adopting parents as the child's parents after which a birth certificate can be obtained. The Declaration of Validity does not confer Australian citizenship on the child and adopting parents still need to contact the Department of Immigration and Ethnic Affairs to arrange for this to be done.

AUSTRALIA - VICTORIA

Domicile (Amendment) Bill 1982

This Bill, in its main amendment seeks to substitute a new s.8 in the Domicile Act 1978 (Vic) -

- (i) New sub-section 8(1) sets out the definition of the word "child" and the meaning of the references to parents;
- (ii) new sub-section 8(2) sets out provisions for determining the domicile of a child who has his principal home with one of his parents and his parents are living apart or he does not have another living parent. In such a case his domicile is that of the parent with whom

- he has his principal home. When that parent dies, the child retains the domicile which that parent had at death. This sub-section must be read subject to sub-section (4);
- (iii) new sub-section 8(3) contains provisions for determining the domicile of an adopted child. If, upon his adoption, he has two parents, his domicile is that which he would have had if he had been a child born in wedlock to those parents. If, upon his adoption, he has only one parent, his domicile is the domicile of that parent or, if that parent dies, the domicile that parent had at the date of death;
 - (iv) new sub-section 8(4) provides that a child ceases to have, by virtue of sub-section (2), the domicile or last domicile of one of his parents, if his principal home changes to the other parent or his parents live together again;
 - (v) new sub-section 8(5) provides, in effect, that where a child acquires a domicile by virtue of sub-section (2) or (3), he retains that domicile until he acquires a domicile of choice;
 - (vi) new sub-section 8(6) provides for the domicile of a child whose adoption is rescinded. If the court order rescinding the adoption provides for his domicile, he has the domicile so provided. Otherwise, his domicile reverts to that which he would have had if he had not been adopted.

October 1982 C.L.B. pp.1286-1287

AUSTRALIA - WESTERN AUSTRALIA

Stamp Amendment Act (No. 3) 1982 (No. 45 of 1982)

This amendment to the Stamp Act 1921 - 1982 (Western Australia) is necessitated by the recent Australian High Court decision in Gazzo v Comptroller of Stamps (Vic.); ex parte Attorney-General (Vic.) (1982) 56 ALJR 143. The Court held in that case that s.90 of the Family Law Act 1975 (Commonwealth) was invalid as ultra vires the legislative power of the Commonwealth Parliament. Section 90 had provided that maintenance agreements and other instruments executed in accordance with an order under Part VIII of the Family Law Act were not subject to any duty or charge under any law of a State or Territory, or any law of the Commonwealth applying only to a Territory.

The validity of s.90 and its effect on the Western Australian Stamp Act 1921 - 1982 had been doubted prior to the decision in Gazzo and the State Taxation Office had nevertheless assessed the instruments referred to in s.90 in accordance with the Stamp Act. However, most documents had been considered to operate as if they were orders of the Family Court and thus only a nominal stamp duty had been assessed.

The High Court decision produced some uncertainty as to the manner in which agreements approved or registered in the Family Court of Australia were to be assessed pursuant to the Stamp Act 1921 - 1982 (WA).

The Stamp Act has now been amended by the insertion of a new Part IVD headed "Maintenance Agreements and Orders". Section 112UA defines a "maintenance agreement" as -

an agreement in writing with respect to any one or more of the following, namely -

- (a) the maintenance of one of the parties to the agreement;
- (b) the conveyance or transfer of property (whether real or personal) of the parties to the agreement or either of them to one of the parties or to a dependent child of the parties or of either of them or to both a dependent child of one of the parties and one of them;
- (c) the maintenance of a dependent child of the parties or either of them;

An "order" is defined as -

a sealed copy of an order made by a court exercising federal or non-federal jurisdiction in any proceeding under the Family Court Act 1975 (WA) or the Family Law Act 1975 (Clth) with respect to one or both of the following, namely -

- (a) the conveyance or transfer of real or personal property;
- (b) the vesting of property;

The effect of ss.112UC and 112UD is to provide that maintenance agreements entered into by the parties to a marriage as a result of their divorce or separation and pursuant to the Family Court Act or the Family Law Act, which provide for the payment of maintenance and/or the disposition of property to either party or to any dependent children, will be charged only a nominal stamp duty of Aus\$5. Similarly any court orders which dispose of, or vest property in the parties to the marriage or dependent children will only be subject to nominal stamp duty.

However, maintenance agreements prepared and agreed to by the parties to a marriage as to the disposition of property and simply registered with, or approved by, the court may simply be a means by which property is transferred between parties other than parties to the marriage without paying ad valorem stamp duty. This is possible even with respect to court orders resulting from consent agreements by the parties. This problem is avoided by the new s.112UB which provides that where a maintenance agreement or court order provides for the sale of property to either marriage partner, or for the disposition of property to a person other than a party to the marriage or a dependent child, stamp duty will be assessed by the Commissioner of State Taxation in accordance with the normal provisions of the Stamp Act relating to such transactions.

January 1983 C.L.B. pp.23-25

BARBADOS

Family Law Act 1981 (No. 29 of 1981)

This Act reforms the law relating to the dissolution and nullity of marriage, judicial separation and institution of conjugal rights. It provides for counselling with a view to facilitating reconciliation in matrimonial causes in relation thereto. Parental rights and the custody and guardianship of children are dealt with in Part V of the Act. Part VI of the Act sets out the powers of the court relating to maintenance and property matters.

The Act also provides for the establishment of a Family Law Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request by the Attorney-General in respect of -

- (a) the operation of this Act and other legislation relating to family law;

- (b) the provision of legal aid in proceedings relating to family law;
and
- (c) any other matters relating to family law.

The Act lays down the jurisdiction of the High Court in matrimonial proceedings.

Change of Name Act 1981 (No. 17 of 1981)

This Act enables a person's surname to be changed in certain circumstances. Consent is required in the case of change of name of a spouse, or a child. The Act also provides that where an individual whose marriage has been dissolved and who has lawful custody of a child of the dissolved marriage may, with the consent of the other parent of the child apply to change the name of the child. Further, the mother of a child who has the custody of the child, may apply to change the surname of the child with the consent of the father in certain circumstances.

A change of name, however, may be revoked if the Registrar is satisfied that it has been obtained by fraud, duress or misrepresentation, and once revoked, the individual is required to deliver up the certificate of change of name to the Registrar. Failure to do so is a criminal offence punishable with a fine of \$100 or three months imprisonment or both.

January 1983 C.L.B. p.25

BELIZE

Status of Children Bill 1980

This Bill seeks to remove the legal disabilities of children born out of wedlock. For all legal purposes, the relationship between every person and his parents would be determined irrespective of whether they are or have been married to each other, and all other relationships would also be determined accordingly. All the legal consequences of that relationship would follow as if the father and mother are or had been married to each other at the time of the conception or birth of that person provided paternity has been admitted or is otherwise established or the parents marry each other at some time subsequent to the birth of that person.

The Bill also contains provisions relating to presumption of parenthood, evidence and proof of paternity, the use of blood tests to ascertain or repudiate paternity and consent to the marriage of infants.

On the subject of maintenance, the Bill would require every man to maintain his own children as well as -

- (a) every child whether born in wedlock or not which his wife may have living at the time of her marriage to him;
- (b) if he cohabits with any woman, every child which such woman may have living at the time of the commencement of such cohabitation;
and
- (c) the children of any child of his, so long as such children are unable by reason of tender years or bodily or mental infirmity to maintain themselves.

January 1981 C.L.B. pp.18-19

BERMUDA

Law Reform (Husband and Wife) Act 1977 (No. 2 of 1977)

This Act amends the law relating to the capacity, property and liabilities of married women, and the liabilities of husbands.

A married woman is now capable of acquiring, holding and disposing of any property in all respects as if she were not married; she may render herself liable in tort or contract or in respect of other legal obligations; she may sue her husband in contract or in tort or otherwise; and the restraint on anticipation is abolished. Her husband is not by reason only of his being her husband, liable for her torts, contracts or other obligations.

The Act also makes provision for the determination of property questions between husband and wife and of questions arising out of money and property derived from housekeeping allowances; it also deals with contributions by spouses in money or money's worth to the improvement of real or personal property.

Law Reform (Miscellaneous Provisions) Act 1977 (No. 3 of 1977)

This Act abolishes actions for breach of promise of marriage, the right of a husband to claim damages for adultery, actions for the enticement or harbouring of a spouse, and actions for the enticement, seduction or harbouring of a child. Special provision is made for the disposal of the property of engaged couples and of gifts exchanged between them.

Recognition of Divorces and Legal Separations Act 1977 (No. 20 of 1977)

The Act, which closely follows the United Kingdom Act of 1971 with the same short title, gives effect to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (Cmd. 4542).

A divorce or a legal separation obtained by means of judicial or other proceedings in any country (including dependencies) outside Bermuda and effective under the law of that country, is recognised in Bermuda if at the date of the institution of the proceedings in the country in which it was obtained -

- (i) either spouse was habitually resident in that country; or
- (ii) both spouses were nationals of that country; or
- (iii) the petitioner was a national of that country and
 - (a) was habitually resident there, or
 - (b) had habitually resided there continuously for one year within the past two years; or
- (iv) the petitioner was a national of that country and
 - (a) he was present in that country, and
 - (b) he and the respondent last resided in a country whose law did not provide for divorce.

The Act also provides, inter alia, that in relation to a country the law of which has the concept of domicile as a ground of jurisdiction in matters relating to divorce or legal separation, references to habitual residence shall be taken to include a reference to domicile within the meaning of that law. No divorce or legal separation will be recognised if it was obtained at a time when, according to the law of Bermuda (including its rule of private international law), there was no subsisting marriage between the parties.

CANADA

Extra-Provincial Custody Enforcement Act (British Columbia) 1976

The Extra-Provincial Custody Orders Enforcement Act (Manitoba)

Extra-Provincial Custody Order Enforcement Act (Newfoundland) 1975-76

Reciprocal Enforcement of Custody Orders Act (Nova Scotia) 1976

The Extra-Provincial Custody Orders Enforcement Act (Prince Edward Island) 1975

These statutes, enacted by British Columbia, Manitoba, Newfoundland, Nova Scotia and Prince Edward Island, are based on a model act, "The Extra-Provincial Custody Enforcement Act", recommended by the 1974 Uniform Law Conference of Canada. The model act essentially provides that a court shall give full faith and credit to a custody order of another jurisdiction unless the court is satisfied either that the child did not have, at the time the order was made, a real and substantial connection with the province, state or country in which the order was made, or that the child would suffer serious harm by remaining in or being restored to the custody of the person named in the order. The provincial statutes recognize the concern expressed at a federal-provincial conference of attorneys general in 1975 about the serious social and legal problems caused in Canada by "childnapping" which usually occurs because a parent has lost or is likely to lose a custody action and seeks a jurisdiction that might favour him or her in a custody action. The ministers agreed that both levels of government would take early action to develop a more effective legal framework whereby children abducted by a parent will be returned to lawful custody. Consideration is also being given to making the Criminal Code sections on abduction and kidnapping more effective and useful in these cases.

January 1976 C.L.B.

CANADA - ONTARIO

Family Law Reform Act 1978

Comprehensive reform of family law has taken place in Ontario with the Family Law Reform Act 1978 and three related Acts. The framework for this reform was laid with the completion of a series of reports by the Ontario Law Reform Commission, and an earlier Act, the Family Law Reform Act 1975. This Act declared the principle of equal status and capacity in law for both husband and wife and abolished many of the legal disabilities of married women.

A federal-provincial agreement provided for an experimental pilot court, set up under the Unified Family Court Act 1976, whereby all family law matters are heard in the same court. Simplified rules of procedure made specifically for the Unified Family Court are designed to facilitate and speed up the process of the court.

Further children's law reform dealing with issues of custody, guardianship and the legal representation of children, is now being prepared by the Ministry of the Attorney-General for passage by 1979, The International Year of the Child.

The Family Law Reform Act 1978, a major piece of novel remedial legislation, reforms the law relating to family property, support obligations, the

matrimonial home, domestic contracts, dependants' claims for damages and specific common law actions and principles. This is done in the context of the formal recognition found in the Act's preamble of "the equal position of spouses as individuals within marriage" and of "marriage as a form of partnership".

The Act introduces the "family assets" system of property which provides for the division of family property. Upon marriage breakdown each spouse is entitled to half of the matrimonial home and to half of the property which is owned by either or both of the spouses and which is ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social and aesthetic purposes.

While providing this basic rule, the Act also contemplates that on application the court may order an unequal division of family assets which it is merited or a division of property which is not a family asset such as business property or private investments, having reference to certain circumstances specified in the Act.

Quite apart from judicial discretion, a spouse or a former spouse is entitled to an interest in property other than a family asset in which the other has or had an interest, when it is shown that "the spouse or former spouse has contributed work, money or money's worth" to that property.

The Act abolishes the presumption of advancement between husband and wife and in its place adopts a presumption of resulting trust except in the case of a joint tenancy, where a joint beneficial ownership is presumed.

During marriage each spouse has an equal right of possession in the matrimonial home (which can include rented premises and personal property such as a mobile home). Notwithstanding this right to possession, or the ownership of the home, the court may order that one spouse is to have exclusive possession of the home.

The Act also regulates one spouse's disposal or encumbrance of his interest in the home, requiring generally the consent of the non-owning spouse to any such dealing. If the requirements set out are not met, the transaction may be set aside, unless the third party holding the interest acquired it for value, in good faith and without notice that the property was a matrimonial home.

The Act deals in a comprehensive fashion with support obligations, unifying and updating the law of support and resulting in the repeal or amendment of other major family welfare statutes.

The obligation to support falls on spouses, parents and children. A parent has an obligation to support an unmarried child under eighteen, and a child who is not a minor has an obligation to support a parent who has cared for or supported him. Both parent and child are broadly defined so as to include a person who treats a child as a child of the family and a child who has been so treated, but excluding a foster parent or child.

Both husbands and wives now have a responsibility to support themselves as well as their spouse. The definition of spouse for the purposes of the support obligation has been expanded to include the partners of a common law relationship of five years duration, or of "some permanence" where there is a child of the union.

Support orders are determined on a basis of need and ability to pay. The several criteria to be considered by the court introduce such factors as the contribution by the dependant to the realisation of the career potential of the respondent; and the domestic responsibilities undertaken by the dependant,

giving legislative recognition to the value of contributions made by both partners of the relationship.

The obligation to provide support exists regardless of the conduct of either spouse. However, the Act provides that a course of conduct that is "so unconscionable as to constitute an obvious and gross repudiation of the relationship" may be considered by the court in determining the amount of support to be provided.

While the Act creates a comprehensive scheme of property sharing and support obligations which is to apply to all married couples, it also makes the system flexible by allowing couples to opt out of the legislation and create their own property and support regimes by contract. The Act provides for marriage contracts and separation agreements, as well as for cohabitation agreements between unmarried couples. Certain specific limitations are placed on this otherwise wide power of contract, such as: preservation of the parens patriae jurisdiction of the court to protect the interests of children, a prohibition of contracting out of the statutory rights and obligations regarding the matrimonial home and a prohibition of dum casta clauses.

The Act repeals the Fatal Accidents Act and replaces it with provisions dealing with the right of dependants to sue in tort where a person is injured or killed by the negligence of another. Noteworthy changes to the former legislation include the expansion of the right to recover to non-fatal injuries and the expansion of the class of dependants who can sue to include brothers and sisters of the victim, persons who have shown a settled intention to treat the victim as their own child, a common law spouse of the victim, and the victim's former spouse where there is a subsisting order for support.

The Act also abolishes the unity of legal personality and removes any legal disabilities imposed on married women. A married woman's domicile is to be determined independently of that of her husband's and rules are set down to determine the domicile of a minor.

The actions for criminal conversation, enticement or harbouring of a spouse, loss of consortium and enticement, harbouring, seduction and loss of services of a child are abolished. The common law rights to dower and alimony are also abolished.

Succession Law Reform Act 1977

The Succession Law Reform Act 1977 broadly reforms the law of testate and intestate succession and consolidates the law relating to estates within one Act. Paramount among the substantive reforms is the equalization of the treatment of all children in estate matters, whether born inside or outside marriage. Similarly, the rights and obligations of husbands and wives have been equalized.

In testate matters, the Wills Act has been repealed and is replaced by provisions recommended by the Uniform Law Conference of Canada for enactment in the various jurisdictions of Canada. The holograph will is now recognised, and the Uniform Law on the Form of an International Will is adopted.

On an intestacy, the surviving spouse is entitled to the first \$75,000 of the estate. Where the estate exceeds this amount, the surviving spouse takes a distributive share of the remainder, and where there are no children, he or she takes the entire remainder to the exclusion of next of kin.

This Act repeals the Dependants' Relief Act and broadens the scope of dependants' relief. In particular, a dependant will now have a claim against an estate where the deceased died intestate as well as where the deceased left a will. The classes of persons who may make claims on an estate have been expanded so as to include brothers and sisters as well as former spouses and common law spouses, as defined in the Act.

Children's Law Reform Act 1977

The Children's Law Reform Act 1977 abolishes the status of illegitimacy and declares that for all purposes the legal status of a child is independent of the marital status of his parents.

The Act provides various means by which parentage may be established, the most definitive method being by judicial declaration. However, in most cases such a step is unnecessary for the Act sets out six circumstances which give rise to a presumption of paternity. The first three presumptions relate to situations where a child is born in a marriage or where his parents marry after his birth. In the fourth presumption, the same principles are extended to the situation where a child is born in a union of some permanence where his parents have not married. The fifth and sixth presumptions deal with cases in which there is a clear public recognition of parentage, either by the parents' statutory declaration or by a judicial finding of paternity where parentage was in issue in the proceeding. The final method provided under this Act is a written acknowledgement of parentage against the interest of the declarant.

The Act encourages the use of voluntary blood tests as evidence of paternity by regulating standards for testing and by facilitating medical consents in cases of persons without capacity. The refusal to consent to a test is admissible evidence, permitting whatever inferences the court wishes to make.

The Act also establishes a registry system for certain documentation which will assist such persons as executors and trustees in making searches for children born outside marriage.

Marriage Act 1977

The Marriage Act 1977, seeking to provide administrative improvements to the marriage process, implements several recommendations of the Ontario Law Reform Commission.

In order to make marriage ceremonies available without delay and with greater dignity, the classes of public officials who have the jurisdiction to perform civil ceremonies have been expanded.

No longer serving its function of publicity in the community, the provincial residency period required before a licence could be obtained has been deleted. The provisions of the Act apply only to the first marriage ceremony and permit additional ceremonies by the same couple without formalities. The minimum age for marriage is eighteen years (the age of majority), or sixteen years with parental consent. Whenever possible, the consent of both parents is now necessary, expanding the prior provision requiring the father's consent only.

The common law action for breach of a promise to marry is abolished.

CANADA - QUEBEC

Civil Code Amendment Act 1977

The Act substitutes parental authority for paternal authority. It establishes the principle of parental authority, provides for its deprivation by judicial declaration, permits disagreements in the exercise of parental authority to be referred to a judge, and creates presumption in favour of third persons in good faith that a parent performing an act of authority concerning the child has the consent of the other parent.

It also empowers judges to authorise investment in trust of money belonging to a minor child.

July 1978 C.L.B. pp.502-506

CANADA - ALBERTA

Matrimonial Property Act 1978

The Act, which will come into force on a date to be fixed by Proclamation, provides for a system under which, upon the breakdown of a marriage, different classes of property owned by each or both of the spouses are to be distributed in the manner, and according to specific guidelines, set out therein. It also empowers the courts to give possession of the matrimonial home and household goods to a spouse to the exclusion of the other spouse in appropriate circumstances.

The following provisions of the Act govern the powers of the court to make a distribution and contain the matters to be taken into account when exercising this jurisdiction -

7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

(2) If the property is

- (a) property acquired by a spouse by gift from a third party,
- (b) property acquired by a spouse by inheritance,
- (c) property acquired by a spouse before the marriage,
- (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
- (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

the market value of that property

- (f) at the time of marriage, or
 - (g) on the date on which the property was acquired by the spouse,
- whichever is later, is exempted from a distribution under this section.

(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in such manner as it considers just and equitable:

- (a) the difference between the exempted value of property described in subsection (2) (in this subsection referred to as the "original property") and the market value at the time of the trial of the original property or property acquired.
 - (i) as a result of an exchange for the original property, or

- (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
- (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
- (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
- (d) property acquired by a spouse by gift from the other spouse.

(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

- (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
- (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
- (d) the income, earning capacity, liabilities, obligations, property and other financial resources
 - (i) that each spouse had at the time of marriage, and
 - (ii) that each spouse has at the time of the trial;
- (e) the duration of the marriage;
- (f) whether the property was acquired when the spouses were living separately and apart;
- (g) the terms of an oral or written agreement between the spouses;
- (h) that a spouse has made
 - (i) a substantial gift of property to a third party, or
 - (ii) a transfer of property to a third party other than a bona fide purchaser for value;
- (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
- (j) a prior order made by a court;
- (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
- (l) that a spouse has dissipated property to the detriment of the other spouse;
- (m) any fact or circumstance that is relevant.

The Act provides that matrimonial property orders cannot be made where spouses (or those contemplating marriage) enter into a written agreement dealing with the status, ownership and division of property (including future property) owned by either or both of them, and the agreement satisfies the formal requirements set out in the Act.

In a separate Part, the Act empowers the court to do one or more of the following, and the order (which may be varied) may be made subject to such

conditions and for such time as the court considers necessary -

- (a) direct that a spouse be given exclusive possession of the matrimonial home,
- (b) direct that a spouse be evicted from the matrimonial home,
- (c) restrain a spouse from entering or attending at or near the matrimonial home,
- (d) and in addition, give a spouse possession of as much of the property surrounding the matrimonial home as is necessary for its use and enjoyment.

Power is also given to the court to direct that a spouse be given the exclusive use and enjoyment of any or all of the household goods. The order may be for such duration and subject to such conditions as the court considers necessary, and may be varied.

In exercising jurisdiction under this Part of the Act, the court is required to have regard to -

- (a) the availability of other accommodation within the means of both the spouses,
- (b) the needs of any children residing in the matrimonial home,
- (c) the financial position of each of the spouses, and
- (d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.

The Act defines "household goods" as meaning personal property that is owned by one or both spouses, and was ordinarily used or enjoyed by one or both spouses, or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or aesthetic purposes. The expression "matrimonial home" is defined to mean property that is owned or leased by one or both spouses which is or has been occupied by the spouses as their family home, and which falls into one of the following categories: a home or part of a home that is a self-contained unit; part of a business premises used as living accommodation; a mobile home; a residential unit as defined in the Condominium Property Act or a suite.

October 1978 C.L.B. pp.793-795

CANADA - MANITOBA

Marital Property Act 1978

The preamble to the Act (expected to come into force on 1 October 1978) sets out the basic presumption of law that all assets acquired by spouses during marriage are to be shared equally in the event of marriage breakdown.

Assets are classified as being either commercial assets or family assets. Generally speaking, all assets used by the family, e.g., the marital home, the household furnishings, the family car, the family trailer, the family boat, the summer cottage, and all monies which are used for family purposes, are classified as family assets. All other assets, including insurance policies and pension plans, are classified as commercial assets. The marital home is placed in a special category and, no matter which spouse owns the marital home, both spouses have an equal right to the use and enjoyment of the marital home - s.6(2). The interest of the non-title owning spouse in marital home is further protected by The Dower Act (Statutes of Manitoba,

Chapter D100) which states that any disposition of the marital home, including any sale, mortgage or lien, is invalid without the written consent of that spouse.

Each spouse has an equal right to the use and enjoyment of any other family asset that is ordinarily used or enjoyed by both of them - s.6(3). This means that both spouses have an equal right to the use and enjoyment of assets like the family car but not to the other spouse's skis or golf clubs, assets which are ordinarily used or enjoyed by only one spouse.

While the basic presumption of equal sharing of all assets acquired during the marriage applies to both family and commercial assets, s.13 provides different tests to be applied by the Court in determining whether to vary the equal division of assets. Subsection 13(1) provides that with respect to family assets, the Court may vary the equal division "if the Court is satisfied that a division of those assets in equal shares would be grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature of value of any of their assets."

With respect to commercial assets, subsection 13(2) of the Act provides that the Court may vary the equal division -

"if the Court is satisfied that the division of those assets in equal shares would be clearly inequitable having regard to any circumstances the Court deems relevant including -

1. the unreasonable impoverishment by either spouse of the family assets;
2. the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
3. any spousal agreement between the spouses;
4. the length of time that the spouses have cohabited with each other during their marriage;
5. the length of time that the spouses have lived separate and apart from each other during their marriage;
6. whether either spouse has assets of an extraordinary value to which the Act does not apply by reason of their having been acquired by way of gift or inheritance;
7. the nature of the assets;
8. the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage."

While the Court is given a wider discretion to vary the equal division of commercial assets, the Court should only vary the equal division where there are clear, unmistakable grounds.

The Act is retroactive in effect and applies to all assets acquired during cohabitation by the spouses from the date of the marriage. In this regard, the Manitoba Law Reform Commission, the Manitoba Bar Association and a special Government appointed Family Law Review Committee recommended that either spouse be permitted to unilaterally opt out of the application of the Act. The government did not follow the recommendation, but this was an important factor in the decision to allow the Court a wider discretion to vary the equal division of commercial assets.

Section 5 of the Act permits spouses to make any agreement between themselves (in writing) as to how they wish to dispose of their assets. Spouses may agree that the Act will not apply to any or all of their assets.

The Act applies to all married persons in Manitoba except those spouses who were living separate and apart from each other on 6 May 1977 (the date that The Marital Property Act was first introduced into the Manitoba Legislature), unless those spouses, after that date, cohabit for a period of more than 90 days.

Gifts, trust benefits and assets acquired by way of inheritance and the appreciation and income earned from these assets are not shareable unless it can be shown that it was intended that both spouses would benefit - s.7. However, the appreciation and income earned (less depreciation) from other assets which are not shareable, i.e., acquired prior to the marriage of the spouses or at a time when the spouses were living separate and apart, is to be included in any accounting of the assets on marriage breakdown - s.4(3).

In the event that assets are dissipated or a spouse makes an excessive gift or a spouse transfers an asset for inadequate consideration, the other spouse may require, an application within two years of discovering the event, that these matters be considered in any accounting - s.6(6), (7), (8) and (9).

Dower Act 1978

The Dower Act had provided for the surviving spouse to elect to take under the will or, if the surviving spouse was not left assets comprising at least one-third of the value of the net real and personal property of the estate, the surviving spouse could elect to take under the Dower Act. The Act is now amended to allow the surviving spouse at least one-half of the value of the estate.

A testator could have avoided this particular provision by providing the surviving spouse with a life income of \$6,000 per year or property of the value of not less than \$100,000 over and above any encumbrances. The Act further provided that an annual income of \$3,000 in addition to property of the value of not less than \$50,000 over and above any encumbrances would also be sufficient. These amounts were clearly out of date.

While the Attorney-General has referred the whole of the Dower Act to the Manitoba Law Reform Commission for an in depth study and report as to recommend legislative changes, the amounts that a testator could leave to the surviving spouse and thereby vitiate the election available to the surviving spouse to take half of the estate, have been increased. The Dower Act now requires that the surviving spouse be provided at least \$15,000 per year or property of a value not less than \$250,000 over and above any encumbrances. Further, a testator could leave the surviving spouse an annual income of \$10,000 if in addition the surviving spouse was provided with property of a value of at least \$150,000 over and above any encumbrances.

While the Dower Act now provides that the surviving spouse is entitled to one-half of the estate, any division of assets that may have been made under the Marital Property Act will be taken into consideration in the accounting of the estate.

Family Maintenance Act 1978

When The Family Maintenance Act comes into force (expected to be 1 October 1978), the present Wives' and Children's Maintenance Act will be repealed.

(C.L.B. October 1978 pp.796-800)

CANADA - MANITOBA

Survivorship (Amendment) Act 1983

This amendment affects the "deemed survival" provisions of the Act. Formerly, where persons died in a common accident and it was not possible to determine the order of death, the younger was deemed to have survived the older. The result of this amendment is that where persons die in such a common accident, each will be deemed to have survived the other for the purpose of disposing of their estate.

Family Maintenance (Amendment) Act 1983

These amendments expand the scope of the statutory obligation to provide support for dependant persons. A common law spouse who has been substantially dependant on the other person during a continuous period of co-habitation of not less than five years may seek maintenance even where there is no child of the union. With respect to children, corroboration is no longer required in proving an allegation of parentage and the court may order that blood samples be taken. Legal distinctions between illegitimate and legitimate are abolished, both groups now having the same rights with respect to maintenance and inheritance.(C.L.B. July 1984 1072)

CYPRUS

Legitimation of Children Born out of Wedlock (Temporary Provisions) Law 1977 (No.48 of 1977)

This law makes provision enabling the court to make an order recognising a child born out of wedlock as a lawful child where such child was born of a mother who was engaged to be married to a deceased or missing person.

A "deceased" person means a person who has been killed as a consequence of the coup d'etat of 14th July 1974, or due to the Turkish invasion. A "missing" person means a person who has been missing as a consequence of the Turkish invasion of 20 July 1974 and in respect of whom the Government of the Republic, acting through the Ministry of Justice, does not possess any positive information as to his fate during the last six months before the making of the application under the Law.

A court order under the Law may be made on the application of the mother of the child which shall be served on the Attorney-General of the Republic and any other person directed by the court.

No order shall be made under the Law, unless -

- (i) at the time of conception of the child there was subsisting between the deceased or missing person, as the case may be, and the mother of the child a valid betrothal in accordance with the law applicable to both or a duly proved mutual promise of marriage;
- (ii) the marriage between them would not have been prohibited on account of any relationship in accordance with the law applicable to both; and
- (iii) from the last day on which the deceased or missing person was with the mother of the child until the birth of the child no period exceeding 302 days has intervened.

A child born out of wedlock which has been legitimated by an order of the court made in accordance with this Law shall be deemed to be a law-

ful child of the deceased or missing person.
(C.L.B. October 1977 pp.567-568)

GIBRALTAR

Inheritance (Provisions for Family and Dependents) Ordinance 1977

This Ordinance follows almost verbatim the United Kingdom Act of 1975 and follows the policy of keeping "family" legislation in line with that in England.

(C.L.B. July 1977 p.362)

GHANA

National Council on Women and Development Decree, 1975

This Decree was made as a result of the declaration by the United Nations that 1975 should be known as International Women's Year. The Decree establishes a Council to be known as the National Council on Women and Development.

The functions of the Council are:-

- (a) to advise the Government generally on all matters relating to full integration of women in national development at all levels;
- (b) to serve as the official national body for co-operating and liaising with national and international organisations on matters relating to the status of women;
- (c) to examine and evaluate the contribution of women in the economic, social and cultural fields and to advise Government as to the specific areas where participation by women may be strengthened or initiated;
- (d) to study the effect of customary beliefs, prejudices and practices on advancement of women in the educational, political and economic fields and to report their findings to the Government from time to time;
- (e) to devise a programme for the establishment of machinery and procedures to make possible the continuous evaluation of women's integration in the total development effort at local, regional and national levels;
- (f) to study plans and proposals for the establishment of large-scale non-formal education and training for the purpose of raising living standards in the rural and urban communities and eradicating illiteracy.

The Council consists of twenty persons, fifteen to be women with competence in areas of public affairs and women's activities, in addition to representatives from Ministries of Education and Culture, Health, Labour, Social Welfare and Co-operatives, Agriculture, Economic Planning, Finance, Foreign Affairs, Information, Justice and the Public Services Commission.

The Council was formally inaugurated by the Chairman of the National Redemption Council on 21 April 1975 with Mrs. Justice Annie Jiagge as Chairman.

(C.L.B. May 1975 p.5)

GUYANA

Dependants' Pension (Amendment) Act 1978

This Act amends the Widows and Orphans Pension and re-styles it as the

"Dependants' Pension Act". It includes females among the categories of Government employees to become contributors to the Fund. It allows children born out of wedlock to benefit from the Fund established by the Act. (C.L.B. January 1979 pp.36-37)

Children Born out of Wedlock (Removal of Discrimination) Act 1983

This Act makes a number of amendments to existing laws for the purpose of removing discrimination with respect to children born in and out of wedlock. Some of the main reforms introduced by the Act are;-

- (i) for the purpose of intestate succession, a person born out of wedlock shall be entitled to the same rights as a person born in wedlock;
- (ii) for the purpose of the maintenance of children, the Act provides for an increase in such maintenance and casts a duty on every man to maintain his children or the children of any woman he co-habits with or, in some cases, his grandchildren, whether the children or grandchildren were born in wedlock or not; and
- (iii) the Act repealed legislation that dealt separately with child-born out of wedlock and has removed the distinction between those born in wedlock and those born out of wedlock.

(C.L.B. April 1981 pp.546-547)

HONG KONG

Marriage Reform (Amendment) Ordinance 1979 Matrimonial Causes (Amendment) Ordinance 1979

These measures together provide that a registered Chinese customary marriage, which previously could only be dissolved by mutual consent, may now be dissolved in the same manner and on the same grounds (with one exception) as other marriages.

(C.L.B. January 1980 p.34)

INDIA

Child Marriage Restraint (Amendment) Act 1978

This Act amends the Child Marriage Restraint Act 1929 which prohibited child marriage. The minimum age limit for marriage for males was 18 years and for females 15 years (raised from 14 in 1949). By this Act the minimum age limits have been raised to 21 years for males and to 18 years for females. Similar and consequential amendments are made to the Hindu Marriage Act 1955 and the Christian Marriage Act 1872.

The Objects and Reasons published when the Bill was introduced explained that the Government felt that there was an urgent need to check the growth of population in the country. Raising the minimum age of marriage would result in lowering the total fertility rate by reducing the span of married life. It would also result in more responsible parenthood and in better health of the mother and child.

(C.L.B. January 1979 p.29)

Hindu Widows' Remarriage (Repeal) Act 1983

It has been judicially settled that once a widow succeeds to the property of her late husband and acquires absolute rights under the Hindu Succession Act 1856, she cannot be divested of that right on re-marriage. Certain provisions of the Act of 1856 making references to disabilities imposed on childless widows under the Dayabhaga School now suffer from a comparable obsolescence and the Law Commission in its 81st Report also recommended that the Hindu Widows' Remarriage Act of 1856, being obsolete, be repealed.

(C.L.B. January 1985 p.16)

JAMAICA

Status of Children Act 1976

The Act seeks to remove the legal disabilities of children born out of wedlock. It provides that (subject to certain provisions specified in the Act) for all purposes of the law of Jamaica the relationship between every person and his father and mother be determined irrespective of whether the father or mother are or have been married to each other and all other relationships be determined accordingly. The Act abolishes the rule of construction whereby in any instrument words of relationship signify only a legitimate relationship in the absence of a contrary expression of intention. The Act seeks to overcome, as far as possible, the lingering and difficult problem of the identification of the father of an illegitimate child by widening the ways in which paternity may be evidenced or established and provides for the inclusion of blood tests in court proceedings.

(C.L.B. October 1976 p.332)

MALTA

Marriage (Amendment) Act 1981

The amending Act adds the following new provisions -

- (a) In the case of non-observance of any formality or other similar requirement relating to the celebration of the marriage or preparatory thereto, a marriage may not be annulled and shall be held to have always been valid, if the demand for annulment has not been made within two years after the celebration of the marriage.
- (b) In the case of a marriage contracted by proxy signed earlier than ninety days before the marriage or which is revoked before the marriage without the knowledge of the other party, the marriage shall not be annulled and shall be held to have always been valid, if there has been co-habitation for at least one month after the celebration of the marriage.

(C.L.B. July 1982 pp.893-894)

MAURITIUS

Divorce and Judicial Separation (Amendment) Act 1978

The principal amendments made by this Act are to abolish the right of a

husband to claim damages against a co-respondent in a petition for divorce or for judicial separation and to remove undue delay as a discretionary bar to the pronouncement of a divorce.

The Act also declares that any party to a marriage who is domiciled in Mauritius or who is a citizen of Mauritius may petition for divorce or judicial separation

(C.L.B. January 1979 p.29)

MONTSERRAT

Matrimonial Causes for Foreigners Ordinance 1978

The Act provides for divorce within the jurisdiction of "foreigners" (defined as persons not belonging to the Colony or to any of the countries listed in the Schedule, at present Commonwealth Caribbean jurisdictions). The object is to provide foreigners with prompt divorces and to enable immediate re-marriage.

An Office of Foreign Divorce is established to which foreigners may apply. The Attorney-General is charged with the duty of determining the existence of a valid marriage, the true place and residence of the petitioner and the appearance of the respondent either in person or by duly authorised counsel. The filing of a petition and the entry of an appearance on behalf of a respondent is deemed a submission to the jurisdiction of Montserrat.

Special grounds for a petition include that the respondent has, since the celebration of the marriage demonstrated an incompatibility of character or temperament with the petitioner.

The court is required to enquire into the possibility of reconciliation and either pronounce a final decree, or dismiss the petition within 24 hours. The court may subsequently grant a rectifying decree on proof that the original decree was obtained by collusion or fraud or that material facts had not been brought before the court.

There is no residential requirement beyond presence in the jurisdiction. The Act also provides that any foreigner who has been in the Colony for 48 hours is entitled to apply for a marriage licence.

(C.L.B. October 1978 p.802)

NEW ZEALAND

Domestic Actions Act 1975

This act does away with the right to claim damages for adultery and abolishes the action for breach of promise of marriage, for harbouring a spouse or child and for enticement or seduction of a child. It does not abolish the action for enticement of a spouse but makes it clear that such an action may be brought by either husband or wife. Provision is made for the informal settling of property disputes arising from broken engagements.

(C.L.B. January 1976 p.14)

Estate and Gift Duties (Amendment) Act 1976

The major effect of this Act is to exempt all matrimonial homes from

estate duty when the home passes to the surviving spouse. Previously only matrimonial homes settled under the Joint Family Homes Act 1964 were in this position. Without affecting the rule on joint family homes the Estate and Gift Duties Amendment Act provides that a deduction from the dutiable estate may be made in any one of the following situations: where a matrimonial home, including a matrimonial home which forms part of a farm or other business, passes to a surviving spouse; where equivalent property passes instead of a home; and where the deceased's estate contains building land for a matrimonial home. The deduction is to the value of the home, land or equivalent property. The existing relief from estate duty on the succession of the surviving spouse continues to operate on the remainder of the succession once the value of the matrimonial has been deducted.

The Act also amends other aspects of the Estate and Gift Duties Act, principally by revising rates of duty.

(C.L.B. January 1977 p.19)

Matrimonial Property Act 1976

The Act came into force in 1 February 1977. Despite many modifications made during its passage through Parliament it continues to embody the philosophy that both spouses make an equal contribution to the generality of marriages and that the division of property if their marriage comes to an end should reflect this. Specifically, there is to be no presumption that a contribution of a monetary nature is of greater worth than one of a non-monetary nature.

Equal division of all the matrimonial property upon divorce or separation thus becomes the starting point, to be departed from only where on the facts the contribution of one spouse to the marriage has clearly been greater than that of the other. The matrimonial home and the family chattels are in a special category. They must be divided equally in every case unless the marriage has lasted for less than three years or there exist extraordinary circumstances in which equal division would be "repugnant to justice". The court is directed to have regard to the interests of minor or dependent children of the marriage and may settle the matrimonial property or any part of it for the benefit of the children of the marriage.

The Act distinguishes between matrimonial property, which is subject to division and separate property which ordinarily is not. Broadly matrimonial property consists of all property acquired by either spouse in contemplation of or after their marriage other than property acquired by gift or succession. The family home and chattels, whenever or howsoever acquired, are always matrimonial property.

The spouses may contract out of the provisions of the Act provided that each has had independent legal advice.

In essence the new Act creates a community property system of "deferred participation" not dissimilar to the situation in the Scandinavian countries. But it stops short of altering the existing law applying on the death of one spouse.

(C.L.B. April 1977 pp.204-205)

Status of Children (Amendment) Act 1978

The 1969 Status of Children Act removed legal disabilities attaching to

illegitimate children by requiring all relationships between all persons to be determined, irrespective of whether or not the parents had ever been married. As a result no one is barred from receiving under an intestacy, will or trust because the relationship through which the claim is traced is not a legitimate one, but the Act placed no obligation upon executors, administrators or trustees to inquire into the existence of any such claimant. The 1978 amendment changes this by requiring all executors, administrators and trustees to make relevant inquiries and letters of administration may not be granted until it is shown that these have been made. Similar inquiries must be made prior to the distribution of an estate or trust. The minimum form that such inquiries may take involves checking through the papers in the estate or trust, inquiring of at least one person likely to know, searching the register of instruments, declarations and orders maintained by the Registrar-General of Births, Deaths and Marriages and, in the case of an estate, inquiring of the solicitor last known to have acted for the deceased.

(C.L.B. October 1978 pp.802-803)

Family Proceedings Act 1980

The Family Proceedings Act which received the Royal Assent on 21 January 1981 is the major measure in which has become known as the "family law package". The other statutes are the Guardianship Amendment Act 1980, the Family Courts Act 1980 and the Social Security Amendment Act (No.2) 1980.

The Act revises the law relating to counselling and conciliation, dissolution of marriage, principles of maintenance, enforcement of maintenance and protection against domestic violence.

The Act is discussed in considerable detail in the Commonwealth Law Bulletin.

(C.L.B. April 1981 pp.483-485)

Domestic Protection Act 1982

This Act, which came into force on 1 March 1983, mitigates the effects of domestic violence and confers protection from molestation in the domestic sphere. It provides four remedies: a non-violence order, a non-molestation order, an occupation order and a tenancy order.

A non-violence order may be made if the court is satisfied that the respondent has used violence against or caused bodily harm to the applicant or a child of the family and is likely to do so again. When a non-violence order is made against a respondent he or she may be arrested if a police officer has good cause to suspect him or her of having breached the order.

When a non-molestation order is made against a respondent, he or she commits an offence by coming on to property where the applicant or child lives or is present, without the applicant's consent; or by molesting the applicant or child in certain specified ways - for example making persistent telephone calls. The penalty for breach of a non-molestation order is \$500 or three months' imprisonment.

An occupation order or a tenancy order may be made under the domestic protection legislation if the court is satisfied that such an order

is necessary for the protection of the applicant, or that it is the best interests of a child of the family. When an occupation order is made the applicant is entitled to live in the household residence to the exclusion of the respondent. When a tenancy order is made the tenancy of the house is vested solely in the applicant.

All the orders described may be made on an ex parte application. However, an order made ex parte is an interim one. As soon as reasonably practicable there must be a court hearing of which both parties have notice.

(C.L.B. April 1983 pp.373-374)

SAINT CHRISTOPHER AND NEVIS

Status of Children Act 1983

This Act gives effect to s.15 of the Constitution by removing legal disabilities of children born out of wedlock. It provides (subject to certain exceptions) that for all purposes of the law of St. Christopher and Nevis, a person is the child of his natural parents and his status as their child is independent of whether the child is born out of wedlock. The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished.

Other provisions of the Act deal with presumptions as to parenthood, the recognition of paternity, evidence and proof of paternity, the procedure for the relevant court to make a declaration of paternity and the power of the court in any civil proceedings in which the paternity of any person fails to be determined to require blood tests.

(C.L.B. October 1984 p.1444)

SAINT VINCENT

Status of Children Act 1980

This Act provides that for all purposes of the law (except in relation to questions of domicile, citizenship, adoption or the construction of the word "heir") the relationship between every person and his mother and father shall be determined irrespective of whether the father and mother are or have been married to each other. All other relationships will be determined accordingly.

(C.L.B. April 1981 pp.485-486)

SAINT VINCENT AND THE GRENADINES

Recognition of Divorces and Legal Separations Act 1983

This Act, which provides for the recognition of foreign divorces and legal separations is noted in the Commonwealth Law Bulletin.

(C.L.B. April 1984 p.547)

Matrimonial Homes Act 1984

This Act provides for the rights of a husband or wife to occupy a dwelling house which has been the matrimonial home.

Where one spouse is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or enactment and the other spouse is not entitled, then, subject to the Act, the spouse not entitled shall have certain rights called "rights of occupation", being -

- (a) if in occupation, a right not to be evicted or excluded from the dwelling house, except by order of the High Court; and
- (b) if not in occupation, a right, with the leave of the Court to enter and occupy the dwelling house.

So long as one spouse has rights of occupation, either of the spouses may apply to the Court for an order declaring, enforcing, restricting or terminating those rights or prohibiting, or suspending or restricting the exercise by either spouse of the right to occupy, or requiring either spouse to permit the exercise by the other of that right.

(C.L.B. July 1984 p.1072)

Domestic Violence and Matrimonial Proceedings Act 1984

This Act makes fresh provisions in the law relating to matrimonial injunctions; to provide the police with powers of arrest for the breach of an injunction in cases of domestic violence; to make provision for various rights in the matrimonial home.

(C.L.B. January 1985 p.17)

TRINIDAD AND TOBAGO

Married Persons Act 1976

The Act consolidates and amends the law relating to married persons. The opportunity has been taken to up-date the law by including certain reforms with respect to the rights of enjoyment by married women in property and with respect to the tortious and criminal liability of spouses inter se.

The Act seeks to equate the position of a married woman to that of a man by removing the restrictions on anticipation and alienation imposed on the enjoyment of property by a married woman. Under the existing law so long as spouses are living together no criminal proceedings in respect of an appropriation of property belonging to either one can be brought by the other, unless it took place in the course of the desertion of one spouse by the other. In such proceedings either spouse is competent to give evidence without the consent of the other.

The Act confers on any spouse the right to institute a prosecution against the other spouse for any criminal offence committed by the latter on the property of the former. The institution of such proceedings would be subject to the approval of the Director of Public Prosecutions so as to curb any over-readiness to institute proceedings by one spouse against the other and thus prevent situations from arising which will militate against the continuation of a satisfactory domestic relationship

(C.L.B. April 1977 pp.205-206)

Status of Children Act 1981

The Act seeks to remove the legal disabilities of children born out of wedlock. It provides that the status and rights, privileges and obligations of a child born out of wedlock shall be identical to those of a child born in wedlock.

The Act also provides for the Court to make paternity orders and gives the Court power to require the use of blood tests.

(C.L.B. October 1983 p.1166)

UGANDA

Affiliation (Amendment) Bill 1984

The Bill seeks to amend the Affiliation Act so as to raise the amount of money the court may order to be paid as maintenance of an infant child by a putative father from shs.100 to shs.2,000.

(C.L.B. January 1985 p.17)

UNITED KINGDOM

Inheritance (Provision for Family and Dependents) Act 1975

This Act follows the recommendations of the Law Commission (England and Wales). It repeals the Inheritance (Family Provisions) Act 1938 and enables the court to order the making of "reasonable financial provision" out of the estate of a deceased person for the wife or husband, former wife or husband, or child of the deceased, and certain other persons, if such provision is not made under the will or the law relating to intestacy. S.3 of the Act contains a list of the matters to which the court is to have regard in exercising its powers.

(C.L.B. January 1976 p.15)

Legitimacy Act 1976

The Act consolidates certain enactments relating to legitimacy. It provides *in alia* for the legitimacy of children of certain void marriages legitimization of adopted children and the rights of legitimated persons to take interests in property.

(C.L.B. October 1976 p.333)

Domestic Violence and Matrimonial Proceedings Act 1976

The Act amends the law relating to matrimonial injunctions and provides the police with powers of arrest for breaches of injunctions in cases of domestic violence.

(C.L.B. January 1977 p.20)

Marriage (Scotland) Act 1977

The Act makes new provisions for marriage in Scotland

(C.L.B. July 1977 p.362)

Domestic Proceedings and Magistrates' Court Act 1978

This Act implements the Report on Matrimonial Proceedings in Magistrates' Courts by the Law Commission (for England and Wales) presented in 1976. In making new provision for matrimonial proceedings in those courts, the Act brings their jurisdiction and procedure more in line with that applicable to matrimonial causes in higher courts.

(C.L.B. July 1978 p.803)

Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979

This order will come into force on 1 March 1980. It provides for the implementation in the United Kingdom of the Convention of the Recognition and Enforcement of Maintenance of Decisions Relating to Maintenance Obligations concluded at the Hague on 2 October 1973.

(C.L.B. January 1980 p.35)

Marriage (Stepparents and Stepchildren) Bill 1981

This Bill has been introduced into Parliament in order to enable courts to consider applications for leave for marriages to take place between stepparents and stepchildren, notwithstanding that they stand in relation to each other within the prohibited degrees of affinity.

(C.L.B. April 1981 pp.486-487)

Matrimonial Homes (Family Protection) (Scotland) Act 1981

The Act makes new provision for Scotland as to the rights of occupancy of spouses in a matrimonial home and of co-habiting couples in the house where they cohabit; to provide for the transfer of the tenancy of a matrimonial home between the spouses in certain circumstances during marriage and on the granting of a decree of divorce or nullity of marriage, and for transfer of the tenancy of a house occupied by a co-habiting couple in certain circumstances; and to strengthen the law relating to matrimonial interdicts.

(C.L.B. January 1982 pp.23-24)

Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983

This Act extends the jurisdiction of sheriffs in Scotland in relation to actions for divorce. It makes provision as regards the sufficiency of evidence in certain actions for divorce in Scotland; it introduces a new provision in Scotland as to the fees and outlays of counsel and solicitors in relation both to legal aid and to the giving of legal advice and assistance under the Legal Advice and Assistance Act 1972.

The Act also makes new provision in relation to the regulation of

fees payable in the Scottish courts.

(C.L.B. July 1983 p.795)

Matrimonial Homes Act 1983

This Act consolidates certain enactments relating to the rights of a husband or wife to occupy a dwelling-house that has been a matrimonial home.

Marriage Act 1983

This Act makes changes in the law relating to the place of solemnisation of marriage in England and Wales and in Northern Ireland. It provides for the marriage of a person to be solemnised where that person is if he or she cannot move by reason of illness or disability or is detained under certain legislation relating to mental health or in prison.

(C.L.B. October 1983 p.1166)

Industrial Relations

GUYANA

Factories (Amendment) Act 1983

This Act amends the Factories Act (Cap. 95.02) so as to remove discrimination with respect to the employment of women in factories.

Prior to this amendment, the Act provided for regulations to be made prescribing different hours of work for women in factories and prescribing different conditions with respect to their employment. Such regulations tend to place women at a disadvantage in the employment market. This amendment removes the power to make such regulations.

(C.L.B. October 1984 p.1445)

NEW ZEALAND

Equal Pay (Amendment) Act 1976

The Act makes a number of procedural changes to the Equal Pay Act 1973 which was passed following the 1971 report of the Commission of Enquiry into Equal Pay. The 1973 Act provided for the removal and prevention of discrimination based on sex in rates of pay of males and females in paid employment. Equal pay was to be implemented under the Act in five approximately equivalent steps with full equal pay to take effect from 1 April 1977.

The Act provides that an employer's own decision to fix the wage rates for an individual employee or groups of employees will be covered by the Act and that the percentage relationship required by the Act to be maintained between male and female rates at each of the five implementation steps must continue to be maintained following any adjustment of male rates of pay at any time.

Employers must provide individual written pay advice to female workers whenever their rates of pay are altered for any reason during the implementation period. They must also supply at the request of an employee all relevant information as to any right or benefit provided for that employee as a result of an employer's own decision to increase that employee's rate of pay.

(C.L.B. January 1977 p.29)

Health, Education and Social Welfare

BANGLADESH

Dowry Prohibition Act 1980

Dowry, meaning the property given or agreed to be given either directly or indirectly by one party to a marriage to the other party to the marriage, or by parents of either party to a marriage or by any other person to either party to the marriage or to any other person, is a social curse condemned by all, irrespective of caste or creed, but all efforts to eliminate it socially have failed. Hence a legislative measure had to be adopted to prohibit dowry. Giving or taking, or abetting the giving or taking, of dowry in a marriage and demanding, directly or indirectly, from parents or guardians of a bride or bridegroom, as the case may be, any dowry, has been made an offence punishable with imprisonment which may extend to one year or a fine of up to 5,000 taka or with both.

The law has also made provision for the transfer to the woman of any dowry received for her benefit or for the benefit of her heirs by any person other than the woman in connection with whose marriage it is given. The failure to transfer any property so given as dowry within the time limit prescribed therefore has been made punishable with imprisonment of up to one year or a fine of up to 5,000 taka or with both.

(C.L.B. April 1981 p.492)

Cruelty to Women (Deterrent Punishment) Ordinance 1983

This Ordinance provides for deterrent punishment for cruelty to women which has been causing anxiety to all in society. It provides inter alia-

- (1) Any person who kidnaps or abducts any woman of any age with intent that such woman shall be employed or knowing it to be likely that that such woman shall be employed, or that such woman may be compelled or knowing it likely that she may be compelled to marry any person against her will or that such woman may be forced or seduced to illicit intercourse, shall be punishable with transportation for life or with rigorous imprisonment of up to 14 years.
- (2) Import, export, sale, letting to hire, disposal otherwise and buying hiring and obtaining possession otherwise, of any woman of any age with intent that such woman shall be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful purpose are punishable with transportation for life or with a term of imprisonment of up to 14 years or a fine or both.

- (3) Further, causing or attempting to cause death or grievous hurt to any woman for dowry by the husband or parent, any guardian or relation of the woman is punishable with death, or with transportation for life or with rigorous imprisonment for a period of up to 14 years or with a fine.
- (4) Causing death to a woman in committing or attempting rape or murdering a woman after committing rape is punishable with death, or with transportation for life and also with a fine. The offence of attempting to cause death or causing grievous hurt to a woman in committing rape or attempting to commit rape is punishable with transportation for life or with rigorous imprisonment for up to 14 years or also with a fine.

(C.L.B. January 1984 p.53)

BARBADOS

Medical Termination of Pregnancy Act 1983

This Act provides that notwithstanding ss.61 and 62 of the Offences Against the Person Act, the treatment for the termination of pregnancy is lawful if administered in accordance with the Act.

The treatment for the termination of a pregnancy of not more than 12 weeks duration may be administered by a medical practitioner if he is of the opinion, formed in good faith, - (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health, or (b) that there is substantial risk that if the child were born, it would suffer such physical or mental abnormalities as to be seriously handicapped.

The written statement of a pregnant woman that she reasonably believes that her pregnancy was caused by an act of rape or incest is sufficient to constitute the required element of grave injury to mental health. In determining whether the continuance of the pregnancy would involve such risk of injury to the health of the pregnant woman, the medical practitioner must take into account the pregnant woman's social and economic environment, whether actual or foreseeable.

There are similar provisions relating to the treatment for the termination of pregnancy of more than 12 weeks duration but not more than 20 weeks if two medical practitioners are of the opinion, formed in good faith of the risks referred to above and the treatment for the termination of a pregnancy of over 20 weeks duration of three medical practitioners are of such an opinion.

For the purposes of termination the duration of the pregnancy must be determined - (a) by calculating from the first day of the last normal menstruation of the pregnant woman ending on the last day of the relevant week; and (b) by clinical examination.

(C.L.B. October 1983 pp.1172-1173)

JAMAICA

National Insurance (Amendment) (No.2) Act 1979

This Act, a companion measure to the Maternity Leave Act, creates a new benefit, namely a maternity benefit.

The amount payable as maternity allowance is equivalent to the

national minimum wage in force at the time of entitlement. This allowance will be payable for eight weeks from the week of claim, if the claim is made prior to the date of confinement, or the date of confinement in any other case. The allowance is not payable in respect of any period earlier than 11 weeks before the expected date of confinement. Also it is not payable unless the claimant confirms the date of confinement or expected date of confinement by furnishing one of the following -

- (i) a certificate from a registered medical practitioner,
- (ii) a certificate from a registered midwife, or
- (iii) such other evidence as the Minister shall consider satisfactory.

(C.L.B. January 1981 p.24)

MALAWI

Decency in Dress (Amendment) Bill 1982

This Bill seeks to amend the Decency in Dress Act (Cap. 7:04) by inserting therein an additional subsection empowering the Minister to suspend in certain cases the application of the provision of the Act which declares the wearing of trousers by a female in a public place to be a criminal offence.

(C.L.B. October 1982 p.1297)

PAPUA NEW GUINEA

Baby Feed Supplies (Control) Act 1977

The Act restricts the right of freedom of expression conferred by s.46 of the Constitution in order to protect baby health from the consequences of the unhygienic, insufficient or wrong use of certain items connected with the feeding of babies.

Under the Act it is an offence to publish an advertisement whose intention or likely effect is to encourage the bottle feeding of babies or the purchase or use of milk or other products in connection with the use of prescribed articles.

(C.L.B. January 1978 pp.24-25)

SEYCHELLES

Termination of Pregnancy Act 1981

This Act legalises the termination of pregnancy (abortion) by qualified doctors in certain circumstances.

These circumstances are similar to those set out in the Medical Termination of Pregnancy Act 1983 of Barbados and appearing at p.54 supra.

(C.L.B. July 1981 p.873)

UGANDA

National Council of Women Decree 1978

This Decree establishes a National Council of Women with branches in each sub-county and province. The objectives for which the Council is established include, inter alia, the promotion and inspiration among women of a spirit of unity and national consciousness; to work for the eradication of illiteracy among women; to improve family life, especially the stability of the family; to provide amenities for the care, education and general welfare of children; to encourage women to play their proper role in national development; to initiate and encourage the formation of girl's and women's organisations; and to promote relations with international women's organisations. All women's and girl's voluntary organisations are abolished and all women's or girl's organisations whose membership exceeds 100 must apply to the Council for membership.

(C.L.B. April 1979 pp.362-363)

Industrial Relations

JAMAICA

Maternity Leave Act 1979

This Act, which came into operation on 31 December 1979, provides for the right of female workers to be granted maternity leave by their employers and to receive maternity pay in some cases.

Basically, the female worker who comes within the scope of the Act is one who has entered into, or works under, a contract with an employer, whether the contract is express or implied and (if it is express) whether it is oral or in writing and whether it is a contract of service or apprenticeship. This includes any individual who is in the service of the Government.

(C.L.B. January 1980 p.27)

Private International Law

AUSTRALIA - SOUTH AUSTRALIA

Domicile Act 1980

This Act abolishes the dependent domicile of married women and makes other reforms in the law relating to domicile. The Act provides, inter alia -

- (i) The rule of law whereby a married woman has at all times the domicile of her husband is abolished;
- (ii) the rule of law whereby the person's domicile of origin revives on the abandonment of a domicile of choice without the acquisition of a new domicile is abolished and the Act provides that the domicile that a person has at any time continues until he

acquires a different.

(C.L.B. July 1981 pp.884-885)

AUSTRALIA - WESTERN AUSTRALIA

Domicile Act 1981

This Act is similar to those enacted in other Australian jurisdictions and to that of South Australia referred to on p.56 supra.

C.L.B. April 1982 pp.473-474)

CANADA

Reciprocal Enforcement of Maintenance Orders Act 1982

This Act revises the Reciprocal Enforcement of Maintenance Orders Act 1980 and adopts the Uniform Act recommended by the Uniform Law Conference of Canada. Among major changes are the simplification of choice of law rules.

(C.L.B. January 1983 p.42)

NEW ZEALAND

Domicile Act 1976

This Act makes a number of reforms in the law of domicile and restates a substantial part of that law. The Act's most noteworthy result will be to abolish the rule of the married woman's dependent domicile.

(C.L.B. October 1976 pp.342-343)

Judicial Decisions

Administrative Law

NEW ZEALAND

Review of decision of certifying consultants allowing abortion

The Court of Appeal dismissed the appeal and upheld Speight J's decision denying the application to review the decision of the certifying consultants that an abortion be performed on a teenage girl. The certificate was in the form prescribed by the Abortion Regulations 1978 (SR 1978/50). Speight J denied that Dr. Wall had standing to bring the proceedings and expressed the view that the allegation of Dr. Wall could not be accepted on a matter "where medical judgment is crucial".

Both Speight J and the Court of Appeal reviewed the history and purposes of the Contraception, Sterilisation and Abortion Act 1977, which constituted a "comprehensive code", which in general placed administrative decisions made by medical practitioners beyond review on the initiative of an outsider claiming to represent the interests of the unborn child. Reliance was placed on the dictum of Lord Wilberforce in Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd. (1981) 2 All ER 93, 97, 98. Ordinarily, there will be no review of decisions taken under the abortion legislation. The Court used this language to describe the legal situation-

"If there is scope for such judicial review there are two constraining factors which must inevitably and very severely limit its operation. The first concerns the matter of standing which already has been discussed. The Act constitutes a code governing the procedure to be followed before abortions are carried out. It provides an elaborate screening mechanism dependent almost entirely on medical judgment. It explicitly defines and prescribes the functions of those who have rights and responsibilities under the statutory scheme. Should one of the defined participants in the prescribed process assert a statutory responsibility in a way which impinges on or affects anyone else directly within the expressed scope of the statute it may be arguable perhaps that the latter has a legitimate interest in having the other person's exercise of the responsibility conferred under the Act reviewed by the Court. But to that extent and no more. Whatever their concerns may be, individuals outside the direct ambit of the Act could not possibly show that the exercise of statutory powers under these provisions would operate to their personal advantage or disadvantage. It follows therefore that no individual who is

not one of the statutory participants could ever be regarded as having a sufficient interest to institute proceedings for judicial review.

The second constraining factor is related to the limited scope of any judicial review that may be available. The subject of the review would be the exercise of medical judgment by professional men in discharge of a professional responsibility under a statutory authority. To put the matter in another way, the legislation provides for the formulation of a medical judgment by medical practitioners as to whether the performance of an abortion is authorized by s.187A of the Crimes Act which with two exceptions is entirely concerned with medical considerations. And most significantly, as we have earlier mentioned, the exercise of that medical judgment in individual cases is not subject to review by the supervisory committee, the specialist body established under the Act to exercise oversight of the legislation. Against that statutory background we do not think it can possibly have been Parliament's intention that upon such a delicate matter as this the Courts could freely take under review the conclusions reached by the professional men so exclusively entrusted with the statutory responsibilities. A further consideration in regard to all this was mentioned by Sir George Baker P in the Paton case(1979) 1 QB 276. He said (at p. 272), "any process for the enforcement of the criminal law in a civil suit must be used with great caution, if at all".

The Courts are ordinarily entitled in terms of their responsibilities under the Judicature Amendment Act to determine whether the statutory criteria under any legislation have been or will be met in particular cases. But if that principle is to be applied to this statutory scheme what will always be difficult will be to isolate underlying and strictly legal questions from what will be the heavy overlay of straight-out medical judgment; and then (if a case actually does arise) to discern an adequate evidentiary basis for an argument that the statutory criteria have not been honestly applied by the professional people involved. " Wall v Livingston and Another Court of Appeal, 20th December 1982. (C.L.B., Jan. 1984 pp.82 - 83).

Bankruptcy and Insolvency

AUSTRALIA

Bankruptcy - execution by wife of bankrupt of mortgage over joint property
The High Court of Australia has held that it was not correct to say that, for the purposes of s.111 of the Bankruptcy Act 1966 - 1973, a wife who joined with her husband in giving a mortgage over land which the two spouses

owned as tenants in common for the purpose of providing a security for the husband's bank overdraft thereby made the land "available" to her husband and, accordingly, the execution of the mortgage did not give the husband any right or power to use or dispose of the wife's interest in the land.

Thompson v. Smith (1977) 12 A.L.R. 513
(C.L.B., July 1977, pp.437)

Bankruptcy proceedings - whether an "engagement ring" a "wedding ring", an "eternity ring" a "settlement" made "in consideration of marriage" or form part of estate of bankrupt

Section 120 of the Bankruptcy Act 1966 provides, in part-

- "A settlement of property, whether made before or after the commencement of this Act, not being-
- (a) a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or
 - (b) a settlement made on or for the spouse or children of the settlor of property that has accrued to the settlor after marriage in right of the spouse of the settlor,
- is, if the settlor becomes a bankrupt and the settlement came into operation after, or within 2 years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy."

The Federal Court of Australia has held that-

1. the words "in consideration of marriage" in s.120(1)(a) of the Bankruptcy Act require more than a settlement made in "contemplation of marriage" if a settlement is to escape avoidance under the section by reason of being a marriage settlement.
 2. a settlement which was not: (a) made on the occasion of a marriage; (b) conditioned only to take effect on the marriage taking place; and (c) made for the purpose of or with a view to encouraging or facilitating the marriage, was not a settlement made "in consideration of marriage" within s.120(1)(a); and
 3. an "engagement ring", a "wedding ring" and an "eternity ring" which a man (who became bankrupt within the relevant period) gave to a woman, after she had accepted his offer of marriage and at about the time of their commencing a de facto relationship which ultimately culminated in marriage, were property the subject of a "settlement" but were not the subject of a settlement made "in consideration of marriage" within s.120(1)(a) and, accordingly, they formed part of the estate of the bankrupt recoverable by his trustee from the wife of the bankrupt.
- Re. Walsh; Hamilton v Walsh (1983) 47 ALR 396
(C.L.B. April 1985, pp. 1097-1098)

Constitutional Law

AUSTRALIA

Whether Family Law Act 1976 constitutional

The High Court of Australia has had its first opportunity to consider the validity of the Family Law Act 1975 which provides that irretrievable breakdown of marriage is the only ground of divorce. In two separate actions the court, by a majority, held-

- (i) that under the Act both custody and maintenance provisions could be heard separately;
- (ii) the provisions of the Act for property divisions were valid only when they were joined with proceeding for divorce or nullity of marriage;
- (iii) the Act related only to disputes between married couples in relation to either their maintenance, or that of their children or adopted children, and not to other persons;
- (iv) the Act's requirement that State courts exercising Federal jurisdiction under the Act should be closed was invalid;
- (v) the Act's requirement that, in effect, dispensed with Judges wearing wigs and gowns were valid; and
- (vi) order of State Supreme courts exercising Federal jurisdiction under the Act were not invalidated if the Courts' Judges had worn wigs and gowns.

Apart from the constitutional issues involved, the High Court had occasion to examine, in some depth, the role of courts, particularly whether they were required by law and tradition to remain open to the public in most circumstances.

Russell v. Russell; Farelly v. Farelly (1976) 9 A.L.R. 103
(C.L.B., October 1976, pp.362)

New South Wales

Cancellation of promotions in employment - all female teachers - valid appointments - whether sexual discrimination

The Supreme Court of New South Wales has had occasion to consider a situation where an issue of the States' Education Gazette contained the following statement: "From the beginning of 1965 the system of equal opportunity for men and women will operate at all levels. Women will be regarded as equally eligible with men for all promotion positions in co-educational high or secondary schools. Men will receive preference in boys' schools and women preference in girls' schools".

A female teacher who was the deputy principal of a girls' high school applied, prior to the issue of the Education Gazette, pursuant to the

Teaching Act 1970 (N.S.W.) for the position of principal of that school, which was to become vacant as from the beginning of the school year in 1979, and was duly appointed. Before she had commenced her new duties, and before notice of the new appointment had been published in the Education Gazette, she was informed that the appointment had been cancelled by the delegate of the Director-General of Education appointed pursuant to s.18(2) of the Act, substantially on the ground that it might contravene s.25(2)(b) of the Anti-Discrimination Act 1977 (N.S.W.). There were two other female teachers whose appointments, duly made, were cancelled in the same circumstances.

In proceedings to determine whether the cancellations were valid, it appeared that there were more senior male teachers available for appointment to each of the positions, the Supreme Court held that-

- (i) while the court would not usually order specific performance of a contract of service, because of the impossibility of supervising the enforcement of it, there were, nevertheless, cases, particularly where persons were employed in, or appointed to, offices in public or civil services, where the court would make declarations and orders which, in substance, had the effect of compelling a governmental Department to retain in its service, in a particular position, persons upon whom are conferred statutory rights;
- (ii) the appointments of the three plaintiffs were validly, and unconditionally, made, pursuant to s.27(1) of the Teaching Services Act;
- (iii) the Director-General was not empowered to cancel, set aside, or withdraw the appointments, either prior to the appointee commencing duties, or prior to the advertisement of the appointments in the Education Gazette pursuant s.44(1) of the Act;
- (iv) the publication of a notice pursuant to s.44(1) was not a condition precedent to the validity of an appointment: only to make publication conclusive evidence of appointment.
- (v) the power of the Director General under s.17(1) of the Act, in particular s.17(1)(f) (which empowered him to determine promotions and transfers of officers), had to be read down in the light of ss.27,31,32 and 37, and gave him no authority to do what he had purported to do here;
- (vi) assuming, but not deciding, that the appointments of the three plaintiffs had been made in breach of s.25(1)(b) of the Anti-Discrimination Act, nevertheless, the appointments would not be invalid unless, upon the true interpretation of that Act and the Teaching Service Act, considered in conjunction, that was the intended legislative consequence;
- (vii) there was nothing in the Anti-Discrimination Act which revealed any such legislative intention;
- (viii) because no penalty was provided for breach of s.25(1)(b) of the Anti-Discrimination Act, and since the Anti-Discrimination Board was empowered by s.113(b)(iv) of the Act to make an order

declaring void, in whole or in part, and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of the Act, the legislative intention was plain that no transaction entered into in contravention of the Act would, because of that fact alone, be void and of no effect.

- (ix) accordingly, assuming the conduct of the Director-General in appointing the three plaintiffs were illegal, that the appointments were nevertheless valid;
- (x) the Director-General could not call in aid s.54(1) of the Anti-Discrimination Act, because, upon its true interpretation, that provision was designed to preserve the validity of things done pursuant to another Act of Parliament, and, if anything, supported the view that the Act was not, except as provided in s.113, intended to void transactions; and
- (xi) therefore, there was no provision in the Anti-Discrimination Act which affected the validity of the appointments which had been made.

Anderson and others v. Director-General of Education (1978) 2 N.S.W.L.R.

423

(C.L.B., October 1979, pp.1044-1046)

Queensland

Scope of the "marriage power" contained in s51(xxi) of the Australian Constitution

A court of summary jurisdiction in Queensland made an order in 1975, pursuant to the Family Law Act 1975, granting custody of a child of a marriage to the child's mother. At that time the child's parents had separated and the mother was living with another man. In 1978, following an assault on the child by the man with whom the mother was living, an order was made by the Queensland Children's Court admitting the child to the care and protection of the Queensland Director of the Department of Children's Services pursuant to s.49 of the Children's Service Act 1965 (Qld) on the ground that, not having a parent or guardian who exercised proper care of or guardianship over her, she was exposed to physical danger.

On the following day the child's father applied, pursuant to the Family Law Act, to the court of summary jurisdiction for a variation of the earlier custody order that had been made in favour of the child's mother. The application was contested, and was therefore transferred to the Family Court of Australia where an order was made granting the custody of the child to the father. No application for principal relief was made.

Section 10(3) of the Family Law Act prevents the Family Court of Australia from making a custody order with respect to a child already in the custody of a State authority pursuant to State law, unless the Court is satisfied that special circumstances exist justifying the

making of such an order. The sub-section also given precedence to an order so made over previous orders made under State law.

The Director sought an order for prohibition from the High Court of Australia against the Judge of the Family Court of Australia on the basis that s.10(3) was beyond the power of the Commonwealth of Australia. On his behalf, it was submitted (a) that the marriage power contained in s.51(xxi) of the Australian Constitution does not extend to the enforcement of rights of custody by proceedings which are separate and independent of proceedings for annulment or dissolution of marriage; and (b) that, in any event, the marriage power is confined to the definition and enforcement of the rights inter se of the parties to a marriage and that it does not enable Parliament to authorise a court to deprive a person, not being a party to the marriage or the Director of the custody of a child reposed in him by State law.

The High Court granted the order nisi for prohibition, and, in so doing, held that:-

- (i) the marriage power contained in s.51(xxi) of the Australian Consitution should be given no narrow or restrictive interpretation;
- (ii) in order to be within power the legislation in question must have a close connection with the marriage relationship;
- (iii) the marriage power extends to the conferring of jurisdiction upon courts to make and enforce orders for custody of the children of a marriage independently of the grant of principal relief;
- (iv) the marriage power is not restricted to a definition of, or to making provision for the enforcement of, the rights of the parties inter se, and, accordingly, orders may be made against persons who are not parties to the marriage;
- (v) s.10 of the Family Law Act, as amended, in so far as it would authorise the Family Court of Australia by its order to interfere with the custody or possession of a child in respect of whom an order had been made under s.49 of the Children's Services Act (Qld.), is invalid as not being a law with respect to marriage and is thus beyond the constitutional competence of the Federal Parliament;
- (vi) however, regarding the order of the Family Court of Australia as no more than an order inter partes binding only husband and wife as to their respective rights vis-a-vis custody of the child, there would be no ground for prohibition, but it should be declared that the order was not enforceable against the Director; and
- (vii) the scope of the marriage power is not so large as to enable an order for custody to prevail over a State law which applies generally to all members of the community or to all children in the community. However, in the present case the State law had legislated with respect to custody itself and custody had been granted to two different persons. In such a case the

Federal Parliament may expressly override the operations of the State law relying upon s.109 of the Australian Constitution to ensure that the Federal law will have effective operation.

R. v. Lamber, Ex parte Plummer (1980) 32 A.L.
(C.L.B. July 1981, pp 901-902)

New South Wales

Sex discrimination complaint - whether misconceived -complainants's right to be notified of reasons for declining to entertain complaint

The plaintiff originally lodged a complaint with the first defendant, who is the New South Wales Counsellor for Equal Opportunity, alleging discrimination against her by her then employer, the University of New South Wales, on the grounds of her sex, contrary to s.24 of the Anti-Discrimination Act 1977 (NSW). The University had required the plaintiff to disclose her current marital status by the use of the title "Mrs." in lieu of the title "Ms." which she preferred, whereas male employees were not so obliged to proclaim a marital status because the equivalent title "Mr." did not differentiate between men who were married and those who were not.

The Counsellor investigated the plaintiff's complaint but ultimately declined to entertain it upon the basis that it was possibly misconceived but definitely lacking in substance. The complaint was then referred to the Anti-Discrimination Board which, after a hearing, held that the complaint was both misconceived and lacking substance.

Section 90 of the Anti-Discrimination Act provides as follows:-

- (1) Where, at any stage of his investigation of a complaint, the Counsellor is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, he may, by notification in writing addressed to the complainant, decline to entertain the complaint.
- (2) The counsellor shall, in a notification under sub-section (1), advise the complainant of:-
 - (a) the reason for declining to entertain the complain and
 - (b) the rights of the complainant under section 91(1).

Section 91(1) provides that:-

Where the Counsellor has given a complainant a notification under section 90(1), the complainant may, within 21 days after the date of that notification, by notice in writing served on the Counsellor, require the Counsellor to refer the complaint to the Tribunal.

The Supreme Court of New South Wales, to whom the matter was brought on appeal, held that:

- (i) a conclusion by the Counsellor for Equal Opportunity that a complaint is outside the provisions of the Anti-Discrimination

- (N.S.W.) is equivalent to declining to entertain the complaint for "any other reason" within the meaning of 2.90(1) of that Act; and
- (ii) such a conclusion gives a complainant the right to be notified of the reason for declining to entertain the complaint in accordance with 2.90(2), and thereafter to require the Counsellor to refer the complaint to the Anti-Discrimination Board, in accordance with s.91(1).

In so holding, the Supreme Court observed, inter alia, as follows:-

"Of the four specific descriptions given by s.90 to a complaint which the Counsellor may decline to entertain, three clearly refer to the insufficiency or to the absence of merit of the factual basis for the allegation made in the complaint rather than to whether the complaint is one within the provisions of the Act at all. The adjective "misconceived" is the possible exception. The ordinary English meaning of something which is "misconceived" is something which is founded upon a wrong idea. In the abstract that could perhaps mean a wrong idea as to the application of the Anti-Discrimination Act to the facts which form the basis of the complaint. The plaintiff submits that this word should be so interpreted here, so that a complaint considered to be outside the provisions of the Act should always be dealt with as "misconceived" and thus in accordance with the provisions of s.90.

In its present context, however, the word "misconceived" should not, in my view, be given here a meaning beyond a complaint founded upon a wrong idea as to the facts, so that a common genus or class is maintained with the three other adjectives utilised in s.90(1).

But that is not an end to the inquiry. The counsellor may also decline to entertain a complaint where she is satisfied that it should not be entertained "for any other reason". Normally, such a phrase would be construed ejusdem generis with the four adjectives which preceded it so as to exclude the application of s.90 where the complaint is considered to be outside the provisions of the Act rather than one for which there is an insufficient or unmeritorious factual basis. The ejusdem generis rule must nevertheless give way to an indication that the words are to be read in the general sense in which they are expressed: R v Regos (1947) CLR 613, at pp. 623, 624; Cody v J H Nelson Pty. Ltd. (1947) CLR 629, at p. 639. There is, in my opinion, a strong indication in this statute that the words in question should not be read ejusdem generis.

Langley v. Niland and Another (1981) 2 NSWLR 104
(C.L.B. July 1982, pp.928-929)

BERMUDA

Person deemed to belong to Bermuda - whether "child" includes illegitimate children

Section 11 of the Constitution of Bermuda provides:-

- " (5) For the purposes of this section a person shall be deemed to belong to Bermuda if that person (a) possesses Bermudian status;.... (c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person; or (d) is under the age of 18 years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies".

The Jamaican mother of four illegitimate children all born in Jamaica married a Bermudian in 1972. The mother and the children took up residence with the husband in Bermuda in 1975. At all material times the children were under 18. In 1976 the Minister of Labour and Immigration ordered the children to leave Bermuda. The mother and her husband applied to the Supreme Court to quash the order and for a declaration that the children were to be deemed to belong to Bermuda. The Supreme Court refused a declaration on the ground that the children were illegitimate. On appeal by the mother and her husband the Court of Appeal held by a majority that the children were to be deemed to belong to Bermuda by virtue of s.11(5)(d) of the Constitution.

On appeal by the Minister of Home Affairs (formerly the Minister of Labour and Immigration) and the Minister of Education, the Privy Council, affirming the decision of the Court of Appeal for Bermuda, held that:-

- (i) a constitutional instrument should not necessarily be construed in the manner and according to the rules which applied to Acts of Parliament and, therefore the presumption applicable to statutes concerning property, succession and citizenship that "child" meant "legitimate child" did not apply;
- (ii) although the manner of interpretation of a constitutional instrument should give effect to the language used, recognition should also be given to the character and origins of the instrument;
- (iii) since s.11 of the Constitution was one of the sections dealing with the fundamental rights and freedoms of an individual and subsection (5)(d) in its context was a clear recognition of the unity of the family as a group and acceptance that children should not be separated from a group which belonged to Bermuda, "child" in the subsection was not to be restricted in its meaning and the mother and her husband were entitled to a declaration that the children were deemed to belong to Bermuda.

Minister of Home Affairs v. Fisher (1979) 2 W.L.R. 889(P.C.)
(C.L.B., October 1979 pp. 1050 -1051)

CANADA

Ontario

Abortion clinic - whether in breach of Criminal code - whether code unconstitutional - injunction to restrain enforcement of code in interim refused - principles to be applied in constitutional cases where validity of law in issue

The applicants opened a clinic offering abortion services which did not operate in accordance with the Criminal Code abortion provisions. The applicants took the position that the Code was unconstitutional in that it conflicted with the Charter of Rights and Freedoms. An application for an interim injunction pending the return date of the motion for an interlocutory injunction for an order restraining the defendants from enforcing the law was sought.

The court, in dismissing the application, held that, in appropriate circumstances, injunctions may be issued to restrain the enforcement of unconstitutional laws, even before the ultimate determination of validity is made. The test applied by the Court in the application was that of American Cyanamid Co v Ethicon, (1975) 2 WLR 316. Although the applicants met the requirement of satisfying the court that there was a substantial issue to be tried, the court held that the other requirements of the test were not met. They had not shown that they would suffer irreparable harm if the injunction was not granted nor did they satisfy the court that the balance of convenience favoured the granting of an injunction. On the point of irreparable harm, the court noted that the harm might befall certain women but not the applicants before the court. Regarding the balance of convenience test, the court suggested that a major public issue, that of what law enforcement agencies may do pending the outcome of constitutional litigation challenging the laws they are meant to enforce, was raised. Halting prosecution and investigation of offences pending the resolution of the constitutional issue would grant to potential offenders an immunity from prosecution in the interim and perhaps forever, the court stated. If the law was ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. Therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision.

Re Morgentaler et al v Ackroyd et al (1983) 42 OR (2d) 659 (C.L.B., April 1984, pp.585)

CYPRUS

Income tax law providing for aggregation of wife's income with that of husband - constitutionality of law

Held by the Supreme Court-

"The old s.21 of the Income Tax Law 1961 (Law No.58 of 1961)

and new s.22 (which provide for the aggregation of the wife's income from sources other than from her own labour with that of her husband, for income tax purposes) are unconstitutional as being contrary to Article 24.1 of the Constitution (which provides that every person is bound to contribute according to his means towards the public burdens) and Article 28 (which safeguards equality)

Ioannides & others v. Republic (1979) 3 CLR 295

(C.L.B. April 1980, p.449)

Application for a certificate of non-citizenship - qualifications for citizenship - whether being illegitimate child alters position

The applicant was born in Stockholm, Sweden, on the 22 September 1959 and was the holder of a Swedish passport. He came to Cyprus with his mother on 24 January 1960, as a visitor. At the material time his parents were not married but they were later married together. Applicant's father was born on 2 April 1937 at Myrtou, Kyrenia and on 30 May 1962, a Cyprus Passport was issued to him. Attached to the application for the issue of this passport there was a certificate from the mukhtar of Ayios Andreas Quarter, Nicosia, to the effect that during the five years period immediately prior to the 16 August 1960, which is the date of the Proclamation of the Republic, he resided, ordinarily, in the said quarter. On 30th August 1972, another Cyprus Passport was issued to the applicant's father; and on his application for this passport he again stated that his place of residence during the period 16 August 1955 to 16 August 1960 was Cyprus.

On 27 December 1979 applicant applied, through his counsel, to the Chief Immigration Officer for a certificate that he was not a citizen of the Republic on the ground that his parents were permanently residing in Sweden during the period 16 August 1955 to 16 August 1960. The Acting Chief Immigration Officer informed applicant's counsel that both the applicant and his father, were citizens of the Republic of Cyprus by virtue of s.2 of Annex D to the Treaty of Establishment of the Republic of Cyprus. The relevant paragraphs of this section read as follows:-

"s.2(1) any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this Section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.

(2) the qualifications referred to in paragraph (1) of this Section are that the person concerned is-

- (a) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or
- (b) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or
- (c) a person descended in the male line from such a person as is referred to in sub-paragraph (a) or (b) of this paragraph.

Section 4 of the Illegitimate Children Law (Cap.278) and ss.9(1) and 3 of the Republic of Cyprus Citizenship Law 1967) which are also relevant read as follows:-

s.4 Where the parents of an illegitimate child marry one another such child shall acquire, as from the date of his birth, the legal status of a legitimate child in respect of both his father and mother and their relatives by blood.

s.9(1) An illegitimate child legitimated in accordance with the law of personal status pertaining to him shall, as from the date of such legitimation or the date of the coming into operation of this Law, whichever is later, be treated, for the purposes of this Law, as if he had been born legitimate.

s.3 Citizens of the Republic are the persons who, on the date of the coming into operation of this Law, either have acquired or are entitled to acquire citizenship of the Republic under the provisions of Annex D or who acquire thereafter such citizenship under the provisions of this Law.

The Court, after finding that applicant's father was, at the material time, a citizen of the United Kingdom and Colonies, that he was born after 5 November 1914, that he was ordinarily residing in Cyprus at some time in the period of five years immediately before Independence and that he did, on the day of the Treaty, automatically become a citizen of the Republic held that:-

- (i) the applicant, though at the time illegitimate child of his father, was, on the day of the Treaty, residing in Cyprus and he, too automatically became a citizen of the Republic since he possessed qualification (c) of Annex D to the Treaty of Establishment in that he was a person descended in the male line from a person who was born in the Island on or after 5 November 1914;
- (ii) the applicant was, at the material time, an illegitimate child, does not change the position, as qualification (c) only provides that a person possesses the qualification to become a citizen of the Republic if he descends in the male line from a person possessing qualifications (a) and (b) of s.2 of Annex D;
- (iii) further, the applicant is a citizen of the Republic by the combined effect of s.4 of the Illegitimate Children Law (Cap. 278) and of ss. 9(1) and 3 of the Republic of Cyprus Citizenship Law 1967 (Law 43 of 1967);
- (iv) the Chief Immigration Officer was right in his decision not to grant the applicant a certificate to the effect that he is not a citizen of the Republic of Cyprus.

Zemblyas v Republic (1981) 3 C.L.R. 258
(C.L.B. April 1982, pp 507-508)

GUYANA

Prohibited immigrant-entered country on false passport-subsequently marries Guyanese woman-whether marriage confers right to citizenship under Constitution

A national of Denmark, who had escaped from custody in Denmark where he was serving a sentence of imprisonment for murder entered Guyana on a Danish passport which was issued to someone else. The passport was forged by substituting the photograph of the fugitive for that of the true holder. On the basis of this false passport the permission granted to remain in Guyana was extended on three separate occasions. During this permitted stay he married a Guyanese citizen. The last permit expired on 4 October 1981. On information received from INTERPOL he was arrested on 26 October 1981 and it was then discovered that the passport was a forgery and his true name was Mortensen not Nielsen. A detention order was issued by the Immigration Officer to detain him in custody until such time as arrangements were completed for his removal from Guyana. A person is deemed a prohibited immigrant under the Immigration Act (Cap. 14:02) if he enters the country without a passport (s.5), or fails to leave at the expiration of the permit granted or extended (s.13). The wife applied for the Writ of Habeas Corpus on the ground that since marriage Mortensen, as her husband, was entitled to be registered as a citizen of Guyana under Article 45 of the Constitution, and had in fact applied for permanent residence before 4 October 1981. Even though application for permanent residence was refused, Article 29 of the Constitution conferred equal rights and status on women, and since an alien wife of a Guyanese husband "belongs" to Guyana as a "dependant" under the Immigration Act and therefore cannot be "deemed a prohibited immigrant", then an alien husband of a Guyanese wife is equally a dependant and belongs to Guyana.

The Court of Appeal in dismissing the appeal held that:-

1. by entering with a false passport the applicant's husband had contravened s.5 of the Immigration Act and was an illegal entrant and a prohibited immigrant for the purpose of the Act;
2. the status of illegal entrant was not altered by the subsequent marriage and vitiates any claim to a constitution right to remain permanently in Guyana;
3. under the Immigration Act the detention was legal and deportation enforceable.

Ragner Harry Nielsen v Lloyd Barker The Director of Public Prosecutions
Court of Appeal, Civil Appeal No.57 of 1981
(C.L.B., April 1984, p 585-5)

INDIA

Discrimination on grounds of sex - female employees in Government service - whether provision requiring permission before marriage and denial of right to employment to married women discriminatory

The question for consideration before the Supreme Court was whether the provisions of the Foreign Service Rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnised and denying the right to be appointed on the ground that the candidate is a married woman are discriminatory against women.

The Supreme Court held that both the requirements are discriminatory. It also observed that equality of opportunity in matters relating to employment does not, however, mean that men and women are equal in all occupations and all situations, and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.

Miss C.B. Muthamma v Union of India and others AIR 1979 Supreme Court 1868 (C.L.B., October 1980, p1182)

MAURITIUS

Right to be resistered as citizen - whether Crown prerogative - mandamus - effect of exclusionary clause purporting to exclude judicial review

The applicant, an alien married to an Mauritian citizen, applied to the Minister of Internal Affairs for registration as a citizen of Mauritius on the ground that she was married to a Mauritian, after renouncing her foreign citizenship and taking the required oath of all allegiance. She argued that, as wife of a Mauritian she had an absolute right under s.24 of the Constitution to be registered as a citizen of Mauritius and she prays for an order of mandamus directing the respondent to grant her application.

The Supreme Court, in setting aside the application, held that-

- (i) the Crown prerogative runs only to the extent that it has not been controlled by Parliament. Since the Constitution contains provisions relating to the acquisition and deprivation of citizenship and has conferred on Parliament power to prescribe many matters in this respect, it has removed the acquisition and deprivation of citizenship from the Crown prerogative.
- (ii) the application of the Constitution and of all enactments fall in general within the jurisdiction of the Supreme court and therefore mandamus would, in principle, lie in a case of this nature;
- (iii) the right of the alien wife of a Mauritian to be registered as a citizen of Mauritius is not absolute but subject to the proviso to s.24 of the Constitution which states as follows:-

"Provided that the right to be registered as a citizen of Mauritius under this section shall be subject to such exceptions and qualifications as may be prescribed in the

- interests of national security or public policy;
- (iv) although s.7 of the Mauritius Citizenship Act which states "...any woman whether of full age or capacity, who is, under ss.21 and 24 of the Constitution entitled to be registered as a citizen of Mauritius, shall be so registered on making application to that effect to the Minister in the prescribed manner" does not specifically mention that alien wives may be refused registration on national security or public policy grounds and that it is the Minister of Internal Affairs who determines the existence of such grounds, it is quite clear that the whole Act was designed to implement the provisions of the Constitution relating to the acquisition and deprivation of citizenship and that s.7 of the Act must be read subject to s.24 of the Constitution;
 - (v) the Mauritius Citizenship Act by its very structure was "setting up the practical machinery for the purposes of implementing all the discretions and powers conferred upon Parliament itself by the Constitution, including the exceptions and qualifications explicitly contemplated under the proviso to s.24 of the Constitution";
 - (vi) section 17(2) of the Mauritius Citizenship Act which states that-
"the decision of the Minister on any application under this Act shall not be subject to any appeal or review in any court" cannot be construed as limiting the almost unlimited jurisdiction conferred upon the Supreme Court by the Constitution. The court's intervention will be determined by the manner in which the Minister's discretion has been exercised. The Court would unhesitatingly intervene where, for instance, the Minister evidently refuses to consider an application on its merits or allows himself to be swayed by extraneous factors e.g. the alien wife's race, colour political opinion etc.;
 - (vii) the Court will undoubtedly exercise self-restraint where the Minister's decision is based on two constitutionally prescribed considerations i.e. national security and public policy "since it would be invidious for the Court to substitute its own notions of what national security or public policy should be" when in fact those matters fall exclusively within the responsibility of the Executive.

G Esther v The Honourable the Prime Minister and Minister of Internal Affairs Supreme Court Judgment No. 233 of 1983.
(C.L.B., October 1983, pp1215-1216)

NEW ZEALAND

Human rights-alleged discrimination against women workers
 Three women slaughterboard labourers at the Ocean Beach freezing works applied to join the learners' mutton slaughtering chain for the 1978/79 season (all having similarly applied in at least one previous

season). When they again failed to gain a place their solicitor complained to the Human Rights Commission. After investigation and failing to reach a settlement with the company, the Human Rights Commission commenced civil proceedings against the company before the Equal Opportunities Tribunal (a judicial body comprising an Auckland QC as chairman and any two lay members drawn by him from a panel of ten appointed by the Minister).

The company did not dispute the women's capability to do the work (although the Equal Opportunities Tribunal was independently satisfied by the evidence on the point). The main defence it raised was that appropriate changing and ablution facilities for female "slaughterers" (the Equal Opportunities Tribunal's suggested word) were not available and it was not reasonably practicable to provide them (this defence, under s.17, will expire on 31 May 1982). The Equal Opportunities Tribunal was satisfied from the evidence that female slaughterers could have used the facilities already provided for female slaughterboard labourers and rejected the defence. Four subsidiary defences advanced for the company also failed.

The Equal Opportunities Tribunal's 36-page decision indicates that the company declined to take the women on to the learners' chain because it had good reason to believe that to do so would provoke an Industrial stoppage. The works sub-branch of the Meatworkers' Union had discussed the question of women at Ocean Beach at some length and, while agreeing to their employment in a number of operations, was strongly against women being on the chain.

The Equal Opportunities Tribunal's carefully worded response to the sub-branch attitude was fourfold - (a) Union opposition could not be allowed to nullify the object of the Act; (b) at national level, the Union had supported the Working Women's Charter (which requires equal occupational entry irrespective of sex); (c) a breathing space for Ocean Beach was likely with the retention of slaughtermen (and consequent absence of a learners' chain) for the 1980/81; and (d) the company's position would be borne in mind when remedies (especially damages) were considered.

The Equal Opportunities Tribunal declared that the company had breached s.15 of the Act, ordered it not to refuse places to women on any future learners' chain, and awarded damages for loss, expense and injury to feelings (totalling \$2,250) to two of the women.

Human Rights Commission v Ocean Beach Freezing Co. Equal Opportunities Tribunal 3/80: 11 September 1980 (noted in (1980) 3 Capital Letter No. 35(116))

(C.L.B. January 1981, pp70-71)

UNITED KINGDOM

R. v. Secretary of State for the Home Department, Ex parte Phansopkar
R. v. Secretary of State for the Home Department, Ex parte Begum (1975)
3 W.L.R. 322; 3 All E.R. 497

The husband of the appellant in the first case was an Indian resident in England and a United Kingdom citizen, thus being a "patrial" having a right of abode in the United Kingdom. His wife had the same right, and she applied to the Home Secretary for a certificate of patriality to enable her to enter; but it was refused on the ground that she should apply to the British High Commission in India, or she would be "jumping the queue".

The second case was similar, the appellant coming from Bangladesh. The Court of Appeal, reversing the Divisional Court, held that a patrial's wife was entitled to come into the United Kingdom "without let or hindrance"; and that since there would have been considerable delay if the applications had been made in India or Bangladesh, and an important part of the inquiries would have to be made in England, the Home Secretary was not justified in refusing to consider the applications. See R. v Secretary of State for the Home Department, Ex parte Akhtar (1975) 1 W.L.R. 1717, for a decision in the opposite sense where the wife was an alien.
(C.L.B., January 1976 p.41)

Sex discrimination-arrangement for women workers to leave factory 5 minutes before male workers-whether discriminatory against males
Held by the Court of Appeal-

- (i) arrangements made in the interest of safety or good administration were not infringements of law, even though they might take notice of the difference between the sexes, such as longer distance to a lavatory or the provision of mirrors in them;
- (ii) the Appeal Tribunal had feared that if "benefits" were given it would open a loophole to evasion of the Sex Discrimination Act, but it should not be so afraid if one could see that what was done was done reasonably and sensibly;
- (iii) the practice Mr. Peake complained of was perfectly harmless;
- (iv) in the last resort the maxim de minimis non curat lex would apply.

Peake v. Automotive Products Ltd., Times newspaper, 6 July 1977
(C.L.B., July 1977 p.400)

Sex discrimination in bank scheme-"pay"-whether principle of equal treatment for men and women as regards "working conditions" contained in the EEC Directive applicable-enforceable Community rights of individuals
On the Court of Appeals' reference to the European Court of Justice (see (1982) 8 CLB 1073) it was held that a contribution to a retirement benefits scheme which was paid by the employer in the name of the employees by means of an addition to the gross salary and which helped to determine the amount of that salary was "pay" within the meaning of article 119 of the Treaty.

On the reference back from the European Court the Court of Appeal held that a declaration in agreed terms would be made that pursuant to the

equality clauses in the applicants' contracts of employment by reasons of s.1(1) of the Equal Pay Act 1970, as amended, and article 119 of the EEC Treaty, on terminating their employment with the employers, the applicants were entitled to be paid a sum equal in amount to the refund of pension contributions in respect of the period referred to in s.2(5) of the Act which they would have received if they had been male employees employed on like work in whose name contributions had been paid to a retirement benefits scheme by the employers.

Worringham v Lloyds Bank Ltd (1982) 1 WLR 841(CA)
(C.L.B., January 1983, p.84)

Discrimination- women in wine bar not allowed to stand and drink at bar- whether unlawful discrimination

Section 1(1)(a) of the Sex Discrimination Act 1975 reads-

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if-(a) on the ground of her sex he treats her less favourably than he treats or would treat a man.....

and s.29 reads as follows-

It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide her with any of them, or (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of that section.

The plaintiffs, who were both women, entered the defendants' wine bar and stood at the bar where they asked for two glasses of wine. In accordance with the defendants' rule that women were not allowed to stand and drink at the bar or in the bar area; the barman refused to serve them at the bar and told them that if they sat at a table the drinks would be brought to them. There were two tables by the main entrance, and a smoking room at the back where a waitress took orders from customers at the tables. The chairs and tables were also available to male customers. On an action by the plaintiffs alleging that the defendants' practice was in breach of s.29 of the Sex Discrimination Act 1975, Judge Ranking gave judgment for the defendants, holding that they had not unlawfully discriminated against the plaintiffs within the meaning of s.1(1)(a) of the Act, and that they were not in breach of s.29.

On appeal by the plaintiffs the Court of Appeal, allowing the appeal, held that-

- (i) the correct approach was to apply the simple words of the statute:
that by allowing male customers to stand and drink at the bar if they so wished but not allowing female customers to do likewise the defendants unlawfully discriminated against women by refusing or deliberately omitting to

provide them with facilities which were afforded to men, contrary to s.29(1) of the Sex Discrimination Act 1975 and that they treated women less favourably than men, contrary to s.1(1)(a);

- (ii) since women were being deprived by the defendants of a facility greatly prized by men and sought by the plaintiffs the maxim de minimis non curat lex could not apply: and, accordingly, the defendants had unlawfully discriminated against the plaintiffs by refusing to serve them at the bar.

Gill and another v El Vino Ltd (1983) 2 WLR 155 (CA)
(C.L.B., July 1983, p.62)

Courts Practice and Procedure

MAURITIUS

Criminal trial by jury - Whether exclusion of women constitutional

The plaintiff was charged with murder before the Court of Assizes consisting of a judge and, for the determination of matters of fact, a jury of nine men drawn from the jury list. This list comprises only male jurors as is required by the Jury List ordinance. The plaintiff complained that- (a) the statutory exclusion of women from the jury list was discriminatory and in breach of ss.3 (fundamental rights and freedoms), 10 (protection of the law and trial by impartial tribunal) and 16 (protection from discrimination) of the Constitution; and

(b) his trial by the Assizes Court as constituted was consequently unconstitutional.

Held-

- (i) the prohibition against discrimination, on grounds inter alia of sex, in section 3 was limited to the fundamental rights and freedoms specified in the section;
- (ii) section 16 applied to all enactments and administrative action which were discriminatory on various grounds from which sex was deliberately excluded;
- (iii) discrimination must be distinguished from reasonable differentiation or classification with no bias or hardship as its object, having regard to the aim which is sought to be achieved;
- (iv) jury service is, in any event, an obligation and not a right or privilege which confers and advantage.

M.R. Jaulim v. The DPP and the Master and Registrar (1976 Supreme Court Record N.19147)

(C.L.B., July 1976, p.216)

Appeal-Costs-Offer to settle made 'without prejudice'-offer unreasonably rejected

In matrimonial property proceedings, the wife was legally aided but the husband was not. The husband's appeal to the Court of appeal succeeded only in part, but did so on the major issue. Prior to the hearing his solicitors had offered to withdraw the appeal should the wife agree to a modification of the lower court order. As suggested in Calderbank v. Calderbank (1975) 3 W.L.R. 586 the letter was written 'without prejudice' but the right was reserved to draw it to the attention of the court after judgment on the question of costs. The offer was rejected. The Court of Appeal held-

- (i) a Calderbank offer should influence but not govern the exercise of the discretion as to costs and it would be wrong to equate such an offer with a payment into court;
- (ii) the question was whether, on the facts known to the wife and her advisers and without the benefit of hindsight, she ought reasonably to have accepted the offer;
- (iii) parties who were exposed to the full impact of costs needed some protection against those who could continue to litigate with impunity under a civil aid certificate;
- (iv) the wife ought reasonably to have accepted the offer and, on the merits, would be ordered to pay the husband's costs of the appeal incurred after the date of the letter containing the offer, on a party and party basis;
- (v) bearing in mind that the wife's only fund from which to meet costs would be the £2,000 awarded to her in the proceedings, her ability to pay would be assessed at £500 (as required by Section 8 (i) (e) of the Legal Aid Act 1974).

McDonnell v. McDonnell, Times Newspaper, 19 April 1976.
(C.L.B., July 1976, p.201)

Limitation of actions - Plaintiff unaware she had cause of action

In May 1970 P was injured by a car driven by D. P was illiterate and she left the matter in her husband's hands. While she was in hospital he went to a solicitor and then told his wife that nothing could be done until the solicitor had been paid £20. They did not have £20 and the matter rested. A writ was finally issued in May 1974. D alleged that it was statute-barred. It was argued for P that s.1(3) of the Limitation Act 1963 applied in that there were material facts of a decisive nature which were at all times outside her knowledge and that therefore the limitation period did not apply. Held-

- (i) P had constructive knowledge of her rights to sue as soon as she could put the facts before her legal adviser and she was not ignorant of material facts of a decisive character which affected her claim in this case;
- (ii) her failure to obtain legal advice was not reasonable or excusable.

Jones v. Bennett (1976) 1 Lloyd's Rep. 484. (C.L.B., October 1976, p.353)

AUSTRALIA

Queensland

Rape-complainant giving evidence as to limited experience with men-whether cross-examination as to credibility permissible

Section 4. of the Criminal Law (Sexual Offences) Act 1978 (Qld) provides, inter alia, the following rules of evidence concerning "sexual offences" as defined in s.3 of the Act-

- (2) Without the leave of the court-
 - (a) the complainant shall not be cross-examined as to her sexual activities with any person other than the defendant; and
 - (b) evidence shall not be received as to the sexual activities of the complainant with any person other than the defendant.
- (3) The court shall not grant leave under Rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.
- (4) Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities with a person or persons other than the defendant shall not be regarded-
.....
 - (b) as being proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

At the defendant's trial on a charge of rape, the complainant gave evidence of her somewhat limited experience with men. Counsel for the accused sought leave to cross-examine her in relation to her employment for some six weeks in a massage parlour about July 1982 and as to the nature of her experience with men while so employed to the extent that this might involve evidence of sexual activities with persons other than the accused. The cross-examination was proposed to be directed to the complainant's credibility.

The Supreme Court to Queensland ruled that-

1. having regard to the complainant's evidence of her limited experience with men, the answers to the questions sought to be asked in cross-examination might cause the jury to doubt the accuracy of the evidence she had already given on the matter of her experience with men and so cast doubt on the accuracy of her evidence generally;
2. therefore, such a special circumstance had been shown as justified the grant of leave to cross-examine the complainant as sought; and
3. the jury would be directed that the cross-examination and the

evidence resulting therefrom went only to the credit of the complainant and not to show that, because she had engaged in such activities, it was likely that she would have consented to intercourse with the accused.

R v Holt (1983) 2 Qd R 462
(C.L.B., October 1981, p.1536)

Injunction sought to restrain abortion-applicant alleged father of child-whether a breach of criminal law-exercise of court's powers and discretion
K sought the Attorney-General's fiat in order to obtain an interlocutory injunction from the Supreme Court of Queensland to restrain a single woman who had conceived a child of which he claimed to be the father from causing or permitting an abortion to be carried out upon herself. His application was refused, and this was upheld by the Full Court of the Supreme Court.

K then applied to the High Court of Australia for special leave to appeal.

In dismissing the application, the High Court held, inter alia, that it would not be a proper exercise of discretion to grant an injunction in the present case, because to do so would be to act on the assumption that the woman proposed to commit a serious crime when the determination of that issue had been left by the law to a jury.

In so holding, the High Court considered the decisions of the English and Australian Courts in Gouriet v Union of Post Office Workers (1978) AC 435; Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd. (1935) 54 CLR 230; and Paton v BPAS Trustees (1978) 2 All ER 987; (1979) 1 QB 276.

The Chief Justice of the High Court observed in his judgment, inter alia-

- (1) While there is no doubt that in appropriate cases the court will grant an injunction to restrain a breach of the criminal law, that is "an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty or to cases of emergency"; see Gouriet v Union of Post Office Workers (1978) AC 435 at 481. In Ramsay v Aberfoyle Manufacturing Co. (Aust) Pty Ltd (1935) 54 CLR 230 at 245, Rich J said that "old fashioned views upon the jurisdiction of courts of equity find the growth of the use of injunction (in the field of criminal law) more repugnant than satisfying". Whether or not that view is shared, it is obviously true to say, as Lord Wilberforce said in Gouriet's case (at 481) that the jurisdiction "is one of great delicacy and is one to be used with caution". As was pointed out in that case by Lord Wilberforce (at 481) and by Viscount Dilhorne (at 470-1) where Parliament had provided for the trial of offences by jury, it may seem wrong, and it may lead to great difficulties, if the court, applying a civil standard, in effect, convicts a subject without the trial to which he or she is entitled. It is true that some of the remarks of Lord Wilberforce in the passage mentioned relate to the exercise of discretion by the

Attorney-General, but similar considerations obtain when the matter comes before the court.

- (2) The second argument is that an unborn child is to be regarded as a person whose existence can be protected by the courts. As at present advised, I would agree with the judgment of Sir George Baker P in Paton v BPAS Trustees (1979) 1 QB 276 at 279, that a foetus has no right of its own until it is born and has a separate existence from its mother.
- (3) There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be over-stepped if an injunction were to be granted in the present case.

Attorney-General for Queensland; Ex rel Kerr V T (1983) 46 ALR 275 (C.L.B., January 1984, pp.119-120)

Criminal Law and Procedure

AUSTRALIA

Western Australia

"Keeping premises for the purposes of prostitution"

The Western Australian Court of Appeal has dismissed an appeal against the appellant's convictions of the offence of keeping premises for the purposes of prostitution, contrary to s.76(F)(1) of the Police Act 1892 - 1972 (W.A.) in circumstances in which the appellant had leased and occupied premises for the purpose of having an employee engage in prostitution for the monetary advantage of both the employee and the appellant. Only one employee was so employed, and the appellant did not engage in prostitution herself. Nor were the premises leased the home of the appellant.

The Court held that-

"the expression "keeping premises for the purposes of prostitution" was not to be equated with keeping premises as a brothel. If (which the Court doubted) the latter offence required that there be the prostitution of more than one woman on the premises, the former offence did not, and a woman who kept premises, not being her home, for the purpose of the prostitution of one woman or more was "keeping premises for purposes of prostitution".

In so holding, the Court who had occasion to consider the offence of prostitution, and the interpretation of the expressions "brothel", "prostitution", "bawdy-house" and "keeping".
Storey v. Wick (1977) W.A.R. 47
(C.L.B., July 1977, p.410)

South Australia

Money received in respect of prostitution-doctrine of "possession"
The Full Court of the Supreme Court of South Australia had to consider what constituted the offence of receiving money paid in a brothel in respect of prostitution, contrary to the provisions of s.28 of the Police Offences Act 1953-1975 (S.A.)

The Supreme Court held that the respondent, a prostitute who had told a police officer to put money paid for purposes of prostitution in a cupboard without actually handling the money, had "received" the money for purposes of the section and should have been convicted of the offence of having "received" money paid in a brothel in respect of prostitution.

In so concluding, the Supreme Court stated that no detailed analysis of the doctrine of possession was necessary, but that the ability to control a thing, as here, had the same effect as the actual exercise of control.
Samuels v. Warland 16 S.A.S.R.41.
(C.L.B., October 1978, p.856-857)

Rape-"mens rea"-mens rea by recklessness

The Full Court of the Supreme Court of South Australia has examined the appropriate direction that should be given by a trial judge to a jury in a case of rape where, as here, the accused in their defence admitted the sexual act but stated that they believed that the female had consented.

In doing, the Full Court compared its own decision in R.v.Brown (1975) 10 S.A.S.R. 139 with that of the House of Lords in Director of Public Prosecutions v. Morgan (1975) 61 Cri.App.R.136 in each of which cases there was some difference of opinion whether the definition of mens rea in rape should be formulated in terms of intention or in terms of belief.

The Full Court concluded that all of the Judges of the Supreme Court of South Australia and all of the Law Lords in the House of Lords who, respectively, had sat on those cases and who had adverted to the topic, had held that, besides the intention to have sexual intercourse without the female's consent, or the intention to have intercourse knowing or believing that she was not consenting, there was an alternative form of mens rea, which could compendiously be described as mens rea by recklessness.

The Full Court observed that-

" it might have been preferable to define the mental element in rape negatively rather than positively and to say that the crime is

committed by a man who has intentional intercourse with a female without her consent and without any belief on his part that he has her consent, instead of saying that it is committed by a man who has intentional intercourse with a female without her consent, knowing that she is not consenting or recklessly indifferent to whether she is consenting or not.

The Queen v. Wozniak and Pendry S.A.S.R. 67
(C.L.B., October 1978, pp.858-859)

Confession by woman charged with rape-unusual charge-failure to warn her constituting trap

Four accused, three men and a woman, were jointly charged with three counts of rape and nine counts of associated violence on the person of a young girl. Each of the accused made a confessional statement to police officers, and at their trial it was contended on behalf of each accused that the confessional statement should be excluded from evidence.

In the case of the female accused, the principal ground of the application was that she had been questioned by a police officer about an assault upon the victim but had not been informed until after the questioning of the possibility of her being charged with the more serious charge of rape.

The Supreme Court of South Australia held in the case of the female accused, that as prosecution of a woman for rape was so rare the failure by the police officers to inform her of the possibility that she would be charged with rape in effect amounted to a trap and that in the exercise of the trial Judge's discretion certain unguarded answers given by her to the police officers which tended to implicate her in the offence of rape should be excluded from evidence.

The Queen v. Hart, Bullock, Peterson and Hill 17 S.A.S.R. 100.
(C.L.B., January 1979, pp.91-92)

Prostitution-whether money "received"

The appellant appealed against her conviction of having received money paid in a brothel in respect of prostitution, contrary to the provisions of s.28 of the Police Offenders Act 1953 - 1975 (S.A.)

A police officer, acting as an agent provocateur, had gone to a brothel and, after the appellant had agreed in a room in the brothel that he could have sexual intercourse with her for \$30, had handed her two \$20 notes, asking if she had any change. The appellant had then taken the money; said that she could change it; told the police officer to get undressed; and walked towards the closed door of the room. Before she could open the door the police officer produced his police warrant card disclosing his identity.

The Supreme Court of South Australia, in dismissing the appellant's appeal, held that she had "received" the money, within the meaning of s.28 of the Police Offences Act.

In so holding the Supreme Court had occasion to examine the law of possession and distinguished two earlier decisions of the Court- Samuels v. Warland (1977) 16 S.A.S.R. 41 and Oldfield v. Samuels (1978) 18 S.A.S.R. 156- which also involved consideration of the interpretation of s.28 of the Police offences Act.
Samuels v. von Stroheim 19 S.A.S.R. 297
(C.L.B., July 1979, p.693)

Trial for rape before jury-newspaper referring to defendant by last initial-whether possibility of prejudice

The defendant was presented to and arraigned before the jury at a Criminal Sessions of the Supreme Court of South Australia for rape in the name of "S" only. After his trial before a jury had commenced, a report of the proceedings was published in a newspaper which referred to the defendant as "S", also known as "M".

The Supreme Court held, upon the application of the defendant, that as there was a possibility of prejudice to the defendant from the suggestion of an assumed name, the jury should be discharged and the case made a remanet to the next Criminal Sessions.

The Queen v. Sherrin (1978) 20 S.A.S.R. 164
(C.L.B., October 1979, p.1079)

Western Australia

Rape and attempted rape-intention or belief-admissible evidence-discretion of trial judge to exclude material prejudicial to other accused

At the joint trial on indictment of four men on charge of rape and attempted rape of a woman arising out of the same or closely related facts, the trial judge ruled that out-of-court statements made by one of the accused were admissible but that material in the statements which implicated the other accused in the commission of any of the crimes should be excluded even if it was also relevant to the charges against the accused who had made the statements.

The trial judge, at the request of the Attorney-General under s.693A of the Criminal code (W.A.), referred to the Western Australian Court of Criminal Appeal two questions of law which arose at the trial.

The Court of Criminal Appeal held that-

- (i) the trial judge did not have a discretion to exclude evidence admissible against an accused against whom it was tendered upon the ground that it was inadmissible against and prejudicial to other accused persons being properly tried together with him;
- (ii) section 325 of the Criminal Code, defining the crime of rape, had nothing to say about intention or belief, but if a man had carnal knowledge of a woman, not his wife, without her

consent, mistakenly believing that she was consenting, then upon an application of s.24 of the Code, he would not be criminally responsible for the act but only if his belief was both honest and reasonable; and

- (iii) by s.4 of the Criminal Code, however, intention was made an element of the crime of attempted rape and an honest belief that the woman was consenting to the carnal knowledge that the man was attempting to have, would negative his intent to have the carnal knowledge without her consent, whether or not his belief was based on reasonable grounds.

In so holding, the Court applied R. v. Gunewardene (1951) 2 All E.R. 790, distinguished R. v. Rogers and Tarran (1971) Crim.L. 413, and referred to D.P.P. v Morgan (1975) 2 All E.R. 347 and Driscoll v. R. (1977) 15 A.L.R. 47,
(C.L.B., October 1979, pp.1083-1084)

New South Wales

Prosecution for rape-assertion by the accused that the complainant was a consenting party-burden of proof on the Crown to negative mistake
The appellant appealed to the New South Wales Court of Criminal Appeal against his conviction for rape.

At the trial, at which the appellant had unsuccessfully raised the defence that the prosecutrix was a consenting party, the trial judge in his summing up said: "You have heard a matter dealt with by counsel and by the Crown which has been referred to as a defence of honest belief based upon reasonable grounds...This aspect of the law involves three concepts, first, that the accused...in fact held the belief that the woman was mistaken in that belief; and, thirdly, he must point...objectively to circumstances which provide him with reasonable grounds for his mistake..."

The Court of Appeal held that:-

- (i) in proving the element of mens rea in the crime of rape, in a case where the accused asserts a belief that the complainant was a consenting party, the Crown must negative any mistake made by the accused as to the consent of the complainant, irrespective of whether the mistake was, or was not, based on reasonable grounds;
- (ii) the reasonableness or otherwise of the belief of the accused will be important only as evidence tending to show whether it was really held by him;
- (iii) for these reasons, the courts should, in trials of charges of rape, no longer direct the jury that it is relevant to consider whether the accused, at the time, entertained an honest but mistaken belief, based on reasonable grounds, that

- the complainant was a consenting party; and
(iv) that in all the circumstances of the case, a judgment and verdict of acquittal should be entered.

In so holding the Court of Criminal Appeal applied the judgment of the House of Lords in Director of Public Prosecutions v. Morgan (1976) A.C.182 and overruled the Court's own previous judgment in R.v.Sperotto (1980) 71 S.R. (N.S.W.) 334.

R.v.McEwan (1979) 2 N.S.W.L.R.926.
(C.L.R., January 1981, p.78)

South Australia

Rape-mentally deficient woman-whether "so mentally deficient as not to understand" amounts to "not to be capable of understanding"

The accused had sexual intercourse with a physically-mature but mentally-deficient 23 year old woman whose mental age was said to be ten years eight months. She had no known previous sexual experience and had not been instructed about sexual matters by her parents, or in the sheltered workshop where she worked. She had, however, been expressing her sexual curiosity to her friends in the workshop. On the day of the offence, the accused had allegedly enticed the woman into his caravan at a country fair, by promising to give her a toy. Intercourse ensued. The woman showed no signs of distress, nor were there any indications that violence had been used. She showed a "carefree attitude" when she left the van.

The accused was charged with rape, contrary to s.48(1) of the Criminal Law Consolidation Act 1935-1976 (S.A.), and with having unlawful sexual intercourse with a mentally-deficient person contrary to s.49(6) of that Act.

The charge of rape was dismissed due to the lack of evidence that the intercourse was against the woman's will or without her consent, but the accused was found guilty of an offence under s.49(6) which, together with sub-section (6) of that section, provide:-

- (6) A person who has, or attempts to have, sexual intercourse with another person knowing that other person to be so mentally deficient as not to understand the nature or consequences of the act shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding 7 years.
- (7) Consent to sexual intercourse is not a defence to a charge of an offence under this section.

The trial judge rejected the submission that "so mentally deficient as not to understand" should be read as "not to be capable of understanding", and held that the legislative intention was to protect those who had the capacity, but did not in fact understand the nature and consequences of the sexual act, "provided the lack of understanding was due in a relevant sense to the degree of mental deficiency". It was further held

that because the victims' parents and workshop supervisors had not provided her with any form of sex education, her lack of understanding was sufficiently related to her mental deficiency.

R.v.Beattie (1981) 5 Crim. L.J. 176

(C.L.B., October 1981, pp.1278-1279)

Victoria

Rape - discharge after committal proceedings - whether Crown prevented from presenting the accused for trial.

Section 359A of the Crimes Act 1958 (Vic.) provides, in part as follows:

359A.(1) Notwithstanding anything in this or any other Act or any rule of law to the contrary the trial of a person for an alleged offence of rape, attempted rape or assault with intent to rape shall not be commenced-

- (a) where a stipendiary magistrate has ordered that that person shall not stand trial for the offence;
- (b) where an information for the offence has not been laid before a justice and the prescribed period has elapsed; or
- (c) in any other case, after the prescribed period has elapsed.

(2) The prescribed period-

- (a)
- (b) for the purpose of paragraph (c) of sub-section (1) means the period of three months after the accused person has been committed for trial or such longer period after the committal is fixed by a judge of the court to which he has been committed for trial before the period of three months or any longer period fixed by a judge has elapsed.

On the appellant's appeal against his conviction for rape, the Full Court of the Supreme Court of Victoria has held that-

- (i) where an accused charged with rape is discharged by a magistrate after committal proceedings, s.359A of the Crimes Act does not operate to prevent the Crown presenting the accused for trial;
- (ii) the discharge of an accused after committal proceedings is not the same as an order that a person shall not stand trial; and
- (iii) where during a trial the judge received a message from the Sheriff that a juror's wife had attempted to commit suicide and was in hospital the judge is entitled to infer that the illness was dangerous within s.44 of the Juries Act 1967 (Vic.); and
- (iv) in such a case counsel are entitled to be heard on the question whether the jury should be discharged.

R. v. Tortomano (1981) V.R.31

(C.L.B., October 1981, pp.1386-1388)

Rape and assault with intent to rape - applicant arraigned after lapse of prescribed period - "trial"

Section 359A(1) of the Crimes Act 1958 (Vic.) provides that the trial of a person for rape, attempted rape, or assault with intent to rape, shall not be commenced;-

(a)

(b) here an information for the offence has not been laid before a justice and the prescribed period has elapsed; or

(c) in any other case, after the prescribed period had elapsed.

The "prescribed period" is defined in s.359A(2) of the Act, and, in the present case, was a period of three months after the applicant had been committed for trial.

Three months and 13 days after having been committed for trial the applicant was arraigned on a presentment which contained, inter alia, two counts of rape and one of assault with intent to rape. The applicant pleaded guilty to all counts except one of theft, in respect of which the prosecution led no evidence, and in due course he was convicted and sentenced. The sentences on the counts of rape and assault with intent to rape were made concurrent with the other sentences. The applicant applied to the Full Court of the Supreme Court of Victoria for leave to appeal against the sentences for rape and assault with intent to rape, on the ground that the court of first instance was without jurisdiction and that the convictions were therefore nullities.

In allowing the applicant's application, the Full Court held, by a majority that

- (i) the word "trial" used in s.359A of the Act is a reference to the arraignment of a person, irrespective of whether he pleads guilty or not guilty, and the proceedings which follow in either case; and
- (ii) the convictions on the counts of rape and assault with intent to rape would be quashed, and the sentences varied appropriately.

In so holding, the Full Court had occasion to consider a number of English and Australian cases as to the meaning of the word "trial".

R. v. Symons (1981) V.R. 297
(C.L.B., October 1981, pp.1386-1388)

Rape of wife by husband-husband subject of non-molestation order-whether can be convicted of rape of wife

The applicant sought leave to appeal to the Full Court of the Supreme Court of Victoria against a conviction of rape with mitigating circumstances upon his wife. The offence was committed before the commencement of the Crimes (Sexual Offences) Act 1980 (Vic.). On behalf of the applicant, it was contended that the conviction could not stand as, by reason of his marriage, his wife must be presumed by law to have consented to his exercise of the marital right of intercourse. At the date of the offence the couple were

separated, the wife had obtained an order ex parte in the Family Court of Australia restraining the applicant from assaulting or molesting her or entering upon or remaining near her premises, and the order had been varied to enable the applicant to have access to the child of the marriage but otherwise the non-molestation order continued in force. Section 114 of the Family Law Act 1975 provides-

- (1) In proceedings of the kind referred to in paragraph (e) of the definition of "matrimonial cause" in subsection 4(1), the court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage
- (2) In exercising its powers under sub-section (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

It was submitted (a) that the orders were clearly made under s.114(1); and (b) that as an order in respect of conjugal rights fell under s.114(2), s.114(1) must be construed as excluding a power to make an injunctive order affecting conjugal rights.

In dismissing the application, the Full Court held that-

- (i) in the circumstances of this case it was open to the jury to find the applicant guilty of the rape of his wife; and
- (ii) without deciding whether the principle that a man cannot rape his wife remains part of the common law, the order of the Family Court effectively eliminated the wife's matrimonial consent to sexual intercourse.

In so holding, the Full Court examined a number of English cases in this area of the law, including such cases as R. v. Clarence (1888) 22 QBD 23, R. v. Clarke (1949) 33 Cr App R 216, R. v. Miller (1954) 2 QB 282, R. v. O'Brien (1974) 3 All ER 663 and R. v. Steele (1976), 65 Cr App R 22.

One of the members of the Full Court observed of the effect of a non-molestation order that-

"I would be clearly of the view that a non-molestation order made for "the personal protection of a party" without any accompanying specific relief by curial order from any obligation to perform conjugal rights would be sufficient to terminate the implied consent of the wife to intercourse said to arise from the marriage contract. If "personal protection" does not mean protection from the violence necessary to achieve intercourse to which the wife is denying actual consent then it means nothing. Such an order was made and it was intended to give the wife immunity, inter alia, from the applicant's unwanted sexual attractions.

Another member of the Full court also observed, inter alia, as follows-

"The legal frame work within which this submission is advanced is based on an ambient principle. The principle was stated by Byrne, J. in R. v. Clarke (1949) 33 Cr App R 216, at p. 217; (1949) 2 All ER 448, at p. 448 in these terms; "As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason is that on marriage the wife consents to the husband's exercise of the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. In such circumstances the marital right of the husband exists by virtue of marriage and not by virtue of a consent given at the time of each act of intercourse, as is the case with unmarried persons. The intercourse between husband and wife is, therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage. In Hale's Pleas of the Crown, vol. 1 p.629, the learned author states the law in this way: "..... by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract"."

That principle runs oddly counter to modern notions of marriage. There does not seem to have been any recent case in which it was considered whether the principle remains part of the common law. In many cases in Victoria it will no longer operate because of s. 62(2) of the Crimes Act 1958 as amended by the Crimes (Sexual Offences) Act 1980. It is not necessary in this case to examine the validity of the principle.

The cases have engrafted exceptions upon the principle. It has been decided that just as, according to the principle, marriage as a matter of law creates the wife's continuing consent to intercourse, so other legal processes may revoke that consent. If a court order is made which has the effect that the husband no longer has a right to have intercourse with his wife, the order brings about a revocation of the consent given by the wife through marriage: See R v. Clarke, (above); R. v Miller, (1954) 2 QB 282; (1954) 2 All ER 524; (1954) 2 WLR 138; 38 Cr App R 1; R v O'Brien (1974) 3 All ER 663. R V McMinn (1982) VR 53 (C.L.B., July 1982, pp.964-966)

Tasmania

Rape of five year old child - determination of absence of consent

The defendant was indicted before the Supreme Court of Tasmania on a count of rape of his step-daughter, a child aged five years and three months. There was evidence that he had had sexual intercourse with her, but there was no evidence of resistance, physical injury or her knowledge of sexual matters.

The trial judge ruled that absence of the step-daughter's consent

could be established in three ways-

- (i) if the jury were satisfied beyond reasonable doubt that she did not comprehend that the physical act of penetration was proposed;
- (ii) if the jury were satisfied beyond reasonable doubt that she had no understanding that the act of penetration was of a sexual character;
- and
- (iii) if the jury were satisfied beyond reasonable doubt that the child was not able to appreciate that she could refuse to comply with her step-father (on the basis she would not then be so situated as to be able to form a rational opinion on the matter within the terms of s.1 of the Criminal Code 1924 (Tas.)).

Roden (1981) 4 A Crim R 166
(C.L.B., October 1982, pp.1351)

BOTSWANA

Indecent assault on female - whether assault by policeman an aggravating factor

The appellant, a police officer, was charged with indecent assault on a female and was sentenced to three years imprisonment and six strokes. The trial court found that the fact that the assault was committed by a policeman was an aggravating circumstance. The High Court differed from this approach-

"While there is every reason to expect a high standard of conduct from policemen because of the nature of their duties as guardians of the peace and enforcers of the law, that in itself does not preclude a court from taking into account the other considerations which apply if the accused followed some other occupation. He has a right like everyone else, to have a previous unblemished record taken into consideration and that his career is now at an end with all that entails is a factor of some weight."

Mothubi Ngwako v The State High Court; Criminal Appeal No. 33 of 1981
(C.L.B., April 1982, p.536)

GHANA

Custody - Father "kidnapping" son and bringing him to jurisdiction - Effect of foreign order in mother's favour - Discussion of relevant factors

In 1970, the plaintiff (a national of the Federal Republic of Germany and

resident there) gave birth to a child, Thomas, of which the defendant, a Ghanaian national resident in Germany, was the father. The parties were not married and by German law Thomas was illegitimate. On his birth certificate he was registered only in his mother's name and he at all times lived with his mother. The defendant brought proceedings in the German courts to legitimate Thomas without success. Custody was granted to the mother, and the defendant given a limited right of access. In October, 1974, in exercise of this right of access the defendant called for Thomas on the pretext that he was taking him boating, but instead flew with him to Ghana. The plaintiff followed and instituted proceedings for a declaration that she was entitled to the custody of Thomas, an order that he be returned to her, and general and special damages. The defendant returned to Germany before the case was heard, leaving Thomas, who could speak no English, with his brother and sister-in-law, who could speak no German. He instructed them not to allow the plaintiff to see Thomas until she had caused to be withdrawn a criminal charge for kidnapping which was pending against him in the German courts, and which carried a possible sentence of five years' imprisonment.

In support of her claim for custody, the plaintiff sought to tender the proceedings in the German courts. This was objected to on the ground that there was no reciprocity of enforcement of judgments between Ghana and the Federal Republic of Germany. Evidence was given that the defendant had expressed a hope of permanently returning to Ghana in 1975 but his passport had been impounded by the German law enforcement agencies; that since the birth of Thomas, he had married another German woman, and had a child with her; and that the marriage was not a happy one. The defendant nevertheless claimed that as the father he was entitled to the custody of Thomas, and on his behalf counsel submitted that Thomas was a Ghanaian citizen, and that it was in his interest to be brought up in Ghana; that the plaintiff was of limited means; and that Thomas might not be regarded as illegitimate by Ghanaian law. He further urged the court to determine the matter solely by reference to Ghanaian law.

The court held that in questions of custody it was well settled that the welfare and happiness of the infant was the paramount consideration. This had now been given statutory recognition by s.16(2) of the Courts Act, 1971 (Act 371).

In considering matters affecting the welfare of the infant, the court must look at the facts from every angle, and give due weight to every relevant material. The relevant material in the instant case included:-

- (i) the fact that this was a kidnapping case where, once the court decided to go into the merits rather than send the child back from whence it came, the duty upon the court was to ensure that the wrongdoer did not gain advantage from his wrongdoing.
- (ii) the order of the German court which although impugned by the defendant gave him the opportunity to see the child and kidnap him. That order need not be treated as a matter of binding

obligation in Ghana, but comity demanded its grave consideration, and the court could look at it as forming part of the evidence.

- (iii) the different personal laws of the parties meant that the case should not be decided only by reference to Ghanaian law, and by virtue of Act 372 the court was enjoined to achieve a result comfortable to natural justice, equity and good conscience, such a result being one which ensured the paramount welfare of the child;
- (iv) the inability of the father to satisfy the court that he could offer in the foreseeable future a home where the happiness and mental stability of young Thomas could be assured. As a natural father the defendant had no right, merely by virtue of fatherhood, to claim custody.
- (v) the natural right of the mother of a young child to its custody, and the fact that the mother of an illegitimate child had a prima facie right to its custody in preference either to the reputed father or any other person.
- (vi) the defendant, having left others to fight his battle for him, the real contest as to who should have custody was between the mother and strangers.
- (vii) the fact that Thomas and his mother needed each other. The affection of a mother for her child must be taken into account, and poverty per se was no reason for depriving a mother of custody when her character had in no way been impeached.

In the circumstances, and regardless of the domicile of the parties, it would be contrary to natural justice, equity and good conscience to deprive the plaintiff of the custody of her son, and he should be returned to her forthwith.

The plaintiff was entitled to damages which were not limited to the loss she incurred, but which should reflect the strong disapproval of the court of the defendant's conduct, and take into account the mental anguish suffered by the plaintiff.

Braun v. Mallet (1975) 1 G.L.R. 81
(C.L.B., July 1976, p.236-238)

Rape - complaint impinging on identification - verdict reached without further directions requested by jury - whether retrial appropriate.

The appellant was convicted of rape on the sole testimony of the prosecutrix. Soon after the alleged offence she complained successively to her mother and the police, on each occasion identifying the appellant as the rapist. The appellant was known to the prosecutrix for some 26 years but the rape was committed in hours of darkness. Before the assault on her commenced she said that she saw his face under a light and also had a conversation with him. The defence was an alibi put forward from the dock.

The Judge summed up impeccably on the question of identification, satisfying the Turnbull criteria. There was no corroboration and the Judge pointed that out to the jury. The jury were directed that the complaints did not go to prove that the appellant had raped the prosecutrix or that (assuming rape was committed) the accused was the man who did it. He directed them that it only helped to enhance the reliability and credibility of her testimony negating consent. The jury deliberated for nearly three hours and returned to the courtroom requesting further directions on the issue of identification. Because of the unavailability at that moment of a court reporter to take the further directions, the Judge sent the jury back to the jury room to await the appearance of one. Before a court reporter could materialise the jury, without further directions, proceeded to deliberate to a majority verdict of guilty.

Held by the Court of Appeal that-

- (i) the majority verdict might have come about in a number of ways including the avoidance of inconvenience through the pressure of a long wait or by the jury giving weight to the complaint of the prosecutrix in resolving their difficulties on the question of identification, or other (unspecified) possibilities. A not unsubstantial degree of uncertainty surrounded the verdict;
- (ii) the obvious poverty of the appellant suggested that he would on a retrial, as at the original trial, be unable to afford counsel to probe the prosecution case. His defence had been poorly presented and the appellant ought not to go through the ordeal of a second trial so handicapped. No legal aid would be available at a retrial. Appeal allowed, and conviction set aside;
- (iii) Judges in Guyana should continue to sum up on statements from the dock as being the defence of the accused person.

R. v. Coughlan (1977) 64 Cr.App.Rep.11, not followed.

The State v. Lennox Thomas (Criminal Appeal No. 61 of 1978)
(C.L.B., October 1980, pp.1206-1207)

JAMAICA

Sentencing - whether circumstances justify imposition of maximum sentence permitted for rape.

The appellants were convicted before a jury of burglary, larceny and rape, and were sentenced to seven years imprisonment for burglary and life imprisonment with hard labour for rape. They appealed in respect of sentence on the rape counts.

The Crown's case was that the appellants and another man armed with a machete, knife and screwdriver, broke and entered a dwelling house at night and stole sundry articles. One of them held a 71 year-old woman hostage while the other two attacked her two young nieces. One girl was raped by two men at knife point and the other by the third man, also at knife point.

Counsel for the appellants contended that having regard to the age of the appellants at the date of the commission of the offence: one having been under 19 years old and the other just over 17 years, and the fact that they were both apprentices learning a trade and had no previous convictions the maximum sentence of life imprisonment was wrong in principle.

In determining the appeal, the Court cited the case of R. v Sergeant (1975) 60 CR APP 74 in which Lawton, L.J. after referring to the four classical principles of sentencing summed up in the words retribution, deterrence, prevention and rehabilitation, stated that "any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them had the greatest importance in the case with which he is dealing", and then went on to deal in turn with each of these principles, and held that -

- (i) though there was no scientific scale by which to measure punishment a sentence must be imposed to fit the offender and at the same time to fit the crime;
- (ii) the appellants were two young and inexperienced men of fair intelligence who were learning a trade. Neither had previously ran foul of the law and there was nothing to suggest that they had developed such anti-social habits and that they were beyond redemption. There was no medical evidence that either were suffering from any mental disorder which would render them a danger to the community and, heinous as the offence was, a determinate sentence of imprisonment would meet the justice of the case;

- (iii) the imprisonment should be for an extensive period demonstrating the Court's utter abhorrence for gang rape.

The sentence of life imprisonment was set aside and one for 12 years at hard labour substituted.

R. v. Sydney Beckford and David Lewis CA, SC, Criminal Appeals Nos. 173, 174.

(C.L.B., April 1982, pp.539-540)

HONG KONG

Indecent assault - forcing women to remove clothes and then taking photograph.

The Court of Appeal has held that forcing a woman to remove her clothes and taking photographs of her amounts to indecent assault.

Mok Pak-wo v. The Queen (Criminal Appeal No. 746/79)
(C.L.B., October 1980, p1209)

MALTA

Voluntary homicide of a child under the age of 12 months by its mother - whether the law presumes imbalance of the mind.

The appellant stood charged with voluntary homicide. In the indictment, the Attorney General alleged that a few minutes after giving birth to a child, appellant maliciously, with intent to kill that child or put its life in manifest jeopardy, did cause its death by throwing it from a window several stories high. The police had originally arraigned appellant on a charge of infanticide; however, following the psychiatric experts' deposition (before the Inquiring Magistrate) to the effect that at the time of the alleged offence she was not suffering either from puerperal psychosis or from any other imbalance of the mind, the Attorney General changed the charge to one of voluntary homicide and subsequently indicted accordingly.

Before the Criminal Court, appellant pleaded, by way of preliminary pleas, the nullity of the committal proceedings subsequent to the change in the charge and the nullity of the indictment. The Court rejected both pleas.

Section 258A of the Criminal Code states-

'Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth of the child, then, notwithstanding that the offence would have amounted to wilful homicide, she shall be guilty of infanticide and shall be liable to the punishment of imprisonment to a term not exceeding twenty years.

The Court of Criminal Appeal, dismissing her appeal held that-

- (i) it was within the prosecution's right to change the original charge to one of voluntary homicide, just as the jury would be within their rights in returning a verdict of not guilty of voluntary homicide but guilty of infanticide or in returning any other verdict open to them on an indictment of voluntary homicide.
- (ii) there was no presumption that a woman who killed her under-12-month-old child was suffering from the imbalance of mind envisaged in s.258A: this imbalance of mind was merely one of elements of the offence of infanticide to be proved by the

prosecution in case of a charge under that section.

the Republic v. Nathalie Pisani Court of Criminal Appeal, 24 May 1982
(C.L.B., October 1982, p.1360)

NEW ZEALAND

Abortion - Meaning of "unlawfully" in s.183 of Crimes Act 1961

The defendant, a qualified medical practitioner, was acquitted on 12 counts charging that, with intent to procure the miscarriage of the woman concerned, he unlawfully used an instrument on 12 named women contrary to s. 183(1)(b) of the Crimes Act 1961. The trial Judge had directed the jury that the test for whether or not the use of an instrument was unlawful was whether it was necessary to preserve the woman from serious danger to her life or to her physical or health, not being the normal dangers of pregnancy and childbirth. On a case stated, the Crown submitted that the Judge's direction went too far in that the jury was told that serious danger to physical or mental health was a sufficient justification in itself, irrespective of whether such dangers to health carried with it a real danger of the mother dying or her life being shortened.

Held (Wild C.J dissenting)-

"for the purposes of criminal law, at least in the case of induced miscarriage during the first trimester of pregnancy, a bona fide intention to preserve the health of the mother from a real or substantial risk of serious harm prevented an abortion from being unlawful, and the Judge's direction was correct in law subject to the qualification that the concluding words "not being the normal dangers of pregnancy and childbirth" were at best redundant and, although there was no misdirection, were better left unsaid."

R. v. Bourne (1939) K.B.687, R.v. Newton and Stungo (1958) Crim L.R.469
and R. v. Davidson (1969) V.R. 667 considered. R. v. Woolnough (Court of
Appeal, Wellington, 22 July 1976; CA 14/7). Noted at (1976) Butterworths
Current Law para 593.
(C.L.B., October 1976, p.373)

Keeping a brothel

The appellant knew that the probable result if massaging her male customers whilst in a state of nudity would be to stimulate and excite sexual desire. It was argued that such conduct did not amount to prostitution.

Held that-

"Prostitution within s.147(1)(a) is not limited to the exposure, by a woman, of her body for sexual intercourse in return for payment. It

is sufficient if a woman offers her body commonly for lewdness in return for payment, and includes the case where a woman offers herself as a participant in either active or passive physical acts of indecency for the sexual gratification of men.

Lowe v. Police (1977) Butterworths Current Law 268
(C.L.B., July 1977, p.412)

Rape - consent - appellant not realising absence of consent until after intercourse had commenced.

The appellant was charged with rape. At the trial his defence was that when he penetrated the complainant, he honestly believed that she was consenting and that he only realised her non-consent during intercourse, but did not desist. The trial judge directed the jury as follows-

"If, having realised that she is not willing, (an accused who had previously thought the girl was willing) continues with the act of intercourse, it becomes rape, because rape is the act of a person having sexual intercourse without her consent."

The appellant was convicted. The Court of Appeal held (by a majority) that the direction was correct and dismissed the appeal.

The majority (Richmond P. and Richardson J.) took the view that the ordinary and natural meaning of the words used in s. 128 is that rape requires (a) sexual intercourse (not an act of sexual intercourse) plus (b) absence on consent; both factors were established when the accused realised the absence of consent but continued with the intercourse. They noted that there is no legal novelty in a continuing act becoming criminal after it has commenced as a result of change in the accused's state of mind.

The main submission for the appellant was that s.127 makes the moment of penetration the relevant time for assessing whether or not there was consent (or a belief thereof). This submission was supported by a South Australian case (Salmon (1969) SASR 76). The submission was rejected by the majority who preferred a Queensland decision (Mayberry (1973) Qd. R 211) contrary to Salmon and distinguished the Australian statutes from the Crimes Act on the basis that the former use the old English formula as to the deeming of completion of carnal knowledge. Section 127, they said, does not exclude from the s.128 definition of rape all acts in intercourse subsequent to penetration; "complete" in s.127 means "come into existence", not "end".

The dissenting judge, Woodhouse J. would have allowed the appeal and ordered a new trial. He pointed out that the trial judge's direction meant that a single continuing act of intercourse could properly be described as being undertaken both with and without the woman's consent - "a remarkable extension of what has been the common understanding of this crime for generations". He went on to point out that rape has always been concerned with the criminal invasion of a woman's body by a male, that a male defending a rape charge must establish consent prior to penetration and that, as a matter of

commonsense, consent is not just to penetration but to a normal, complete act of intercourse. He regarded the "legally critical" moment as that of penetration.

R. v. Kaitamaki (CA 43/79; 19 March 1980) noted in The Capital Letter vol. 3 No.9 (90)
(C.L.B., July 1980 pp.842-843)

Costs in criminal cases - rape charge - inadequate tests - whether awarded on indemnity basis.

The applicant in this action for costs in a criminal case was a sergeant in the US Army, permanently stationed in Hawaii, but present with his unit at the Papakura military camp for manoeuvres with their NZ counterparts. He was arrested on 27 September on charges of rape and indecent assault. The complaint arose after a late night party at the Corporals' Club at the camp. After hearing all the evidence in a three-day jury trial in the High Court, Holland J. discharged the applicant pursuant to the provisions of s.347 of the Crimes Act 1961. Such a discharge is deemed to be an acquittal.

The application for costs was made under s.5 of the Costs in Criminal Cases Act 1967. That Act replaced, inter alia, s.402, the analogous provision in the Crimes Act 1961, which dealt with costs of trials in the Supreme Court. In spite of the language used in the new section, which might be taken to refer to District Court trials and appeals to the High Court, Holland J. followed recent precedent and concluded that s.5 could apply to High Court trials: R. V. AB(1974) 2 NZLR 425 R. v CD (1976) 1 NZLR 436; R. v Reed (1980) 1 NZLR 758. See also the Regulations, set out at SR 1970/20, and the Schedule to those Regulations.

Holland J. then traversed the heptadic criteria established in sub-section 5(2). The fourth criterion, of the seven, was of greatest relevance: "Whether generally the investigation into the offence was conducted in reasonable and proper manner".

The complainant had alleged that the defendant had ripped her panties apart. Evidence called for the prosecution, from the DSIR, was inconclusive on how the cotton stitching in the panties had come undone. Under cross-examination, the expert said that he "could not discount" the possibility that the panties had been ripped apart by strong hands. More exhaustive materials tests were conducted by experts for the defence, and testimony offered that some thread had been unpicked, not torn. The Judge concluded that-

"If the police had made proper inquiries from the DSIR, and the DSIR had ascertained that the crotch part was unstitched, then it is obvious that the complainant would have been shown to have been wrong in a material aspect and the proceedings should have been withdrawn."

The Judge also considered the behaviour of the defendant, under the seventh criterion of subsection 5(2), in that the defendant, at the outset, made an untruthful, complete denial of any association with the complainant.

As that statement was almost immediately retracted, the behaviour of the defendant did not disqualify his application.

The Court found that the Regulations prescribed a maximal recovery of costs of \$100 a day (SR 1970/20) but s.13(3) of the Act allows an order in excess of that prescription. Holland J. ordered that the applicant be paid \$1,000 in costs, plus \$1,034.64 in experts' fees, but disallowed a claim for \$830.30 for a private investigation.

Scott v R (1981) NZ Recent Law 179
(C.L.B., April 1982, p. 92-93)

Rape - deterrent sentence

The appellant was sentenced to 4 years imprisonment for rape. He had forced a young woman to have intercourse with him under threat that he would strike her. There was no actual striking of the woman beyond the intercourse itself. The appellant was 32 years of age, married with two children. He was in regular employment. There was no relevant previous offending.

It was submitted that the lack of violence beyond the rape itself and the absence of weapons indicated that a lesser sentence was appropriate. The Court of Appeal, however, agreed with the observation of the sentencing judge as to the need for a deterrent sentence: "We are aware that the climate of opinion in the community at the present time in relation to the crime of rape is that this Court should uphold the view, expressed by the Judge on imposing sentence."

R v Mead Court of Appeal, 4 November 1982 (CA 265/81)
(C.L.B., January 1983, p.163)

Rape - penetration with consent or in belief that woman consenting to sexual intercourse - continuation after realisation that woman unwilling - whether rape.

Section 127 of the Crimes Act 1961 provides; "For the purposes of this Part of this act, sexual intercourse is complete upon penetration" Section 128 provides; "(1) Rape is the act of a male person having sexual intercourse with a woman or girl - (a) Without her consent"

The defendant was charged on indictment with one offence of rape contrary to s.128 of the Crimes Act 1961 and one offence of burglary. The Crown's case was that he broke into a young woman's flat and twice raped her. There was no dispute that sexual intercourse had taken place on two occasions, but his defence was that the woman consented or he honestly believed that she was consenting. His evidence as to the second occasion was that after he had penetrated her he became aware that she was not consenting but he did not desist from intercourse. The trial judge directed the jury that if, having realised she was unwilling, the defendant continued with the act of intercourse, it then became rape. He was convicted and appealed. The Court of Appeal by a majority upheld the judge's direction and dismissed the Appeal. The defendant subsequently applied to the Court of Appeal under s.2(1) of the Offenders Legal Aid Act.

1954, which empowered a court having jurisdiction in criminal proceedings to direct that legal aid be granted, for legal aid to prosecute an appeal to the Judicial Committee, but the court dismissed the application holding that it had no jurisdiction to grant it, and that the regulations made under s.3(1) did not make provision for legal aid for appeals to the Privy Council.

On the defendant's appeal to the Judicial Committee against both decisions of the Court of Appeal, the Judicial Committee, in dismissing the appeals, held that-

1. the purpose of s.127 of the Crimes Act 1961 was to remove doubt as to the minimum conduct needed to prove sexual intercourse, and, although sexual intercourse was complete upon penetration in the sense that it had come into existence, it was a continuing act only ending with withdrawal: since rape was defined by s.128(1)(a) as "having" intercourse without consent a man was guilty of rape within the section if he continued intercourse after he realised that the woman was no longer consenting; that although the prosecution case was that there were two rapes there had been no miscarriage of the indictment, and that, accordingly, the defendant had been properly convicted;
2. the Court of Appeal, having disposed finally of the matter before it by dismissing the appeal, no longer had jurisdiction and was therefore precluded by s.2(1) of the Offenders Legal Aid Act 1954 from granting legal aid; and, since under the terms of ss.2(1) and 3(1) regulations were necessary to give effect to the aid, the absence of any provision in the regulations dealing with an appeal to the Judicial Committee prevented the grant of legal aid for such purpose.

Kaitamaki v The Queen (1984) 3 WLR 137 (PC)
(C.L.B., October 1984, pp 1546 - 1547)

SWAZILAND

Disposal of a child's body - intent to conceal birth - whether death before or after disposal material

The accused had pleaded guilty in the Magistrate's Court of having contravened s.2(1) of the Concealment of Birth Act 1943 (No 5 of 1943), but the matter thereafter came to the High court on review when the Chief Justice directed that it be set down for argument. It appeared from the recorded evidence that the accused had given birth to a child which she dumped in her toilet, from where the child was removed to hospital but who died about three days later from atelectasis of the lung. Section 2 of the Swaziland Act is in practically identical terms with s.113 of the South African General Law Amendment Act 1935 (No.46 of 1935). The section under which the accused was convicted on her plea of guilty makes it an offence for a person to dispose of the body of any child with intent to conceal the fact of its birth "whether such child died before, during or after birth". In the case

of R. v. Lequila (1946) E.D.L. 8 Gardner J. on review, not argued before him by Counsel, held that there could be no conviction unless what was disposed of was the dead body of the child. In R. v. Oliphant (1950) (1) S.A. 48 de Beer J.P. stated that the relevant section "quite clearly envisages the disposal of a dead body and this is an essential element of the crime which should have been alleged".

The Chief Justice Mr. Justice C.J.M. Nathan, however, differed from the decisions in these cases.

Held:-

- (i) the evil with which the legislature is concerned is the disposal of the body of a child with intent to conceal the fact of its birth, and should be just as much an offence if the child is alive as if it is dead;
- (ii) in the light of s.2(3) of the Act which is to the effect that "a person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of" (a similar provision appears in the South African section), it was unnecessary to prove that the child was dead before the body was disposed of and that the subsection indicated that it could just as well be a live body.

The conviction was accordingly confirmed.

Rex v. S.M. Nkambule (Review Case No. 135 of 1976)

Carnal relations with girl aged 14 years - marriage under Swazi law and custom - repugnancy test - not age but mental and physical capacities
The accused had been found guilty by the Senior Magistrate for the Hhohho District of a contravention of s.3(1) of the Girls and Women Protection Act 1920 (No.39 of 1920) in that he had carnal connection with a girl aged 14 years. Sentence was postponed for a period of 12 months on condition that the accused was not during the period of suspension convicted of a similar offence. The Magistrate concluded that although a ceremony intended to constitute a customary marriage of the complainant with red ochre only took place the day following the intercourse complained of, the accused when called upon to plead stated that complainant was his "lover", but complainant denied that he was her "boy friend". Apparently, however, she had spent several days alone with the accused and at some stage she was taken to a cattle byre by other women. There some ceremony, not clearly recorded, was performed on her. The accused himself did not aver that he was married to the complainant at the time of the acts of sexual intercourse between them, but her father stated that in view of the formalities which had taken place he "took" the accused as his daughter's husband. The Magistrate forwarded the record to the High Court for consideration under its reviewing powers. He apparently had some doubt as to whether a child of 14 years could consent even to a Swazi marriage and considered that such a marriage would be regarded as repugnant to natural justice or morality under s.11(a) of the Swazi Courts Act 1950 (No. 80)

of 1950). The reviewing Judge following the judgment of Bock J in the case of R. v. Smith (1941) G.W.L.D.2., found that in a marriage under Swazi Law and Custom the husband need not wait until the wife had attained the age of 16 years before he indulged in sexual intercourse with her. Although he upheld the Magistrate's finding of fact that the intercourse actually took place before the traditional marriage ceremony he concluded by way of obiter dictum that in cases of this kind it was not the age of the "wife", but her mental and physical capacities which should be the main relevant consideration in the application of the repugnancy test. Amongst other factors which influenced him in this opinion was that even under the Marriage Act 1964 (No.47 of 1964) the possibility of a girl under 16 years being permitted to marry is not excluded as the Deputy Prime Minister may give special dispensation whereby such a marriage may be entered into. Rex. v. M.L. Mhlabane Review Case No 83/1978. (C.L.B., January 1978, pp.89-90)

UNITED KINGDOM

Race Relations Board v. Applin (1974) 2 W.L.R. 541 (H.L.); 2 All E.R. 73
A married couple, registered with local authorities as suitable foster parents, had in the course of 23 years, without reward and as a public service, taken in more than 300 children, over half of them coloured. The appellant and another took action which amounted to incitement to the foster parents to take white children only. The House of Lords (with one dissident) held that this was to incite the foster parents to act unlawfully contrary to the provisions of the Race Relations Act 1968; the foster parents, in providing a public service by fostering children in the care of a local authority, were "concerned with the provision of facilities, or service" to those children, who were "a section of the public" within the meaning of the Act. (C.L.B., January 1974, p.27)

R. v. Morgan (1975) 2 W.L.R. 913; 2 All E.R. 347
In an appeal from a conviction for rape the House of Lords, by a majority, held that, where the appellant had had sexual intercourse with a woman without her consent, yet believed that she did consent, he ought not to have been convicted, even though the jury were satisfied that his belief was not founded on reasonable grounds. The essential element of mens rea, an intention to have intercourse without the consent of the victim, was lacking. There must at least be an intention to commit the act without caring whether the victim consented or not. (A Private Member's Bill has been introduced into the House of Commons to amend the law) (C.L.B., October 1975 p.31)

Rape - adoption of statement - cross-examination of victim

Three defendants were convicted of rape. D, appealed against conviction on three principal grounds; that the judge wrongly (a) admitted in evidence contemporaneous notes of alleged admissions by D1, which were unsigned by him; (b) ruled that counsel for D2 and D3 had a duty to cross-

examine D1, where their evidence differed, thereby performing the Crown's task; (c) ruled that D1's counsel could only cross-examine the complainant as to whether she had had sexual relations within the previous five days, but no further.

The Court of Appeal, dismissing the appeal, held that-

- (i) the technically incorrect admission of the notes - admittedly an irregularity - could not have effected the outcome;
 - (ii) the judge rightly pointed out counsel's duty to clarify, by cross-examination, his intention to challenge the co-defendant's evidence, whilst he warned of his duty to comment to the jury should counsel fail to do so, where there was extreme disparity between Ds' evidence. (Browne v. Dunn (1893) 6 R. 67 and dictum of Lord Herschell L.C. at 70 applied);
 - (iii) the judge had properly exercised his discretion under s. 2 of the 1976 Act by allowing sufficient cross-examination of the complainant for D1 to expand his viewpoint without causing her the further distress of a fishing expedition.
- R. v. Fenlon; R. v. Neal (1980) 71 Cr.App.R.307 (C.A.)
(C.L.B., April 1981, p.537)

Cross-examination of rape victims

Section 2 of the Sexual Offences (Amendment) Act 1976 provides -

- (1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of a defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.
- (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked

The court of Appeal, in allowing an appeal against conviction for rape, also gave guidance on the effect of s.2 of the Sexual Offences (Amendment) Act 1976 concerning leave to cross-examine a complainant in a rape case and to call evidence about her sexual experience with a person other than the defendant. The Court held that -

- (i) It was apparent from the statutory words that the first question the judge had to ask himself was whether the proposed questions were relevant according to the ordinary common law rules of evidence and relevant to the case being put against the defendant.

If they were not so relevant that was the end of the matter.

- (ii) The second question for the judge's consideration, if the questions were relevant, was whether they should be allowed or not, and that depended on the terms of s.2, which limited the admissibility of relevant evidence.

In R v Mills (Leroy) (1979) 68 Cr app R 327 Lord Justice Roskill gave the judgment of the Court of Appeal approving the decision of Mr. Justice May in R v Lawrence (1977) Crim LR 492: "The important part of the statute which I think needs construction are the words 'if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked. An in my judgment, before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to a defendant he must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury properly directed in the summing-up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed."

The approval in Mills meant that their Lordships in the present case were bound by Mr. Justice May's words. In the end the judge would have to ask himself whether he was satisfied in the terms expounded by Mr. Justice May. It would be a problem for him to apply that doctrine to the particular facts of the case.

- (iii) It would be both improper and very unwise for their Lordships to state in advance what might or might not be unfair in any particular case.

Mills had referred to Mr. Justice May's decision as an exercise of the judge's discretion. However, it had been agreed on all hands in the present case that it was, perhaps, wrong to speak of a judge's "discretion" in the case. He had to make a "judgment" whether he was satisfied or not in the terms of s.2. Once having reached his judgment on the facts he had no discretion.

If he concluded that it would be unfair to exclude the evidence or question, it had to be admitted and allowed.

- (iv) The section was clearly aimed primarily at protecting the credit of a complainant and excluding questions which went merely to credit and no more. The result was that, generally speaking - of course, there would always be exceptions - if the proposed

questions merely sought to establish that the complainant had had sexual experiences with other men to whom she was not married so as to suggest that, for that reason, she ought not to be believed on oath, the judge would exclude the questions or evidence.

- (v) On the other hand, if the questions were relevant to an issue in the trial in the light of the way the case was being run - for example, consent as opposed merely to credit - they might as a general rule be admitted.

Their Lordships were far from laying down any hard and fast rules. In such situations there was a grey area which existed between the two types of relevance: credit and issue.

Evidence of sexual promiscuity might be so strong or closely contemporaneous in time as to come near to or reach the boundary. Conversely, the relevance of the evidence as to an issue might be so light as to lead the judge to conclude that he was far from satisfied that to exclude it from the jury would be unfair to the defendant.

- (vi) The problem facing the judge of making the decision at an early stage was they type of problem continuously faced on such decisions as whether counts or defendants should be tried separately.
- (vii) To what extent was the court on appeal entitled to differ from the judge's conclusion? Their Lordships were in many respects in as good a position as the judge to reach a conclusion. They had to decide whether they believed the judge to have been wrong in the conclusion which he reached applying the test of Mr. Justice May in Lawrence.

Like so many decisions in the grey area it was not easy to make. His Lordship considered the proposed questions against the background of the way in which the case had been put against the appellant and concluded with the greatest possible reluctance that the judge was wrong to have excluded two out of three subjects for cross-examination of the complainant.

Regina v Viola Court of Appeal, 10 May 1982 (The Times: 13 May 1982)
(C.L.B., July 1982, pp.982-984)

Sexual offences - masseuses providing sexual services not amounting to full sexual intercourse - whether massage parlour a "brothel".

On appeal, the Queen's Bench Division has held that premises where more than one woman offered herself as a participant in physical acts of indecency for the sexual gratification of men constituted a brothel for the purposes of s.33 of the Sexual Offences Act 1956, that, accordingly, on a charge of assisting in the management of a brothel it was not essential to prove that normal sexual intercourse was provided at the premises.

Kelly v Purvis (1983) 2 WLR 299
(C.L.B., April 1983, p453)

Scotland

Rape - whether husband can be guilty of rape of wife

An accused was charged in the High Court on indictment that he had assaulted and raped a woman. The woman, as was averred on the indictment, was the wife of the accused although they were living apart. No decree of judicial separation had been pronounced. An objection to the relevancy of the indictment was made on behalf of the accused. In argument it was conceded by the Crown that, so far as was known, this was the first time an attempt had been made to indict a husband for the rape of his wife.

Lord Robertson repelled the objection. There were no reported Scottish cases on the matter but the institutional authority of Baron Hume was against the proposition that a husband could rape his wife. However, the whole position of marriage and the status of women was today very different than it was in the time of Hume and although it is not said in the passage where that author treats of the matter, it would appear that he was dealing only with a husband and wife who happened to be living together. In modern times it is quite illogical and unreasonable to treat the question of rape as if it is in some way different from assault. A man can be found guilty of assault in whatever way and in whatever degree of seriousness of violence on his wife and it would be unreasonable if he could not be found guilty of rape if the necessary facts were proved. It might be a question of degree but it could not be affirmed as a matter of principle that the law of Scotland today is that a husband in no circumstances can be guilty of the crime of rape upon his wife.

HM Advocate v Duffy 1983 SLT 7

(C.L.B., October 1983, p.1262)

United Kingdom

Sexual offences - procuring or attempting to procure woman to become common prostitute - reasonable belief in woman being prostitute - whether belief irrelevant - whether genuineness of belief question for jury.

The appellant pleaded no guilty at trial on indictment to a court charging, under s. 1(1) of the Criminal Attempts Act 1981, attempting to procure a woman to become a common prostitute. He wished to raise as a defence that he believed her to be a prostitute. On a submission at the close of evidence for the prosecution the trial judge ruled that the appellant's belief whether or not the woman was already a prostitute was irrelevant to the offence charged. The appellant thereupon changed his plea and was convicted.

On appeal against conviction on the question as to the necessary intention in relation to a charge under s.1(1) and a charge of the full offence contrary to s.22(1)(a) of the Sexual Offences Act 1956 the Court of Appeal, in allowing the appeal, held that -

1. on a charge under s.1(1) of the Criminal Attempts Act 1981 of attempting to procure a woman to become a common prostitute, the intent necessary was the same as the intent to commit the full

offence under s.22(1)(a) of the Sexual Offences Act 1956;

2. a man who genuinely believed on reasonable grounds that a woman was a prostitute could not be said to be trying to procure her to become that which he already believed her to be: that the genuineness or otherwise of the appellant's belief was essentially a question for the jury; and that, accordingly, the trial judge was wrong to rule that the appellant's belief was irrelevant and the conviction would be quashed.

R v Brown (1984) 1 WLR 1211 (CA)
(C.L.B., January 1985, p.75)

Evidence

AUSTRALIA

Victoria

Rape - corroboration

The applicants were convicted of rape, and applied for leave to appeal on grounds, inter alia, that-

- (a) evidence of a complaint by the prosecutrix had been wrongly admitted; and
- (b) the trial judge had wrongly directed the jury that evidence of the distressed condition of the prosecutrix was capable of amounting to corroboration.

The applicant applied to the Full Court of the Supreme Court of Victoria which held that-

- (i) evidence of recent complaint by the prosecutrix in a case of rape was not admitted to prove or tend to prove any of the facts stated in that complaint, nor to prove lack of consent, but was admitted solely to buttress the prosecutrix's evidence given in the witness box.
- (ii) evidence of recent complaint was accordingly admissible only if it was made at the first reasonable opportunity and, in the circumstances in which it was uttered, could serve to buttress the prosecutrix's credit as a witness by demonstrating consistency;
- (iii) the decision whether to allow evidence of the complaint to go to the jury therefore depended upon whether the complaint was capable of being regarded as a spontaneous and unvarnished narrative. If the complaint was not made as soon as could reasonably be expected in the circumstances after the event, or was the product of suggestion or intimidation, or might have been induced as a consequence of the relationship between the

- prosecutrix and the person to whom the complaint was made, then the evidence might be excluded;
- (iv) evidence of two complaints might be admissible where each complaint could fairly be regarded as having been made at the first reasonable opportunity after the offence;
 - (v) where in a rape trial consent was in issue, it was generally advisable that the jury be directed that it should look for corroboration in respect of that issue;
 - (vi) each separate item of corroborative evidence need not, when taken alone, implicate the accused, provided that in conjunction with other evidence it did implicate or tend to implicate him; and
 - (vii) while evidence of the distressed condition of the prosecutrix would sometimes carry little weight, evidence given at the trial concerning the prosecutrix's distressed condition only seconds after the event was capable of constituting corroboration because such evidence, in conjunction with the surrounding circumstances, tended to show that it was more probable than not that the acts on intercourse were non-consensual.

R v. Freeman and others (1980) V.R.1
(C.L.B., July 1980 p833-834)

Western Australia

Compellability of spouse - misdirection by trial judge

By s.8(1)(b) of the Evidence Act 1906 - 1978 (W.A.) the spouse of a defendant is a non-compellable witness.

At the trial of K for wilful murder, his wife was called as a witness on behalf of the prosecution. She declined to testify.

On appeal against conviction, the Full Court held that -

"a reference by the trial judge to the fact that the wife "was not called in defence of her husband" had prejudiced the jury and resulted in a miscarriage of justice.

If the Crown had any reason to think beforehand that Mrs. Kerr might be unwilling to give evidence - and this may not have been the case - then her unwillingness ought to have been established before the trial judge in the absence of the jury and indeed it would seem to us that in every case it would be a desirable practice to test and to establish the willingness of a wife to give evidence in the absence of the jury."

The appeal was allowed and an order made for retrial.

Kerr v R. (1980) W.A.R.21
(C.L.B., October 1980 p.1232)

South Australia

Rape-admissibility of police testimony of statements made by prosecutrix shortly after the incident complained of - "character" of utterances
Section 34i of the Evidence Act 1929 - 1974 (S.A.), provides as follows-

- 34i. (1) In proceedings in which a person is accused of a sexual offence, evidence of a statement made by the alleged victim of the offence-
- (a) after the time the offence is alleged to have been committed; and
 - (b) otherwise than in the presence of the accused, is inadmissible unless introduced by cross-examination, or in rebuttal of evidence tendered by or on behalf of the accused.
- (2) In proceedings in which a person is accused of a sexual offence, evidence of-
- (a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or
 - (b) the sexual morality of the alleged victim of the offence
- shall not be adduced (whether by examination in chief, cross-examination, or re-examination) except by leave of the judge.
- (3) Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that-
- (a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and
 - (b) the introduction of the evidence is, in all the circumstances, of the case, justified.

The two accused were charged with rape. The prosecution sought to lead evidence that not long after the offences had allegedly been committed in a pine plantation, the police had observed the prosecutrix run onto a track and toward the police car in a hysterical condition calling "Help me, help". The police were to give evidence that when she got into the vehicle she said "They're after me. They're going to kill me. I've been raped". Objection was taken on behalf of the accused to the admission of the evidence that related to statements by the prosecutrix as infringing sub-section (1) of s.34i. of the Evidence Act. It was also submitted that if the evidence was admitted it could not be left to the jury as capable of being corroboration.

The trial judge ruled that evidence was admissible and capable of being corroborative because of the importance that may be attached to the police testimony was not derived from the information contained in what the prosecutrix said, but upon the character of her utterances. The test to be applied by the jury in order to determine what use was to be made of the girl's cries and utterances in the instant case as she neared and entered the police car was: Was the girl still in the grip of the emotions created by whatever experiences she had just passed through? Were her cries and utterances the spontaneous and natural outpourings of one who was still reacting to the situation? Or, on the other hand, in the circumstances, and in the time available to her, had she been afforded a real opportunity of

which, viewing the circumstances as a whole, she might fairly have availed herself, for working out, as a narrative, what she was going to assert had happened?

R v Kooyman and Brydson (1980) 2 A Crim. R.18
(C.L.B., October 1981) p.1300-1302)

Queensland

Rape - evidence of distress - weight to be given to such evidence - whether amounting to corroboration - direction to jury

The appellant was convicted of rape. Evidence was given by a friend of the complainant as to the latter's distressed condition at a time when an intruder was observed fleeing from her residence. The trial judge directed the jury that, as a matter of law, evidence of the complainant's condition, if accepted, was capable of corroborating the complainant's evidence of the rape.

The appellant appealed to the Queensland Court of Criminal Appeal which, in dismissing the appeal, held that-

- (i) what weight evidence of distress carries depends on the facts of each case;
- (ii) a warning that distress may be feigned or may not reflect the complainant's state of mind at the time of the offence is not called for in every case, nor is it absolutely necessary that a jury be told that generally evidence of a distressed condition is of little weight; and
- (iii) such a warning was not called for in the present case where the evidence relied on as corroborative of the complainant was that she was observed at the very moment an intruder was seen fleeing from her residence.

R v McDougall (1983) Qd R 89
(C.L.B., October 1983, pp1267-1271)

Victoria

Rape - visual identification - direction to jury - whether adequate warning on circumstantial evidence

The applicant had been convicted of rape and other offences. The alleged offences arose out of the kidnapping of a girl and a young man, the locking of the young man in the boot of a car and prolonged sexual attacks on the girl. Two men committed those offences. It was common ground that one of the offenders was C, and the issue was whether the other offender was the applicant. When the offences were committed, the applicant, having been committed for trial about two months prior to the commission of the instant offences, was awaiting a trial for robbery. The applicant fled to England about a week after the commission of the instant offences. Thereafter the girl and the young man identified the applicant from a photograph.

The applicant was extradited to Australia more than three years later, but no identification parade was conducted. At the trial both the girl and the young man conceded that there were significant differences between the applicant and the relevant offender and the young man in fact said that the applicant could not be the offender. The jury heard evidence of the flight of the applicant and of the fact that he was then awaiting trial for robbery. The question whether the applicant had fled because of the robbery charge or because of the instant offences was left to the jury.

The applicant was convicted, and he applied to the Full Court of the Supreme Court of Victoria for leave to appeal.

The Full Court, in granting the application, allowing the appeal, quashing the applicant's convictions and sentences and ordering a new trial held that-

- (i) in deciding on appeal whether a direction on visual identification was adequate, the approach is to ask what warnings would have been expected as adequate in the circumstances and to weigh against that what the trial judge had said;
- (ii) the question as to what is an adequate warning depends on the circumstances of the particular case;
- (iii) in the circumstances, the warning and directions which had been given by the trial judge were inadequate;
- (iv) the absence of objection at the conclusion of the charge did not in the circumstances warrant a rejection of the application;
- (v) in a criminal trial it is only the elements (ingredients or ultimate facts) of the crime which must be established by the evidence beyond reasonable doubt;
- (vi) in a case depending wholly or mainly on circumstantial evidence it is wrong for a jury to be told that, before they rely on an evidentiary fact as an item of circumstantial evidence, they must be satisfied of its existence beyond reasonable doubt;
- (vii) in the present case the Crown did not rely wholly or mainly on circumstantial evidence and there was no call for giving the commonly given general direction on circumstantial evidence; and
- (viii) having regard to the inadequate direction and warning in relation to identification evidence, the appeal should be allowed.

R v Dickson (1983) VR 227
(C.L.B., October 1983, p1269-1271)

South Australia

Rape-several counts relating to different incidents with different girls-

striking similarities in circumstances-whether evidence in respect of one incident could be used in others

The appellant was charged upon an information containing eight counts-one of attempted rape and seven counts of rape. The counts related to different incidents with three girls and there were a number of similarities in the circumstances of the offences alleged which the trial judge considered so striking that an application for separate trials was refused. In his summing up the trial judge directed the jury that they could use the evidence in relation to the incident with each girl when considering the incidents in which the other two girls were concerned. The appellant was convicted upon all counts, and appealed to the Full Court of the Supreme Court of South Australia.

The Full Court, in dismissing the appeal, held that upon the evidence the three sexual assaults upon the girls bore such a striking similarity to one another that the trial judge (having given proper and adequate warnings to the jury as to the dangers attaching in the circumstances to identification evidence) was justified in authorising the jury to use an independent finding of guilt in respect of one incident to support proof of identity of the accused and finding of guilt in respect of the other two incidents.

In so doing, the Full Court had occasion to examine the principles upon which evidence of similar facts may be admitted upon a criminal trial, particularly as enunciated by, respectively, the House of Lords in Harris v DPP (1952) AC 694 and The Queen v Boardman (1957) AC 421 and the High Court of Australia in Penny v The Queen (1982) 44 ALR 449, The Queen v Sutton (No 2) (1983) 32 SASR 553 (C.L.B., April 1984, ppl129-1130)

Prostitution-whether evidence of payment of money essential to charge of keeping a common bawdy house

Upon the hearing in a court of summary jurisdiction of a complaint against the appellants for the offence of keeping a common bawdy house, evidence was given by a number of male witnesses who had visited the premises in question. The entrance to the premises was secured by remote-controlled doors. A customer, on being admitted, was introduced to one of a number of women, and paid to one or other of the appellants a fee. In return he was permitted to take the woman to one of four bedrooms on the premises and have sexual intercourse with her. None of the customers paid any money directly to the women.

The appellants were convicted of the charge. On appeal to the Supreme Court of South Australia, it was contended on their behalf that the convictions should be set aside because there was no evidence of any payment having been made to the women of the establishment.

In dismissing the appeal, the Supreme Court held that evidence of the payment of money to a prostitute is not essential in proving a charge of keeping a common bawdy house.

Jones v Killian; Powers v Killian (1983) 34 SASR 152
(C.L.B., October 1984, ppl537-1539)

Rape-unsworn statement by accused-newspaper publicity criticising generally making of an unsworn statement-whether jury should have been discharged

The appellant was presented for trial before the Supreme Court of South Australia upon charges of rape. After the prosecution case had been completed, the appellant made an unsworn statement, and at the completion of the evidence, on a Friday, the trial was adjourned to the following Tuesday, for counsel to address the jury. On the intervening days a daily newspaper published an article and correspondence in which the making of an unsworn statement by an accused person, particularly in cases of rape, was criticised. Upon the trial being resumed, application was made to the trial Judge by counsel for the appellant for the jury to be discharged, upon the ground that as the appellant had made an unsworn statement the criticism published in the newspaper was likely to have had a prejudicial effect upon the jury. The application for discharge of the jury was refused by the trial Judge, the trial proceeded, and the appellant was convicted.

The appellant appealed to the Full Court of the Supreme Court which, in dismissing the appeal, held that -

1. a Judge of the Supreme court has power, by staying the trial of an accused person, to prevent an abuse of process by the repeated presentation of the accused for trial upon the same charge;
2. it would be only in a rare and very exceptional case that a Judge would interfere with the Attorney-General's exercise of the discretion vested in him to present an accused person for trial; and
3. although it was unfortunate that the criticism of the making of an unsworn statement should have been published immediately following the making of such a statement by the accused, the trial Judge had properly exercised his discretion in refusing to discharge the jury.

The Queen v Donald (1983) 34 SASR 10
(C.L.B., October 1984, pp1537-1539)

Victoria

Rape-whether reasonableness of belief as to consent

The Full Court of the Supreme Court of Victoria held that-

1. on a charge of rape, the Crown must prove that the accused was aware that the prosecutrix was not consenting, or else realised that she might not be and determined to have intercourse irrespective of consent;
2. the reasonableness of a belief that there was consent bears only on whether the accused actually held such a belief;
3. for fresh evidence of fresh complaint to be admissible, a

grievance or an accusation must be expressed, but it is unnecessary that such complaint be of rape; and

4. evidence of complaint is admissible as evidence of consistency of behaviour and may also be admissible to rebut a suggestion of recent invention.

DDP v Morgan (1976) AC 182 followed
R v Saragozza (1983) VR 187
(C.L.B., October 1984, pp1537-1539)

BOTSWANA

Rape-corroboration

In this case the Court in a judgment in review expounded on the principles leading to corroboration in rape cases. The Court held that the Chief Magistrate's attention had not been drawn to the decision in Jacob Mokgopa v The State, Criminal Appeal No 157 of 1981 which followed the decisions of Lord Parker CJ in R v Wilson (1974) 58 CR App R 304 and the decision in R v Knight (1966) CAR, 122 (CA). Furthermore, the learned Magistrate was right to convict the accused but his reasoning left a lot to be desired and "did not take account of the wealth of the law on the subject. He would be well advised to bring himself up to date on the decision of this Court as well as the decisions in the English and South African Courts on the subject". (It may be noted that this is the first occasion in which such strong comments have been made concerning the judicial functions and duties of a Magistrate by a senior member of the judiciary.)

The State v Richard Matho Rasetshwane High Court, Review Case No.398 of 1982,
(C.L.B., October 1983, p1240)

Attempted rape - test to be applied

This judgment on review concerned the accused who had pleaded guilty to a charge of attempted rape contrary to s.143 of the Penal Code (Cap 08:01). The High Court discussed whether the accused was rightly convicted of attempted rape and applied the test as enunciated in Davey v Less (1967) 2 All E R 423 where Lord Parker CJ cited as authority Archbold's Pleading, Evidence and Practice at paragraph 4104. The position in South Africa is as is laid down in R v J & A (1942) TPD 284 where it was held that where a man and a woman are found in a prone position with adjusted clothing which in circumstances indicated that but for interruption carnal knowledge would immediately have ensued, the facts constitute an attempt to commit the act (See further Gardner and Lansdown South African Criminal Law and Procedure Vol 1, 6th Edition at page 137).

The State v Sethatu Phuthogo Tumeletso High Court, Review Case No 411 of 1982
(C.L.B., October 1983, p1273)

Rape-the nature of corroboration

This was an appeal against conviction on a charge of rape contrary to s.141 of the Penal Code (Cap 08:01), and the sentence of three years imprisonment and six strokes passed by the Senior Magistrate at Maun.

On appeal, the High Court, in dismissing the appeal, held that the approach with regard to corroboration must assess the nature of the recent complaint and the distressed condition of the complainant but these must not be over emphasised and that except in exceptional circumstances little weight should be given to such evidence. With reference to the review case, State v R M Rasetswana (No 398 of 1982) where relevant authorities in Botswana had been cited, applying the ratio in the Rasetswana case, the Court found that even though there was not a proper direction the evidence was overwhelming against the accused.

Letswang Dimbo v The State, High Court, Criminal Appeal No284 of 1982 (C.L.B., January 1984, p.175)

CANADA

Rape-whether evidence of similar acts or psychiatric evidence as to disposition admissible in rebuttal

The accused was charged with rape. The accused and the complainant had developed a relationship over the course of two years, during which they had moved into an apartment and considered marriage. After several arguments the complainant terminated the relationship and moved to another apartment. It was at this apartment that the accused was alleged to have raped her. Sexual intercourse was admitted and the issue was whether the complainant had consented. She testified that she had performed intercourse and other sexual acts at knife-point, while he testified that she had consented throughout and that he had accidentally cut her with a knife. The defence called a number of witnesses to testify as to the accused's good character. The Crown then sought to tender in rebuttal evidence of another complainant that the accused had raped her after their relationship had terminated, and also the evidence of a psychiatrist that the accused had told him that during the course of an argument with the present complainant he had threatened her with a pair of scissors and that the accused had a disposition towards violence after a separation. The trial judge ruled that the Crown rebuttal evidence was inadmissible. The jury returned a verdict of not guilty, against which the Crown appealed.

The Court of Appeal, in allowing the appeal and ordering a new trial, held that -

- (i) once an accused puts his character in issue, evidence of similar acts or psychiatric evidence as to disposition may be admissible in rebuttal; the former is also admissible to prove guilt;
- (ii) evidence of a single act which is a part of a distinctive, albeit unplanned, pattern is admissible as probative of the occurrence of another act which bears the hallmarks of that

pattern. Here the evidence of the two complainants disclosed a remarkably similar pattern of emotional involvement followed by rejection and then violence. So too the evidence of the scissors episode was admissible as a similar act of hostility;

- (iii) the psychiatric evidence of disposition must be as to abnormal disposition, and the evidence must fall within the expertise of the psychiatrist. Here the diagnosis of the abnormal disposition by the psychiatrist was admissible to rebut the evidence of the accused's peaceable nature;
- (iv) the existence of an order prohibiting the publication of the complainant's identity could not be used to adversely affect her credibility.

R v Tierney (1982) 31 CR (3d) 66 (CA)
(C.L.B., October 1983 pp1241-1242)

MALTA

Admissibility of evidence-attempted murder of wife by husband-whether wife a compellable witness.

Defendant was charged with the attempted murder of his wife. Upon a preliminary plea, the trial judge ruled that defendant's wife was a competent witness but whether the Court would compel her to testify against her will had to be decided at the appropriate stage of the trial after she took the witness stand and not by way of preliminary plea on the admissibility of evidence. Defendant appealed from the interlocutory decree.

The Court of Criminal Appeal, dismissing the appeal, held that-

- (i) since the offence charged against defendant was allegedly committed against the person of his wife, the wife was both a competent and a compellable witness;
- (ii) however, it lay in the discretion of the trial court, regard being had to the reluctance to give evidence against her husband and to other particular circumstances of the case, not to compel her to testify (R. v Aquilina 3 December 1953 : Criminal Appeal, and R. v Lapworth (1931) 1 K.B. 117, considered).

The Republic v . George Baldacchino, Court of Criminal Appeal : 16 June 1981, (not yet reported).
(C.L.B., October 1981 p.1303)

NEW ZEALAND

Spouse as witness - offence of obscene language over a telephone - whether

when call to wife an offence against the wife

A husband used obscene language over a telephone when calling his wife. As to whether the wife a competent witness, held by the Court of Appeal-

"the wife was not a competent witness against her husband as the offence was not an offence against the wife in terms of s.5(1) and (3) of the Evidence Act 1908. Whether the offence charged against the respondent was an offence "against" his wife or was an offence "affecting the person or liberty" of his wife must be answered by reference to the legal nature of the offence charged rather than by reference to the evidence given in support of that charge."

Police v Griffiths (1978) Butterworths Current Law 1095.
(C.L.B., April 1979 p.410)

Entrapment - whether police activities exceeded bounds of proper police conduct

The appellant had been convicted of procuring a woman to have sexual intercourse with a man not her husband. The woman involved was an undercover policewoman. She answered an advertisement by the appellant who raised the question of prostitution and indicated that he was "fairly used to setting this sort of thing up". They went to a hotel, a man was indicated, and the appellant made the arrangements. The man was an undercover policeman. It was urged that where the police provided not only a willing purchaser but the vendor as well simply to implicate the offender, the situation went beyond the bounds of proper police conduct and evidence from it should be rejected as being unfairly obtained.

Held by the Court of Appeal-

- (i) the appellant had shown himself to have attempted to recruit women in general for purposes of prostitution and had taken steps which showed clearly enough that he was prepared to live on the earnings of prostitution;
- (ii) in that sense the police were not working in a vacuum and the evidence was admitted.

Lavalle v Police (1979) Butterworths Current Law 164.
(C.L.B., July 1979 p.712)

Rape-corroboration-distressed condition of complainant

Held by the Court of Appeal-

"The time element is all important in assessing whether the appearance and emotional state of a complainant in a sexual case may be regarded as capable of corroborating her evidence. The real question is whether or not it can be said that the condition itself was involuntary and uncontrived. It was felt that a case where nearly an hour had passed before independent witnesses were able to observe the distressed condition of the complainant was a borderline example of distress being capable of validity and significance of the signs of distress must depend entirely on the jury's

evaluation of the woman concerned as an honest person who would not stoop to mere pretence in order to shore up her allegation. Where evidence is just capable of being corroborative but is certainly not strongly so it may be safer and fairer to direct the jury that there is no corroboration but that they should consider all the relevant evidence in deciding whether they are nevertheless convinced of the truth of the essential allegation. There must be a particularly clear direction to the jury to be sure that they are able to exclude the chance of simulated distress or other extraneous reasons."

R. v. Moana and Smith (1979) Butterworths Current Law 264.
(C.L.B., October 1979, pp.1087-1088)

SWAZILAND

Evidence of spouse-technical defect in marriage ceremony-testimony excluded on ground of public policy

A witness at a preparatory examination had stated that the first accused was her husband who, although he had paid lobola for her, had not smeared her with red ochre. On her evidence being tendered in the High Court objection was taken that she was not a competent and compellable witness against her husband. The Chief Justice who tried the case consulted with the Swazi assessors who had been called to assist him and found that of the ceremonies performed at a Swazi wedding the legally significant one was the anointing of the bride with the red ochre (libomvu). On the basis the witness could not, strictly speaking, rank as a wife. Nevertheless, since she regarded herself as the wife of the accused, who probably also so regarded her as did the populace as a whole, he ruled that the evidence should be excluded, stating, inter alia: "The rule excluding one spouse from giving evidence against the other is based on public policy, the underlying motivation being the sanctity of the marriage and the preservation of marital confidence flowing from the marital state. In England, however, which is a monogamous country, the rule of public policy has been narrowed so as to exclude from its ambit marriages which are potentially polygamous. I am not satisfied that the rule should be similarly cut down in Swaziland where polygamous marriages are the order of the day".

Rex v J.B. Fakudze and J. Makhanya (High Court CRIT S3/76)
(C.L.B., July 1977, p.420-421)

UGANDA

Circumstantial evidence-strange conduct of accused after death of his wife-whether conviction could be based on such evidence

The appellant was convicted of the murder of his wife and sentenced to death. The only evidence against him was his strange conduct after the death of his wife. The evidence accepted by the court was that the appellant and his two wives, who included the deceased, left their home intending to go and

settle elsewhere. They had to cross a deep river 12-30 feet wide by a bridge made of logs. The appellant and his other wife, who were ahead of the deceased, crossed the bridge first. Then the appellant went back to assist the deceased, who was lame, to cross the river. Later the appellant returned to his second wife without the deceased and said nothing about her. The appellant and his second wife proceeded to the home of his father-in-law where they stayed for a night. The father-in-law observed some strange behaviour on the part of the appellant when asked about the whereabouts of the deceased. Later the body of the deceased was found in the river near the bridge. The deceased's head was covered with a piece of cloth which was tied tightly round the neck. An examination of the body did not disclose the cause of death, though the doctor thought that the deceased might have died of strangulation and not drowning. However the doctor made it clear that there was no bone fracture.

At the trial the appellant made a short statement to the effect that as the deceased was walking across the bridge, before he got to where she was to give her the help she had asked for, she fell into the river and was drowned. The incident shocked him so much that he could not raise an alarm but continued with his journey to his father-in-law.

Allowing the appeal, the Court of Appeal held-

- (i) although the very strange conduct of the appellant in relation to the death of his wife was no doubted, for purposes of criminal responsibility, this strange behaviour, in the circumstances of this case, did not more than raise very grave suspicion against him.
- (ii) there was no evidence to prove that it was the accused who tied the cloth round the deceased's neck or that he pushed her into the river. The possibility that the deceased might have fallen into the river accidentally as she attempted to cross it by the log bridge was not excluded.
- (iii) appellant's failure to report the incident may have been due to the fear of being accused of causing his wife's death.
- (iv) in view of the shortcomings in the prosecution case in establishing the guilt of the appellant, more especially as he was facing the serious charge of murder, it could not be said that the burden of proof had been discharged and therefore the conviction could not be allowed to stand.

Doroviko Bangizi v. Uganda (1976) H.C.B.41
(C.L.B., July 1977, pp421-422)

Family Law

AUSTRALIA

New South Wales

Position of de facto wife on death of de facto husband-deceased the sole owner of house financed by special loan.

The plaintiff was the executrix of a man who had been her de facto husband and who was at the date of his death the registered proprietor of a house and land which was subject to a mortgage to the Director of War Service Homes under the Defence Service Act 1918-1973. Section 35 of the Act provides that the interest in a Defence Service Home is not to be transferred to another person while any moneys owing on the mortgage to the Director are still owing and unpaid. The plaintiff sought-

- (a) a declaration that the deceased had held his right, title and interest in the house and land for her, provided that such trust had no force and effect until the consent in writing of the Director had been obtained thereto, or until the mortgage to the Director had been discharged; and
- (b) an order that subject to such consent of discharge, she, as executrix, was at liberty to transfer the property to herself absolutely.

The Supreme Court of New South Wales held-

- (i) a resulting trust, such as had arisen in the present case, was a "transfer of an interest in land" within the meaning of s.35(1) and (5) of the Act;
- (ii) s.35(1) of the Act denied any force or effect to such a transfer only so long as the property in question was subject to a security in accordance with the Act;
- (iii) there should be a declaration that there was a trust which would have no force or effect until the mortgage was discharged; and
- (iv) there should not, however, be a declaration that there was a trust which should have no force or effect until the Director should consent in writing to the trust, because, to be effective for the purposes of s.35(1)(c), the Director's consent should have been given before, or contemporaneously with, the relevant transfer.

Olsen v Olsen and anor (1977) 1 N.S.W.L.R. 189 (Sup.Ct.)
(C.L.B., April 1978, pp318-319)

Australia

Marriage according to Jewish religious ceremony-undertaking by husband to give his wife a Bill of Divorcement-whether failure to comply with such an undertaking amounts to contempt of court.

The Full court of the Family Court of Australia had occasion to consider an appeal by a husband for a decree of dissolution of marriage under the Family Law Act 1975 (as amended). The husband was resident and domiciled in Australia, whereas his wife was resident in Israel. Both parties were members of the Jewish faith and had been married in a Jewish religious ceremony.

At the hearing of the application, the husband undertook to the Family Court to do all things necessary to give his wife a Bill of Divorcement in accordance with the Jewish faith and with the law of the State of Israel. However, subsequent proceedings before the Beth Din Court in Australia were aborted, and a number of applications were made to the Family Court to deal with the husband for his contempt in failing to comply with his undertaking. The Family Court dismissed the contempt application, but ordered the husband to pay the costs incurred by his wife in all proceedings in which she had appeared before the court-

The Full Court held that-

- (i) the undertaking which had been sought and received by the Court did not infringe the prohibition against the establishment of religion contained in s.116 of the Australian Constitution;
- (ii) as it would create a serious injustice to the wife if she were to remain effectively bound by the marriage by reason of her domicile while her husband was effectively freed from the same marriage, the Court should, consistent with its duty under s.43(a) of the Family Law Act, ensure that the same rights were made available to the wife as would be available to the husband;
- (iii) although the usual situation under the Act was that each party should bear his own costs, in cases of contempt, the Court must more readily consider making an order for costs, and, in such a case, the conduct of the parties became significant; and
- (iv) the direction in regulation 173 of the Family Law Regulations that in making an order for costs the Court "may" take into account the matters therein set out was a purely discretionary direction and not a mandatory one.

In the Marriage of Shulsinger 28 F.L.R.202
(C.L.B., October 1978, pp877-879)

Matrimonial property-after order made husband filing in bankruptcy-whether bankruptcy should be annulled

The applicant, in proceedings for a dissolution of her marriage to the bankrupt, obtained an order from the Supreme Court of New South Wales that the matrimonial home be sold by the applicant as agent for the bankrupt and the applicant was to use the net proceeds of sale for the purchase of another home for herself and the children of the marriage. A few days later the bankrupt presented his own petition for bankruptcy. The house was not sold immediately but at subsequent meeting of the bankrupt's creditors the Official Receiver was authorised to join with the applicant in accepting an offer for the house which was then sold for a sum, half of which was credited to the bankrupt's estate. The applicant claimed-

- (a) the bankruptcy should be annulled as the bankrupt was in fact solvent and that his bankruptcy petition had been presented solely for the purpose of defeating the order of the Supreme Court; and
- (b) alternatively, a declaration in her favour in respect of the sum of \$15,000, being part of the sum brought to the credit of the bankrupt's estate as a result of the sale of the former matrimonial home.

In dismissing her application, the Federal Court of Bankruptcy held that-

- (i) the applicant was a "person aggrieved" and a "person interested" in bankruptcy within the meaning of s.303 of the Bankruptcy Act 1966 and, accordingly her petition was competent;
- (ii) on the facts it was not shown that the bankrupt was solvent or had overstated his indebtedness at the time of presenting his petition, and administration of his estate in bankruptcy was therefore desirable;
- (iii) where a man was insolvent, or reasonably believed he was insolvent, and presented a petition of bankruptcy against himself, and did not thereby commit a fraud on his creditors, his bankruptcy will not be annulled merely because his notion in presenting petition was "to protect himself from the evils which he might otherwise suffer"; and
- (iv) the proceeds of sale of the matrimonial home were to be regarded as realty and the order of the Supreme Court did not confer any interest in the applicant or divest the bankrupt of any interest in the property, and the bankrupt's interest became vested in the Official Receiver.

Re Mottee; Ex parte mottee et anor (1977) 29 F.L.R. 406
(C.L.B., January pp97-98)

New South Wales

Surname of child of unmarried parents-power of court to change surname-welfare of child paramount consideration

C was the father, and S. was the mother, of a child. C. and S. were not, and had never been, married to each other, and the child was in the custody of his mother. The child's father, who had regular access, conceded that this was best. The child was known by his mother's surname, which was the mother's maiden name. The father had a close relationship with the child, which he intended to maintain and develop. The father sought orders that the mother do all things necessary to cause the child to be known by the father's surname, and that the mother be restrained from addressing or allowing the child to be addressed by her surname.

At the hearing, the mother, who had not been married before, gave evidence that she intended to marry another man, and to take his surname. She stated her wish that, by the time the child commenced school, he should be known by her husband's surname. The father, who had been previously married but was now divorced, gave evidence of his intention to remarry.

The Supreme Court of New South Wales held that-

- (i) the Court had jurisdiction to entertain the proceedings (a) because the plaintiff had sought orders "regarding the custody" of an infant within s.5(1) of the Infants' Custody and Settlements Act 1899 (N.S.W.) and (b) under its jurisdiction derived from the Crown's prerogative in relation to the welfare to infants;
- (ii) by virtue of s.6 of the Children (Equality of Status) Act 1976 (N.S.W.) the plaintiff was the child's father for the purposes of s.5 of the Infants' Custody and Settlements Act;
- (iii) the Court has no power, by order, to change the surname of a child, as the only way in which a child's surname can be changed is as a consequence of usage and reputation;
- (iv) in the present case, supposing that the Court had the power to make the order sought-
 - (a) the fact that the choice was not simply between the father's surname and the mother's maiden name, but rather the mother's married name, would be a factor to be taken into account.
 - (b) by virtue of s.17 of the Infants' Custody and Settlements Act the first and paramount consideration which should guide the Court would be the welfare of the child, and

- (c) on the facts it appeared that it would be more conducive to the child's welfare if his surname, in due course, became that of his mother and her intended husband, especially if they had children of their own;
- (v) section 6 of the Children (Equality of Status) Act had no effect upon the surname which a child has or ought to have;
- (vi) that was so because there is no rule of law that a child should have, or must be given, the same surname of his father;
- (vii) that rather, the position is that there is a rebuttable presumption (whether of fact or law being presently irrelevant) that a child is known by the surname of his father, at least in a case where the parents are married and the mother has taken the surname of the father;
- (viii) that in the present case, if any such presumption were to arise by virtue of s.6 of the Children (Equality of Status) Act, it would have been rebutted; and
- (ix) that although s.6 of that Act applies to children born prior to its commencement, it should not be construed so as retrospectively to invalidate, or to require any action to be taken to reverse, a past and completed event such as the acquisition by a child of his surname.

C v S (1979) 2 N.S.W.L.R., 598
(C.L.B., October 1980, pp1232-1234)

Custody of illegitimate child-interim custody-main consideration degree of stability pending final hearing

The Supreme Court of New South Wales had occasion to consider the principles applicable in granting custody of an illegitimate child

In so doing, the Supreme Court, inter alia, held that-

- (i) the principles applicable in the Family Court of Australia on an application for interim custody of a child of a marriage are applicable also in a New South Wales Court, mutatis mutandis, on an application for the custody of an ex-nuptial child when the parents have separated after living together as a family for a significant period; and
- (ii) these principles may be summarised as follows-
 - (a) it is not the task of the Court, on such an application, to determine whether the interests of the child would be better served by being in the custody of either party on a permanent basis,
 - (b) whilst the welfare of the child is always paramount, such welfare will not usually be promoted by a decision based only

on such materials as can be prepared and presented on the hearing of an application for interim custody

- (c) in general, the interests of the child will best be met by ensuring a degree of stability in its life until the final hearing.
- (d) if the child has remained in the family home after its parents have separated, this arrangement should be continued, unless that course is strongly refuted by reason of evidence that the child's physical or mental health or moral welfare will be endangered by remaining where it is, and
- (e) if the child has accompanied the party leaving the family home, and becomes established in a new environment before proceedings for interim custody are taken this new situation should be preserved, unless that course, in turn, is strongly refuted by equally cogent evidence.

Holland v. Cobcroft (1980) 2 N.S.W.L.R. 483
(C.L.B., October 1981, pp.1303)

Australia

Alteration of property interests-whether a foreign ante-nuptial agreement capable of being registered as "overseas maintenance agreement"

A husband and wife married in Borneo, then part of the Netherlands East Indies and now a part of the Republic of Indonesia, in February 1946. At the time of the marriage the husband, who was the son of a Dutch civil servant, had acquired a domicile of choice in The Netherlands East Indies and was thus subject to Dutch law.

In accordance with Dutch law, a day prior to their marriage the parties entered into a marriage contract which excluded the operation of any form of community property and provided, inter alia, that property acquired in the name of a spouse was to be the sole property of that spouse.

In 1950 the parties emigrated to Australia and thereafter made their home in Australia. Cohabitation ceased in 1971. At the time of the hearing of an application by the wife for alteration of property interests, she owned a home with a net equity of approximately \$A42,000. The husband had sold the former matrimonial home which had been registered in his name for \$A95,000 and had invested part of the proceeds in a home owned by some relatives in which he had a right to live during his lifetime. He had invested the balance of proceeds namely \$A44,000 in a mortgage loan.

It was submitted on behalf of the husband that the ante-nuptial agreement was binding upon the parties and was capable of registration under s.86 of the Family Law Act 1975 as a maintenance agreement; and that in view of the agreement it would not be just and equitable to make any order in favour of the wife pursuant to s.79 of the Act.

The Family Court of Australia held that-

- (i) the existence of the ante-nuptial agreement could not oust the Court's jurisdiction under s.79(2) of the Family Law Act to alter the interests of the parties if it was just and equitable to do so;
- (ii) the ante-nuptial agreement, having been entered into in and governed by law of a foreign country was incapable of registration under s.86 of the Act as a "maintenance agreement" because neither The Netherlands nor Indonesia were prescribed overseas countries, the agreement was incapable of being registered and enforced as an "overseas maintenance agreement",
- (iii) the fact the parties had not married until the day after execution of the agreement in question did not take their agreement outside of the definition of "maintenance agreement" within the meaning of s.4(1) of the Act; and
- (iv) that having regard to the appropriate considerations under ss.75 and 79 of the Act the wife should receive 60 per cent of the mortgage moneys and the husband the balance.

In so holding, the Family Court observed, inter alia-

"It is a well-established principle of statutory interpretation that whenever Parliament refers to contractual obligations, or as in the present case, seeks to make enforceable certain agreements hitherto not enforceable at common law, it might be taken to have intended to affect only those relationships which are governed by the law of the forum: Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society (1934) 50 CLR 582. This presumption is re-enforced by the express reference in the definition of overseas maintenance agreement to the agreement having a certain effect under the law of foreign country. For these reasons I agree with the conclusion of McCall J. in In the Marriage of Duncan (1978) 4 Fam LR 282 that the definition of "maintenance agreement" does not cover an agreement which as in the present case, was entered into in, and is governed by, the law of a foreign country.

In the Marriage of Hannema:(1981) 54 FLR 79
(C.L.B., April 1983,p.467)

Dissolution of marriage-marriage in fact bigamous-application for settlement of property-whether proceedings a "matrimonial cause"

The Family Court of Australia pronounced a decree nisi for dissolution of marriage which subsequently became absolute, the Court being unaware that the marriage was bigamous. The applicant later made an application for settlement of property, and a case was stated to the Full Court of the Family Court of Australia.

The Full Court of the Family Court held that-

1. the connection between the property proceedings and principal relief which is required under para.(ca) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act 1975 is that the former be in relation to "concurrent, pending or completed proceedings for principal relief" between those parties;
2. the connection is not between the property proceeding and the decree of principal relief but between the property proceeding and the proceeding for principal relief;
3. if the applicant knew at the time he was seeking a dissolution of marriage that the marriage was bigamous and void then the proceeding would be regarded as a sham and would not provide the necessary connection with para (ca) of the definition of "matrimonial cause" in the Act;
4. however, that deficiency could be overcome by an application under para. (a) or (b) of the definition of "matrimonial cause";
5. the term "matrimonial cause" has long been understood to include not only proceedings as to the validity of a purported marriage but as encompassing proceedings relating to the custody, welfare and financial support of children of that union and the financial support and property rights in appropriate circumstances of parties to that union;
6. accordingly, on the facts, s.71 of the Act is a valid provision; and
7. the power to make laws with respect to marriage may include not only laws relating to the validity of the purported marriage but also laws controlling or regulating the custody, welfare and maintenance of children of that union (though not a valid marriage) and rights to maintenance and property between the parties to that union in relevant circumstances.

In the Marriage of Miller (1983) 49 ALR 689
(C.L.B. July 1984 pp.1161-1162)

New South Wales

Custody proceedings - both parties suitable custodians - whether expert evidence required for an insight into the psychological and other needs of the child

The Supreme Court of New South Wales has had occasion to hear competing claims between a father and the maternal grandmother of a five year old girl at which neither party called expert evidence as to the needs of the child. Both parties were suitable custodians and the child was healthy and normal.

The Supreme court has held that-

1. any child, no matter how normal and healthy it may have been to date, may be put at risk in its psychological development by a custody decision which does not give proper weight to its needs, the strength of the bonds it has formed, its capacity to adjust and so forth;
2. a judge's main hope of getting a real insight into the child's view of the world, the foundations of its security and its psychological needs, is through the evidence of an expert; and
3. therefore, the Director-General of Youth and Community Services ought to arrange for an appropriate expert to interview and report on the child.

Sullivan v Read-Bloomfield (1983) 1 NSWLR 649
(C.L.B., July 1984, pp1161-1162)

BELIZE

Husband and wife - contributions by wife - whether resulting trust giving wife beneficial interest

The appellant and respondent, husband and wife, were married on 12 April 1950. There were ten children of the marriage; the eldest, a daughter, was born in 1951 and the youngest born in 1962. At the time of the marriage the husband was a woodcutter. The wife assisted him in bundling and selling the chopped wood. About 1955 they turned to farming and thereafter farmed 20 acres of land near the village of Bomba which according to the wife they purchased from Government. Both husband and wife worked on the farm growing fruit and vegetable crops and raising poultry. The children were left in charge of neighbours and as soon as she was old enough the eldest daughter looked after them.. The income from the farm was kept by the wife from which farm and family expenses were paid. In February 1964 she opened a bank account into which she deposited part of the surplus income from the farm after paying expenses.

In 1964 a lot of land in Neal's Pen Road, Belize City was purchased on the suggestion of the wife. It was conveyed to the husband alone in fee simple by an indenture dated 7 May 1964, the consideration being \$290. The wife said the lot remained vacant until they raised a little money and started to build. The house was built in stages. First to be built was the upstairs portion on poles. Then in 1968 a loan of \$1,300 was obtained from the Reconstruction and Development Corporation upon the security of an indenture of mortgage dated 7 November 1968, the husband being the mortgagor. With this money the lower portion of the house was constructed. Later a further extension was built at the back of the upstairs portion of the house.

During these years the farming continued as before until 12 April 1976 when husband and wife separated. At that time the wife gave the husband half the credit balance in the bank account she had opened in 1964 amounting to

\$412.

In 1981 the wife sued the husband for a declaration, firstly that the husband held the 20 acres of land near Bomba and the lot of land in Neal's Pen Road with the house built thereon in trust for both husband and wife in equal shares; secondly, that the wife was entitled to a half share of the proceeds of sale in the event of either of the said properties being sold, and thirdly that the wife was entitled to half the rents collected in respect of the Neal's Pen Road property from "12th April 1976 to date".

The trial judge gave judgment in favour of the wife, and the husband appealed against that decision.

The Court of Appeal held that-

1. there were contributions made by the wife without which the properties would not have been bought and in circumstances imputing to the husband a resulting trust giving the wife a beneficial interest in the properties : Falconer V Falconer (1970) 3 All ER 452 Henry V Henry 20 WIR 524, and Smith v Baker (1970) All ER 826 considered;
2. in respect of the Neal's Pen Road property, the land and house were held by the husband in trust for himself and the wife in equal shares beneficially in fee simple: and that the wife is entitled to half the rent collected from any letting of the property, and to a half share in the net proceeds of any sale of it;
3. the evidence did not disclose proof of title and ownership of the 20 acres of land near Bomba, and no declaration can be made as to the beneficial interests over this property.

Flowers v Flowers, Court of Appeal, 10 June 1982, (Civil Appeal No.1 of 1981)

(C.L.B., January 1984, p177-178)

BOTSWANA

Affiliation proceedings-period of time for making complaint-whether directory
The Court disagreeing with the judgment of Edwards J. in Moathlodi v Oduetse 1978 BLR 33 where Edwards J. held that the provisions of the Affiliation Proceedings Act (Cap. 28:02), and in this regard, s.4 specifically, which provides that a complaint may be made against the alleged father "at any time before or within twelve months after the birth of the child" were directory and not peremptory, held on the authority of the English decision in G(A) v G(T) (1970) 3 ALL ER 546 (CA) that a limitation of time should and has been strictly interpreted.

McPherson Sichinga v Annah Phumetse High Court, Civil Appeal 4 of 1981 (C.L.B., July 1982, p998)

Divorce and custody proceedings-defendant wife and children living out of jurisdiction - welfare of children

The plaintiff commenced divorce proceedings against his wife in October

of 1980. The action was undefended and a rule nisi for divorce was granted in December 1982. However the defendant was permanently residing in Mozambique and the plaintiff in his application sought custody of the two children, one of whom was born in Mozambique and the other, a boy, was born in Botswana.

The Judge held that-

- (1) the domicile of the children follows that of their father and the Court therefore had jurisdiction as regards their custody. However, the children had been living for over three years with their mother in Mozambique and applying the judgment in Handford v Handford (1958) 3 As 378, the Court could not make an order directing the defendant to deliver custody of the child to the plaintiff in view of the fact that the defendant was outside the Court's jurisdiction. Furthermore, in Eilon v Eilon (1965) 1 SA at 725 it was held that the Court's jurisdiction was impaired where it could not give an order which was practically effective. In this case, the court could not order the defendant to surrender the children to the plaintiff;
- (2) in deciding custody matters, the welfare of the children is a paramount consideration, and before a Court could come to a decision it had to have a full legal argument on the advantages and disadvantages to the children of living with one parent or the other. Since there was no such information in this case, the proceedings were dismissed. Verona v Angelina, High court, Matrimonial Cause 98 of 1980 (C.L.B., January 1984, p178)

CYPRUS

Marriage solemnised at registrars office-no religious ceremony-marriage void ab initio

The Supreme Court of Cyprus has ruled that-

"a marriage solemnised at a registrar office in England between Greek Cypriots who were permanently resident and domiciled in Cyprus and who were members of the Greek Orthodox Church, but who did not go through any religious ceremony, was void ab initio." Metaxa v Mita (1977) Judgments of the Supreme Court of Cyprus, Part I, p.1. (1977) Bulletin of legal Developments 103 (C.L.B., July 1977, p.425)

Parties members of the Greek-Orthodox Church-civil marriage-religious ceremony condition of essential validity of marriage

By this petition the petitioner, husband, prayed for a declaration that the civil marriage performed between the parties in England was null and void.

The petitioner and the respondent, both Greek Cypriots and members of the Greek Orthodox Church, went through a ceremony of marriage at

Waltham Forest Register Office in London. Later the respondent gave birth to a child. The petitioner alleged that after the celebration of the marriage he did not co-habit with the respondent and that he was not the father of the child. It was also alleged that the marriage was not a valid marriage as it was not celebrated in accordance with the rites of the Greek Orthodox Church.

The respondent, on the other hand, alleged that she and the petitioner had met in Cyprus and had sexual relations first in Cyprus and later in London before the marriage. While in London the petitioner promised to marry the respondent and they in fact went through the civil marriage in London on 3 November 1972, believing it to be valid marriage; that after the celebration of the marriage they lived together as husband and wife and continued to have sexual relations and that she did not have such relations with any other man; that on the 15 July 1973, she gave birth to a female child which was registered at Stoke Newington in the London Borough of Hackney and that in the certificate of birth the name of the petitioner appears as the father of the child.

After hearing the evidence of the parties, a Judge of the Supreme Court held-

- (i) matters of marriage between members of the Greek-Orthodox Church are governed by Article 111 of the Constitution which lays down that such matters shall be governed by the law of the Greek-Orthodox Church;
- (ii) in accordance with the law of the Greek-Orthodox Church a marriage between members of that Church shall be recognised as a valid marriage only if it is celebrated in accordance with the rites of that Church, that is, it must be an ecclesiastical marriage. Hence a civil marriage celebrated between persons who are members of that Church, anywhere, is void;
- (iii) the religious ceremony is not considered to be a mere form of marriage but a condition of the essential validity of the marriage;
- (iv) by English law a marriage performed in accordance with the formalities of the *lex loci celebrationis* is considered to be a perfectly valid marriage in England.

The marriage between the parties is declared void *ab initio*.

Epaminondas N. Metaxa v Margarita Michael Mita (1977) 1 J.S.C.1 (C.L.B., October 1977, pp609-612)

Separation agreement providing for maintenance-whether contrary to public policy, morals or law

The parties were husband and wife. Owing to certain differences they decided to live apart and made a contract in Tanganyika in 1955, whereby husband undertook to pay maintenance to his wife for life until the dissolution of the marriage. The wife subsequently died and an action was brought in

the District Court of Nicosia by the administratrix of her property against the husband.

A preliminary objection was raised by the defendant to the effect that the agreement in question, being a "separation agreement" is void and unenforceable as being contrary to public policy, morals, contrary to law and/or unsupported by consideration.

The Full District Court of Nicosia, dismissing the defendant's objections held-

- (i) any direct or indirect act or omission under any guise tending to offend against or by-pass any laws of the State or Church, written or unwritten, or any well-established and accepted principles of justice, morality, human or constitutional rights, may be interpreted as contravening public policy;
- (ii) Judicial separation and separation a mensa et thoro is either an alternative to divorce or it may provide an interim arrangement until the dissolution of the marriage;
- (iii) agreements for maintenance are considered as valid in law when an actual separation exists;
- (iv) no provision is made in the Charter of the Autocephalous Orthodox Church of Cyprus about separation a mensa et thoro and it is not known whether the Supreme Court, in the exercise of its original jurisdiction, can deal with such a matter where the parties are not members of the Greek Orthodox Church;
- (v) a separation agreement intended to facilitate a divorce is a completely different thing from an agreement made on account of an actual separation existing between the spouses to provide for a pending matter such as maintenance. Such an agreement is enforceable both in England and in Greece and it should, in the absence of any evidence that the situation regarding public policy/morals is substantially and materially different in Cyprus, be so treated here as well;
- (vi) the agreement in question does not provide for a separation to take effect in future but immediately: agreement is not void as being contrary to public policy, public morals for the law.

Constantinidou v. Karadjias (1977) 9-10 JSC 1693.
(C.L.B., January 1979, pp. 98-102)

Application for dissolution of marriage on ground of adultery-strict measure of proof required

The petitioner sought the dissolution of his marriage with the respondent on the ground of adultery. He alleged that the respondent committed adultery with the co-respondent in May and June 1973 and that as a result the respondent became pregnant and that he is not the father of the child.

He gave evidence that the co-respondent, who is an electrician, visited his house on many occasions as the petitioner had given him certain electrical jobs and that on many occasions he found the co-respondent in his house when he went home from work, but always on some pretence that he was repairing some electrical appliance; that in May or June 1973 he saw the respondent and the co-respondent travelling in the respondent's car. He also alleged that since August 1972 he had no sexual relations with the respondent and that, therefore, he could not be the father of the child.

Other witnesses gave evidence that the respondent often went to the petitioner's house when the petitioner was not there and that the respondent and co-respondent were together in a cafe and travelling in the co-respondent's car.

On the question of jurisdiction of the Supreme Court of Cyprus, held that it had jurisdiction to entertain a matrimonial petition as the husband petitioner had changed his domicile of origin which was England and acquired a domicile of choice in Cyprus.

On the question whether the respondent had committed adultery the Court held-

- (i) that it must be satisfied that there was more than opportunity before it will affix guilt: that there is no direct evidence of any eye witness as to the actual act of adultery and that though the evidence may create a suspicion it falls short of the standard required to prove the offence;
- (ii) that though the rule in Russell v Russell (1924) A.C.687 is no longer applicable in view of s.32(1) of the Matrimonial Causes Act 1950, by virtue of which evidence of non-access is admissible, the measure of proof is still a strict one and the evidence required to displace the presumption of legitimacy must be strong, distinct, satisfactory and conclusive. (Cotton v. Cotton (1954) P.305). Having regard to all the circumstances of the case the husband's evidence of non-access was not enough to rebut the presumption of legitimacy.

William Henry Holroyd v. Carol Anne Holroyd and Iacovos Zisimos (1979) 1 C.L.R.,206
(C.L.B., April 1980, pp518-519)

Wife sole beneficiary under a will-validity challenged on grounds of unsound testamentary capacity-"dispose of by will"

A testator by his will, executed on 11 September 1970, gave to his wife the whole of his movable and immovable property which he could "dispose by will". Upon his death he was survived by his wife and his sister (the respondent), who challenged the validity of the said will on the ground that the testator was not of sound mind, memory and understanding, that at the time of the execution of the will he did not know and approve its contents, and that it was executed under the undue influence of his wife (appellant 1). Furthermore, it was claimed that, if the will was

found to be valid, the testator could dispose by it of only half of his estate.

The trial Court found that the legislative provisions applicable to the will, which was a valid will, were those in force at the time of the death of the testator and that by means of the will the testator disposed of only one half of his estate and that, as a result, half of it belonged, according to the will to appellant 1, the wife of the testator, while the remaining half devolved, by operation of law, on the heirs of the testator in case of intestacy, namely, in equal shares to his wife and to his sister, the respondent. The trial Court, after accepting the evidence of Dr. Grangos, the family doctor, further found that the will of the testator was valid in that at the material time he was of sound mind, memory and understanding.

Antoniades and another v. Solomonidou (1980) 1 C.L.R. 441
(C.L.B. , April 1981, pp550-552)

GHANA

A wife sued her husband from whom she had been separated for a declaration that she was joint owner with her husband of three houses, an account for all rents collected, and an injunction to restrain the husband, his servants and agents from interfering with the wife's joint interests in the houses. In an amended statement of claim she asked for a declaration that she was the absolute owner of the houses.

In his statement of defence, the husband denied the wife's claim and contended that the houses were built by him alone, and that he provided the initial capital for the wife's trade, and that he in fact set up the wife in trade. The conveyances of the properties were executed in the joint names of both the wife and the husband. The wife's explanation for this was that she was misled into executing the said documents, and that she being an illiterate could not in any case be bound by these documents. On the other hand the husband explained that the documents were executed in their joint names in order to safeguard the interests of the wife and children in case he died intestate.

The trial judge found as a fact that the wife was both a housewife and a trader, and that she acquired the properties in dispute without the aid of the husband.

The High Court held that by virtue of section 2 of the Married Women's Property Ordinance (Cap.131) a wife had legal capacity to acquire her separate property and to bring an action in respect of such property. A wife would be considered as trading separately from her husband even where the husband occasionally ran errands for her in the course of the business or where the husband assisted her in investing the proceeds of her trade by supervising any building she put up out of her earnings. The mere fact that the husband provided the initial capital or actually set up the wife

in trade would not of itself imply that the married woman was not trading separately from her husband. In this case, the evidence was clear that the wife was both a housewife and a trader and that the premises in question were acquired from the proceeds of her trade. Ownership of the properties therefore vested in the wife alone and not in both husband and wife as marriage property.

Although the husband had failed to show that the wife understood the contents of the documents she executed, yet on the evidence the wife would not be allowed to rely on her illiteracy, since she was fully aware that the documents bore the names of the two of them as joint owners of the premises. This, however, did not mean that the wife consented to make a gift of the interest in the houses to the husband, who did not rely on a gift. Parle evidence was in the circumstances admissible to show that even though the wife and the husband were shown by the conveyance to be co-owners, the real purchaser and builder of the properties was the wife who advanced the moneys used in buying the plots and constructing the houses.

Since the properties were purchased in the joint names of the parties with money provided by the wife alone, without the wife intending to make a gift to the husband of the properties, the husband was in such a case presumed to be holding the properties in trust for the wife. In the absence of evidence rebutting the presumption, a resulting trust had been created in favour of the wife.

The judge added that there were certain relationships not peculiar to Ghana, but which had gained colourful names there, where a comparatively rich and elderly woman formed an association with a young man of little or no visible means of support. The young man lived off the rich woman, and might even have his education and further training financed by this rich woman. The relationship sometimes blossomed into marriage and properties were bought by the rich woman in the name of the young husband. These were called the "scholarship" cases. No advancement could be presumed, there must be evidence direct or circumstantial that a gift was intended by the wife to the husband.

The wife was claiming an injunction, and an account and that she was the sole beneficiary and sui juris. By claiming these remedies the plaintiff was in effect putting an end to the trust, and in these circumstances it was held by the Court that she was both the legal and beneficial owner of the properties in dispute.

Reindorf alias Sacker v Reindorf (1974) 2 G.L.R.38
(C.L.B., May 1975, p.36)

Arrears of permanent maintenance-right to levy on immovable property

A High Court Judge made an order for permanent maintenance against the appellant in favour of his former wife and their children. In the order the Judge had described his award by the misnomer of permanent alimony. It was argued on appeal that the order was void. On this issue, it was held by the Court of Appeal that the matter fell clearly within the inherent powers of the court to amend so that the impugned order would

accurately express and carry out the Court's intention which was the making of monetary payments to the wife and children in accordance with law.

Under the order the appellant had fallen hopelessly in arrears and a writ of sale of immovable property was duly sealed by a marshal of the High Court to recover the arrears under the Court's order. The appellant's property was levied on and duly advertised for sale in the Official Gazette. Thereupon, the appellant instituted an action for damages and an injunction restraining the sale of his property. To make assurance doubly sure he launched another action-an opposition action (a Roman-Dutch law procedure for opposing the sale of immovable property). In his notice of grounds and reasons for opposition the appellant contended that it was not competent for his former wife to cause the sale at execution of his immovable property to settle arrears of maintenance due under the order of Court and that the said property, being subject to a mortgage, could not be taken in execution to settle any sum due under the order which the Judge had made payable out of the appellant's "present income".

It was held by the Court of Appeal that a judgment summons was not the only mode of recovering such arrears, that the rules of the Probate, Divorce and Admiralty Division of the High Court of Justice of England would have applied by reason of express provision to that effect in the local Matrimonial Causes Act and that the issue of a writ of execution on the immovable property of the appellant was sustainable. It was also held that a judgment debtor such as the appellant could not use the procedure of opposition to object to a levy by his judgment creditor. The proper course was to institute an ordinary action for an injunction restraining the sale of the property. The principle that it was in the State's interest that there should be an end to litigation would be offended by the opposition proceedings and the trial Judge in those proceedings would really be sitting on appeal from the judgment of a Judge of co-ordinate jurisdiction and causing disorder in the hierarchy of appeal procedures.

Weithers v. Weithers (Civil Appeal No.12 of 1978)
(C.L.B., April 1981, pp552-553)

HONG KONG

Maintenance-jurisdiction of court to set aside or vary consent order sanctioning prior agreement for full and final satisfaction of present and future claims to maintenance

A consent order was made in divorce proceedings commenced by a wife after the court had sanctioned an agreement between the parties whereby, in consideration of certain financial arrangements made for the wife and the child, the wife undertook not to make any further financial claim or demand upon the husband either on her own account or on behalf of the child. The divorced wife subsequently claimed that, by virtue of s.15 of the Matrimonial Proceedings and Property Ordinance, she was entitled to apply to the court to vary the financial arrangements previously accepted by her.

Held by the Court of Appeal (by a majority)-

"the wife's undertaking to make no further financial claim or demand contained in the agreement was void and the court had no power to sanction that undertaking. The entire tenor of the matrimonial legislation was to preserve to the court flexibility and jurisdiction to make such orders as the circumstances prevailing at the time of the application demanded, and that either party to a maintenance agreement freely arrived at could seek to have it altered.

de Lasala v de Lasala C.A. No6 of 1976, Part I Hong Kong Law Reports 1977

(C.L.B., July 1977, pp.425-426)

Maintenance-lumpsum payment for son injured-retrospective effect of legislation

The parties were divorced in 1960, when the respondent was ordered to make periodical payments to the applicant and two sons. Before decree absolute, the respondent purchased a residential property. The respondent remarried in the same year, and that marriage was dissolved in 1976. In 1977, one of the sons was injured and the applicant now had to care for him. Application was made for a lump sum and property adjustment order in 1978. Legislation providing for the right to apply for a lump sum payment was enacted in 1967.

The Court held that-

"the provision relating to lump sum awards was retrospective. Therefore, even though the marriage had been dissolved seven years before the power to award a lump sum was introduced, a Court had power to make such an order."

Chatterjee v. Chatterjee (1976) Fam.199 applied.

P. v P. (High Court) (Mis. Proceedings of No. 501 of 1978)

(C.L.B., April 1979, pp411-412)

Divorce-irretrievable breakdown of marriage-whether wife who had committed adultery was entitled to relief

In divorce proceedings where there was irretrievable breakdown of marriage due to husband's behaviour, the court has held that a wife who has committed adultery is nevertheless entitled to relief even though her confession and continued coldness precipitated her husband's conduct if she can satisfy the court that any right thinking person would conclude (taking into account all the circumstances and the personalities of the parties) that her husband has in fact behaved in such a way that she cannot reasonably be expected to live with him.

Li Kao Feng-ning, Judy v Li Hung-lit Court of Appeal, 28 June 1983, Civil Appeal No. 58 of 1983

(C.L.B., October 1983, p.1282)

JAMAICA

Joint savings account-death of one signatory-whether term of will sufficient to displace rule of survivorship

The plaintiff and his wife (now deceased) had a joint savings account in the City Bank of Lauderdale, Florida, United States of America. Both the plaintiff and his wife, although Jamaicans by birth, were naturalised American Citizens but were resident in Jamaica at the time of the deceased's death.

On the death of the plaintiff's wife, the plaintiff authorised the defendant, an attorney-at-law, to withdraw the balance standing to the credit of himself and his wife in the Florida bank account, and to hold the sum on his behalf.

The plaintiff later sought to obtain the proceeds held by Mr. Jones on his behalf through another attorney-at-law but was unable to do so, as Mr. Jones faced with competing claims to the same sum by the executors and other beneficiaries paid the sum into Court to await the determination as to who was rightly entitled to the said sum.

The competing claim by the executors and beneficiaries arose as a result of a clause in the purported last will and testament of the plaintiff's wife in which she bequeathed "all money, in financial institutions to her two nieces, Joyce Nelson and Gwendolyn Peters."

It was contended on behalf of the executors and beneficiaries that this clause provided the necessary intention to displace the rule of survivorship which ordinarily applies in joint accounts. There were also a number of affidavits filed by the contesting parties which sought to prove that the testatrix intended certain persons to benefit from the moneys in the two joint accounts which she had.

The issue to be decided was whether this money was to be paid over to the plaintiff as husband and survivor under the survivorship clause in the joint account, or whether it should be paid over to the executors and personal representatives of the deceased, to be distributed under the terms of the testatrix's will. The beneficiaries under the testatrix's will would have had to satisfy the court that the clause in the will giving all money in financial institutions to her two nieces....."was sufficient to provide a contrary intention to defeat the rule of survivorship that normally applies in cases of joint ownership/accounts, by producing documentary evidence to show that the deceased had by some unequivocal act cancelled the original mandate or authority given to the bank."

Held that-

- (i) the mere fact that the entire proceeds of the joint account earnings might have been furnished by the deceased could only fix her husband as trustee if the mandate to the bank so indicated or, if the testator by her own act sought during her lifetime to exercise control over the sums in the account to the exclusion of her husband, and on the facts of the case, there was no evidence of this, as both had the power to withdraw funds from the account (Reid v Grant distinguished).

- (ii) the conduct of the Bank in paying the entire balance in the account to the attorney on the basis of a power of attorney given to him by the plaintiff provides irresistible inference that the authority/given to the bank was one authorising payments to the plaintiff or his wife, hence the survivorship clause to the plaintiff or his wife, hence the survivorship clause operated to give the plaintiff the entire beneficial interest in the fund and this cannot be displaced by an clause in the purported will of the testator (Re Figgis applied);
- (iii) at date of the execution of the will, the testatrix had only power to dispose of such sums in financial institutions to her nieces as belonged absolutely and indefeasibly to her and did not relate to any joint accounts which were opened and maintained during her lifetime along with her husband, the plaintiff;
- (iv) there was no triable issue raised on the affidavits of the respondents or on the legal arguments advanced by attorneys for the contesting beneficiaries and therefore the sum paid into court by the defendant was to be paid over to the plaintiff forthwith. (Reid v. Grant Volume 23 1 WIR 91 distinguished; and Re Figgis (1969) 1 Ch Rep. 124, Shepherd v Cartwright (1954) 3 All E.R. 649 and Russell v Scott C.L.R. 440 applied)
Osmond Reid v. Gresford Jones (S.C. Suit No. 74/1979)
(C.L.B., October 1980, ppl234-1236)

MALTA

Nullity of marriage-grave homosexual tendencies of the husband-impossibility of fulfilling essential obligations of marriage-whether fraud as to matrimonial consent

If her writ of summons the plaintiff requested the Court to declare that her marriage to defendant was null and void. The evidence showed that P. and D. were married on 31 October 1976 and lived under the same roof for a year and a half. Two days after the marriage D abandoned the matrimonial bed for three days and declared to P that he felt himself shackled by marriage and that he was not happy. For the remainder of the time they lived together D did not seek his wife. On a number of occasions he invited men and slept with them in the spare bedroom. Before their marriage D had not told P anything about his homosexual propensities. There were no children from the marriage.

Section 19(19) of the Marriage Act 1975 provides that-
 a marriage shall be void

- (a) if the consent of either of the parties is extorted by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;
- (b) if the consent of either of the parties is vitiated by a serious defect of discretion of judgment on the matrimonial life, or on its

essential rights and duties, or by a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage.

In declaring the marriage null and void the First Hall of the Civil court held that-

- (i) grave homosexual tendencies were a quality which could of their nature seriously disrupt matrimonial life because they made very difficult the conjugal act:
- (ii) in the case of grave homosexual tendencies it was sufficient to constitute "fraud" for the purpose of paragraph (c) of s.19(1) that the husband had not mentioned or said anything about his propensities to the other party before the marriage and that the other party was not aware of these propensities before the marriage;
- (iii) the defendant's tendencies amounted also to a serious psychological anomaly vitiating his matrimonial consent and which made it impossible for him to fulfill the essential obligation of marriage: "impossibility" did not have to be "absolute impossibility": it was sufficient that the fulfilment of the essential obligations of marriage was "impossible" by the standards of the bonus pater-familias.

Olivia Williams sive Schembri v Emmanuel Schembri First Hall of the Civil Court, 23 March 1983
(C.L.B., October 1983, pl283)

NEW ZEALAND

Enforcement of separation deed vesting home in husband

The husband instructed his solicitor to prepare a separation deed based on a handwritten note from his wife. The wife was told by the solicitor that she was at liberty to take independent advice but she declined to do so. She signed the deed, but later refused to sign memorandum of transfer.

Held -

- (i) the evidence disclosed an unfair bargain:
- (ii) that by reason of her emotional condition and distress the wife was bereft of proper judgment: and
- (iii) the husband had failed to establish that the transaction was fair, just and reasonable and that no advantage had been taken:
Morrison v Coast Finance Ltd. (1966) 55 DLR (2d) 710, Blomley v Ryan (1954-56) 99 CLR 362 and Saltor v Nolan (1877-1878) 11 Ir Eq 367 referred to - Specific performance refused.

Henley v Henley (Supreme Court, Wellington, 15 March 1976)
(1976 Butterworths Current Law 205)
(C.L.B., July 1976, p238-239)

Matrimonial property-wife's contribution as wife and mother

A husband received a gift of a farm from his father which he developed and it substantially increased in value. His wife cared for the children and managed the home. The parties separated and the wife applied to the Supreme Court under s.5 of the Matrimonial Property Act 1963 for an order that the husband should pay her such sum as the court thought fair and reasonable. On the question of determination of the wife's contribution to the family assets, the Privy Council, allowing an appeal by the wife held-

- (i) for the purpose of the Act the performance of domestic duties in the matrimonial home is to be regarded as an indirect contribution to the matrimonial home;
- (ii) the court had discretion whether to take into account a wife's domestic contribution in relation to assets other than the matrimonial home;
- (iii) there was no justification for treating a farm differently from any other commercial enterprise;
- (iv) apart from assets outside the Act and the need to consider separately the question of the matrimonial home, there can be no justification of an "asset by asset" approach;
- (v) conduct of parties is irrelevant except in so far as it has a direct or indirect effect on the family fortunes.

Cases considered included Hofman v Hofman (1965) N.Z.L.R. 795,
Keswick v Keswick (1968) N.Z.L.R. 6 and E v E (1971) N.Z.L.R. 859
Haldane v Haldane (1976) 3 W.L.R. 760
(C.L.B. January 1977, pp74 and 75)

Variation of deed of separation - possession of home by wife after children no longer required accommodation

In a deed of separation it was agreed that the wife would have custody of the children and that the matrimonial home should remain jointly owned by husband and wife and that possession be given to the respondent wife until death or remarriage. That deed was entered into in 1969. It was considered that the welfare of children was an implicit controlling factor behind the drafting of the clauses dealing with possession of the home. That the children no longer required accommodation was regarded as a material change in circumstances justifying variation in terms of s.79 of the Matrimonial Property Act 1976. Preservation of the clause granting possession to the wife until remarriage or death was felt to be unwarranted on the altered facts and undesirable in principle.

Worthington v Worthington (1979) Butterworths Current Law
(C.L.B., July 1979, pp720-721)

Extra-marital cohabitation-residential property-whether a constructive trust

The appellant appealed against a decision of Moller J determining that he had no interest in the estate of a Ms. Sanders, deceased, a woman with whom

he had lived for five years prior to her death. The deceased had owned a house when the relationship commenced. During the relationship the appellant had done a considerable amount of work on the property. The couple had pooled their resources. By a will executed prior to the relationship the property was left to the respondent. A later, unwitnessed "will" was discovered, leaving the property to the appellant.

Moller J had rejected the appellant's claim to a half share in the property as he was unable to find an agreement or common intention that there should be joint beneficial ownership. The appellant had declined the deceased's offer to register the home in their joint names. He had declined because he considered it an unnecessary expense. He was 20 years older than the deceased and believed he would die first.

Their Honours agreed that the appellant should be granted a half share in the property on the basis of a resulting or implied trust. They accepted that such a trust exists where there is a common intention of the parties that each is to have a beneficial interest. The intention may be expressed or implied from conduct.

Hayward v Giordani court of Appeal, 27 June 1983, CA 76/81((1983) 9 N.Z. Recent Law 355)
(C.L.B., July 1984, pp.1163-1164)

ST. VINCENT

Nullity-marriage performed in private house at 7 a.m.-whether provisions of the Marriage Ordinance as to time and place of marriages directory or mandatory

The parties went through a ceremony of marriage at a private house at about 7 a.m. on morning. It was performed by a Registrar, in the presence of witnesses and in all respects other than time and place conformed with the Ordinance, Section 27 of the Ordinance states that "if the parties so desire, they may contract and solemnize marriage at the office and in the presence of a Registrar with open doors, and between the hours of ten a.m. and four p.m."

Held by the High Court-

(i) the effect is that parties who desire to contract and solemnize marriage in the presence of a Registrar qua Marriage Officer may only do so at the office and in the presence of the said Registrar, and in the presence of two witnesses, with open doors and between the hours of ten a.m. and four p.m.;

(ii) these provisions are fundamental and as such are mandatory, not merely directory;

(iii) decree of nullity pronounced.

Da Silva v Da Silva (judgment 12 January 1979)
(C.L.B., April 1979, pp.412-413)

SRI LANKA

Marriage-parent's gift of house and property to son-in-law-dissolution of marriage on wife's desertion-whether gifted property recoverable by wife
S and P were married in December 1952. Just prior to their marriage S's parents gifted a house and property to P "the intended son-in-law" on the condition that the gift was to be operative after the solemnisation of the marriage.

In November 1966 the marriage between S and P was dissolved on the ground of malicious desertion on the part of S. She however continued to live in the house gifted to P and in February 1972 instituted action in the District court for the recovery of that property. After trial the District Judge dismissed S's action and declared P entitled to the premises and made an order for the ejectment of S therefrom as prayed for by him. S then appealed to the Court of Appeal.

In delivering the judgment the Court of Appeal stated that on the authority of the decision in Fernando v Fernando S had no cause of action to sue P: reliance was placed on the following passage from Nathan's Common Law of South Africa (Vol. 1, 2nd Edition, Pages 266 and 267): "Dowry consists of the property which is given by a wife or by some other person on behalf of the wife, to the husband, for the purpose of sustaining the burdens of the marriage. If the marriage does not take place, the giving of the dowry is null and void. If it takes place, the giving of the dowry is irrevocable, if the contract relating to it is entered into by the person who gives it with the intent that it shall always remain with the husband".

On behalf of S it was argued that the District Judge had overlooked the Roman Dutch Law principle that enables the wife to sue for the recovery of the dowry. While conceding that the wife does have this right to sue for restitution of her dotal property by an action known as the *actio ex stipulatu*, Justice de Silva quoted Voet as authority for the qualification to this principle, namely, that the right of the wife to claim a restitution of the dowry may be forfeited if the husband obtains a divorce by reason of misconduct on the part of the wife. Since S was admittedly the offending spouse as she was guilty of maliciously deserting P, the decision of the Court of Appeal was that she had forfeited her right to recover the house and property gifted to P.

As regards the order for ejectment, however, the Court considered sympathetically the facts that S had been in occupation of these premises for the last 30 years, that she had no other properties, that the house once belonged to her parents and was gifted to P presumably to enable the new couple to establish their matrimonial home and that the search for alternative suitable accommodation would very probably be a long and painful process, in the context of the prevailing housing shortage. In conclusion Justice de Silva said, "In these circumstances, it would be inequitable to place the plaintiff (S) in the evening of her life, in a situation where she would have no roof over her head. We accordingly direct writ of ejectment not to issue till 1 August 1985"

Somawathie v Perera, court of appeal, 2 February 1984
(C.L.B., October 1984, ppl584-1588)

SWAZILAND

Adultery-husband's claim for damages against man who committed adultery with his wife-whether marriage by civil rights or Swazi law and custom material

The appellant had been ordered by the Swazi National court to give five head of cattle to respondent by reason of the appellant's adultery with respondent's wife. After appeals to the Swazi National Court of Appeal and the Higher Court of Appeal and the High Court the matter reached the Swaziland Court of Appeal which was called upon to decide whether in the circumstances the Swazi National Court had jurisdiction. It appeared that respondent and his wife were at the time of the adultery married to each other both by civil rites and in accordance with Swazi Law and Custom. It was contended on behalf of the appellant that by reason of the provisions of s.9(b) of the Swazi Courts Act 1950 (No.80 of 1950) the Swazi National Court had no jurisdiction by reason the the subsistence of a civil marriage at the time of the adultery. This section provides inter alia, that no Swazi Court shall have jurisdiction to try cases in connection with marriage other than a marriage contracted under or in accordance with Swazi Law and Custom, except where and in so far as the case concerns the payment or return or disposal of dowry. Smith J.A. with whom the rest of the Court of Appeal concurred, concluded that a civil marriage contract and customary law marriage contract were not mutually destructive and could stand side by side.

Held-

- (i) a husband had a claim for damages against any man who has sexual intercourse with his wife whether he is married to her by civil rites or by Swazi Law and Custom and that the respondent had based his claim for damages on his customary marriage;
- (ii) a civil rites marriage does not dissolve the customary one and that the jurisdiction of the National Court was not limited only to those customary marriages which stood alone and excluded those cases where such marriage formed part of a "dual marriage" ie. one where the parties had contracted both a civil and traditional marriage.

The appeal was accordingly dismissed with costs.

E.F. Dladla v S.J. Dlamini (1976) Civ. App. No.2 of 1976 (C.A.)
(C.L.B., July 1977, pp426-428)

Illegitimate child-guardianship-whether Swazi law and custom applicable

The applicant, a major spinster and the mother of an illegitimate male child, applied for an order against the respondent, the father of the child, to return to her the child whom she alleged had been removed from the care of her mother. She also asked for custody of the child and maintenance. It appeared that the respondent had married some other person and that he had never paid damages for the seduction of the applicant nor "bought" the child. The respondent contended that he and the applicant were Swazis by birth and that he had at all material times followed Swazi law and custom in regard to the custody of the child. He stated in his affidavit that there was no obligation upon him to pay damages for the seduction of the applicant as this was her second child and that it was her

duty to bring the child to his family for "tinyamatane" - that is that he should pay "tinkomo tekutsenga mntwana" (the cattle for buying the child). The applicant joined issue with the respondent on the contention that the matter was to be decided in accordance with Swazi law and custom.

The Chief Justice held-

- (i) under Roman-Dutch law an illegitimate child is normally given to the natural guardianship of the mother (Hallo and Kahn's The Union of South Africa (1960 edition) 354);
 - (ii) in terms of s.3 of the General Administration Act 1905, the Roman-Dutch common law, save in so far as it had been or was from time to time modified by statute, is the law in Swaziland;
 - (iii) following the Swaziland Appeal Court case of Kealeboga Baruti v Solomon Nndiniso (1961) 2 H.C.T.L.R. 46,48, that there was no provision specifically making Swazi law and custom applicable in the High Court or in the Subordinate courts, although in regard to Swazi Courts the Swazi Courts Act 1950 provided that a Swazi Court administered the Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law enforced in Swaziland. The law therefore to be applied was the Roman Dutch law;
 - (iv) accordingly the mother was entitled to the custody of the child and that the ancillary prayers should also be granted.
- J.T. Dlamini v D.M. Nhlengethwa (Civil Case No.62/77)
(C.L.B., July 1978, pp563-564)

UNITED KINGDOM

Chaudhry v Chaudhry (1975) 3 W.L.R. 559;3All E.R. 687

A divorced wife applied under section 17 of the Married Women's Property Act 1882 for a declaration of her interest in the former matrimonial home in London. The parties were domiciled in Pakistan and had been married in Pakistan under Islamic law. Rejecting a contention on behalf of the husband that there was no jurisdiction to hear the summons because the words "husband and wife" in the Act of 1882 did not apply to parties to a polygamous or potentially polygamous marriage, the High Court held that they parties, having been married according to the law of their domicile, were "husband and wife" for the purpose of any application under section 17 of the Married Women's Property Act 1882.
(C.L.B., January 1976 p.39)

Family home jointly owned-On divorce husband applied for order for sale-Reasonable for wife and children to continue living there

A family home was bought in joint names. It became subject to a trust for sale on the granting of a divorce. The wife remained in the home with the children, the youngest of whom was 13. The husband invoked s.30 of the Law of Property Act 1925 which provides; "If the trustees for sale refuse to sell any person interested may apply to the court.....for an order directing the trustees to give effect thereto, and the court may

make such order as it thinks fit".

Held by the Court of Appeal-:

- (i) in recent years the courts have regarded matrimonial home not as an investment to be realized for cash but as a home in which the family was to be brought up;
- (ii) if it was reasonable that the house should continue to be a home for the partner who remained in it and had the children, that was the primary matter and means should be considered by which it could be preserved as a home and the outgoing partner receive such compensation as was reasonable by being bought out or in some other way;
- (iii) it would not be proper in the circumstances to order a sale unless it was clearly shown to be a practical proposition with alternative accommodation provided for the family in a cheaper house so that the husband's capital could be made available to him;
- (iv) the discretion given by s.30 should be operated in the light of more recent statutes concerning matrimonial property.

Williams v Williams, Times Newspaper, 11 May 1976
(C.L.B. July 1976, p.239)

Lump sum payment - Prospective assets of the husband to be taken into account
The Court of Appeal held that in assessing the amount payable to a wife on divorce, the husband's prospect of becoming entitled to an inheritance should be taken into account. The husband's mother enjoyed a large income from two settlements of Canadian properties created by her father. The husband had a vested interest in one settlement if he survived his mother, and a contingent interest in the other. The Court held that the husband's interest in the Canadian settlements could not be ignored, and therefore increased the lump sum payable to the wife from £30,000 to £60,000 but postponed payment until the death of the present life tenant under the settlement.

Calder v Calder, Times Newspaper, 29th Juen 1976
(C.L.B., July 1976 p.240)

Name of child-change of name by deed poll by mother

A woman left her husband to live with another man after she had conceived a child by her husband. She changed her name by deed poll and when the child was born registered him under the name she had assumed for herself and any children she might have.

Held-

- (i) the mother was not competent to change the child's surname, either by declaration evidenced by deed poll before birth or on registration of birth, without the consent of the father or by order of the court;

- (ii) this principle applied even though the mother had changed her name before the birth and the father had never seen the child.

D v B (or D (1977) 2 W.L.R. 1011
(C.L.B., July 1977 p428)

Injunction-domestic violence-man sole tenant of house-jurisdiction of county court to grant

The parties, living together as man and wife in a house of which the man was the sole tenant, had two children. Following the deterioration of their relationship and acts of violence, the woman left the house and went to stay with a friend in accommodation where she could not have the children with her.

She applied under the Domestic Violence and Matrimonial Proceedings Act 1976, requiring that the man vacate the house, and later also under the Guardianship of Minor Act 1976, for the custody and care and control of the children. The judge took the view that it would not be reasonable to expect the woman to live under the same roof as the man, and it was in the interests of the children that they should be with their mother rather than with their father. He ordered that the man vacate the house, and made provision for the custody, care and control of the children.

The Court of Appeal, allowing an appeal by the man, held-

- (i) on the true construction of s.1 of the Domestic Violence and Matrimonial Proceedings Act 1976 its purpose was to give jurisdiction to the county court to grant injunctions of the types specified independently of other relief;
- (ii) it did not alter the substantive law as to the rights of the parties to occupy premises, and the judge had no jurisdiction to order the man to vacate the house which at common law he had an indefeasible right as against the woman to continue to occupy by virtue of his tenancy;
- (iii) where the children had a roof over their heads and were being well cared for by the man, the court's inherent jurisdiction to override property rights for the protection of children would not have entitled it to order the man to vacate the houses simply because it felt that the children ought to be with their mother;
- (iv) on the evidence there was no basis for inferring any contractual licence of the woman to occupy the house; and such contractual licence would not in any event have given the court power to evict the man, overriding his common law rights as tenant.

B. v B. (Domestic Violence:Jurisdiction) (1978) 2 W.L.R. 160 (C.A.)
(C.L.B., April 1978, pp301-302)

Abortion-injunction-whether husband can restrain wife from seeking abortion

A husband sought an injunction to restrain his wife, and a charitable organisation, for causing or permitting an abortion to be carried out upon the wife without the husband's consent.

Held that

"since an unborn child has no rights of its own and a father had no rights

at common law over his illegitimate child, the husband's right to apply for the injunction had to be on the basis that he had the status of husband; that the courts had never exercised jurisdiction to control personal relationships in marriage and, in the absence of the right to be consulted under the Abortion Act 1967, the husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors carrying out the abortion, which was lawful under the Act of 1967. Per curiam. It would be quite impossible for the courts to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by law upon the shoulders of the medical profession. Paton v British Pregnancy Advisory Service Trustees and another (1978) 3 W.L.R. 687 (C.L.B., January 1979 ppl02-103)

Divorce-marriage dissolved by talaq in Pakistan-recognition of foreign decree-whether "judicial or other proceedings"

The parties, who married in India in 1963, were Muslims, born in India and nationals of Pakistan. They moved to Pakistan in 1964 and to Thailand in 1965. In 1968, while still living in Thailand, they made a khula, which was recognised as a form of divorce under Muslim law by which the parties signed a document terminating the marriage. They continued to live together in Thailand and then in Penang. Early in 1973, they returned to Pakistan but did not live together. The husband only stayed in Pakistan for a few weeks and then came to live in England. He bought a house and his son and members of his family came to live with him. In 1974 against the husband's wishes, the wife came to live in the house. The husband doubting the validity of the khula, flew to Pakistan and there purported to divorce the wife by pronouncing the talaq in accordance with the laws of Pakistan. He return to live in England.

The husband presented a petition for a declaration that the marriage had been lawfully dissolved either by the khula in 1968 or by the talaq in 1974. Wood J. held that

- (a) although the khula was not "judicial or other proceedings" within the meaning of s.2(a) of the Recognition of Divorces and Legal Separations Act 1971, the parties were domiciled in Thailand in 1968, where the khula would be recognised as dissolving the parties' marriage and, in those circumstances, the divorce would be recognised by the court under s.6 of the Act,
- (b) the talaq had been pronounced in accordance with the laws of Pakistan and therefore was a divorce obtained by judicial or other proceedings within the meaning of s.2(a) of the Act and would also be recognised by the court as dissolving the marriage.

The Court of Appeal allowed an appeal by the wife, holding that the phrase "judicial or other proceedings" in s.2(a) of the Act of 1971 excluded from recognition a foreign decree which depended for its legal efficacy solely on the acts of the parties to the marriage and that, since both the khula and talaq were so dependent, neither was within the meaning of that section, and that neither divorce was entitled to recognition under s. 6 of the Act.

On appeal by the husband, it was held, allowing the appeal, that-

- (i) the words "other proceedings" in s.2(a) of the Recognition of Divorces and Legal Separations Act 1971 were not to be limited to quasi-judicial proceedings by being construed ejusdem generis with "judicial" proceedings: that they referred to any proceedings, other than judicial proceedings, which were officially recognised in the country in which they were taken, and that a divorce obtained by talaq in Pakistan in accordance with the requirements of Pakistani law was a divorce obtained by such "other proceedings";
- (ii) since the wife's place of residence at the time of talaq was Karachi, despite her temporary absence in London, and since all other steps necessary to render the divorce effective in Pakistan had been taken, the talaq was entitled to recognition under s.2(a) of the Act and the husband was entitled to a declaration that the marriage had been dissolved thereby.

Quazi v Quazi (1979) 3 W.L.R. 833 H.L.
(C.L.B., April 1980, pp519-521)

Disposition of estate-no share for ex-mistress

The plaintiff, who was intermittently over ten years mistress of the deceased, claimed a share of the estate under the provisions of the Inheritance (Provision of Family and Dependents) Act 1975.

In considering the claim it was necessary to decide whether she was a person "who immediately before the death of the deceased was being maintained wholly or in part by the deceased" if so, whether the statutory provisions relating to intestacy operate so as not to make reasonable financial provision for the plaintiff mistress. The Court held that-

- (i) the deceased had divested himself of financial responsibility for his mistress and had left her shortly before his death;
- (ii) the defendant was the deceased's widow

Kourkey v Lusher 8 December 1981 (The Times newspaper; 9 December 1981)
(C.L.B., April 1982, p557)

Trust for sale-family home-beneficial interests-unmarried couple-man acquiring house in sole name-woman not directly contributing to purchase price or mortgage instalments-couple living in house for 17 years-woman performing domestic duties and caring for children-whether common intention that woman to have beneficial interest in house

The plaintiff and the defendant set up home together in 1961 in rented accommodation where their first child was born. In 1963 when the plaintiff was expecting the second child, the defendant decided that it would be a better use of his money to buy a house. The house was purchased and conveyed in the sole name of the defendant who financed the purchase

price out of his own money and by way of a mortgage. The plaintiff did not directly contribute to the purchase price or to the mortgage payments. She remained at home to look after the children and to perform domestic duties and was thus unable to earn until 1975 when she started working as a driving instructor. Although the defendant continued to give her a generous housekeeping allowance and did not ask her to contribute to the household expenses, she used her earnings to pay the rates and the telephone bills and to buy fixtures, fittings and certain domestic chattels for the house. She also redecorated the interior of the house. The plaintiff left the defendant in 1980 and brought proceedings against him claiming that she was entitled to a beneficial interest in the house by reason of her contributions to the household over the 17 years they had lived there. The judge dismissed the plaintiff's claim.

On appeal by the plaintiff to the Court of Appeal, in dismissing the appeal, held that-

1. since the plaintiff had not made a substantial financial contribution to the acquisition of the house the court could not impute a common intention that she should acquire a beneficial interest in it;
2. the plaintiff's domestic duties of the household and bringing up the children were not factors which could be taken into account in determining whether or not she had acquired a beneficial interest in the house: and accordingly, the plaintiff had failed to demonstrate the existence of any trust in her favour.

Pettitt v Pettitt (1970) AC 777 (HL) and Gissing v Gissing (1971) AC 886 (HL) applied.

Burns v Burns (1984) 2 WLR 582 (CA)
(C.L.B., July 1984, pp.1165)

Administration of estates-wife convicted of husband's manslaughter-and thereby precluded from taking under will-whether entitled to financial provision from deceased's estate-whether statutory modification of forfeiture rule applying retrospectively

The plaintiff, who was convicted of the manslaughter of her husband with a finding of diminished responsibility, was the sole beneficiary under his will. Following conviction, she was committed to a mental hospital under s.60 of the Mental Health Act 1959 and detained for a period of about 20 months. After her release and before the Forfeiture Act 1982 came into force, she applied for an order under the Inheritance (provision for Family and Dependents) Act 1975 that such provision as might be just be made for her out of the estate of her deceased husband, since she was precluded by her conviction from taking any benefit under his will. On the defendants' summons, the judge ordered that the plaintiff's application be struck out as disclosing no reasonable cause of action

On appeal by the plaintiff the court of Appeal, in dismissing the appeal held that-

1. since by the deceased's will reasonable financial provision would have been made for the plaintiff, her application was precluded by ss.1 and

2 of the Inheritance (Provision for Family and Dependants) Act 1975 but, in any event, the rule that no one could benefit by a criminal act applied to the Act; and therefore, the court had no discretion to consider making an order under the terms of the Act.

2. even if the Forfeiture Act 1982 were capable of applying retrospectively, any application by the plaintiff for an order under s. 2 of the Act of 1982 modifying the effect of the forfeiture rule must be time barred under s.2(3) as it had not been brought within three months of her conviction for manslaughter; and, accordingly, the plaintiff's application was bound to fail as it disclosed no reasonable cause of action.

Royse, In re descd.(1984) 3 WLR 784 (CA)

(C.L.B., January 1985, p.85)

ZIMBABWE

Customary law-seduction of daughter-action for damages-daughter of majority age-whether father as guardian has locus standi

The respondent, the father, brought action in the Community Court against the appellant claiming damages for the seduction of his daughter who, at the time of the seduction had attained the age of 18 years. The Community Court awarded damages; and on the appellant's appeal to the District Court, that Court dismissed the appeal with costs.

The appellant appealed to the Supreme Court on the sole ground that as the respondent's daughter was a major at the time when she admitted having first had sexual intercourse with the appellant, the respondent had no locus standi and is not entitled to claim damages for the seduction of his daughter.

It was common ground (and the court agreed) that the effect of the Legal Age of Majority Act which came into effect on 10 December 1982 was to do away with the old customary law concept that an African woman was a perpetual minor who needed a guardian to assist her in contractual obligations, because under the Act every person acquires status on the attainment of the age of 18 years. It was also common ground that an African woman with majority status can contract a marriage without the consent of her guardian because she no longer needed a guardian.

the Supreme court held that-

1. under customary law and as long as the daughter remained a minor under the guardianship of her father, the father has a right to sue and is entitled to damages for seduction;
2. as a major, the daughter acquired the capacity and right to sue for damages under the general law of Zimbabwe. She cannot vest her own right in her father;
3. the daughter having attained majority status, the respondent father had

lost his right under customary law to sue for damages for seduction and, accordingly, lacked locus standi in the action. In its judgment the Supreme Court also made observations regarding the customary practices and requirements of lobola and roora. Katekwe V Mhondoro Muchabaiwa, Supreme Court, Harare, 1 August and 7 September 1984 (C.L.B., January pp.85-86)

Finance, Trade and Economic Development

CYPRUS

Income tax assessments-whether legislative provisions unconstitutional-incomes of husband and wife aggregated-whether discrimination on ground of sex-doctrine of judicial precedent

The appellants, the Minister of Finance and the Commissioner of Income Tax, appealed from the judgment in the first instance of a single Judge of the Supreme Court given in a recourse made under article 146 of the Constitution; by this judgment there were annulled the income tax assessments relating to the income of the respondent in respect of the years of assessment 1962-1968 on the ground that the relevant legislative provisions concerning taxation of income, on which the assessments had been based, were unconstitutional.

The Judge found that the legislative provisions were contrary to articles 24 and 28 of the Constitution. Relying on these enactments the Commissioner of Income Tax aggregated the income of the respondent with that of his wife for the purpose of taxation.

It was common ground in the appeal that the legislative provisions in question were those enacted on the basis of the decision in 1961 in the case of Mikrommatis v The Republic, 2 R.S.C.C. 125, where it was held by the Supreme Constitutional Court that it was unconstitutional, as amounting to discrimination on the ground of sex contrary to article 28 of the Constitution, to aggregate the income of the wife from her own labour with that of her husband for purposes of income tax; the wife's "income from her own labour" was defined in the decision in the Mikrommatis case as meaning "income derived from exercise of the right safeguarded by article 25 of the Constitution". Article 25 protects the "right to practise any profession or to carry on any occupation, trade or business".

In the same case it was held that the aggregation of the income of the wife from any other source with that of her husband, for income tax purposes, was not unconstitutional.....

Relevant legislative provisions in Cyprus are similar to those in England and according to these the family is treated as one tax unit with the result that the income of the spouses for income tax purposes is aggregated. In this connection reference was made to the English case of Leitch v Emmott (1929) 2 K.B.236, which was confirmed in Elmhirst v Commissioners of Inland Revenue (1937) 2 Q.B.551. and to s.23 of the Finance Act 1971.....

The Court reached the following conclusions-

- (a) the sub-judice assessments were annulled;
- (b) the Mikrommatis case was rightly decided at the time when it was determined.

The Court left entirely open the issue whether or not the decision in the Mikrommatis case has to be treated as being no longer valid.

The Republic of Cyprus v. Demetrios Demetriades (1977) 12 J.S.C.2102.
(C.L.B. January 1979 pp.103-105)

Health, Education and Social Welfare

CANADA

Prince Edward Island

Mentally defective young woman-power of Court to authorise sterilization operation

The applicant, mother of a 24 year-old girl "Eve" suffering from extreme expressive aphasia and moderately retarded, sought-

- (a) a declaration that "Eve" was a mentally incompetent pursuant to the provisions of the Mental Health Act;
- (b) that the applicant be appointed the Committee of the person of "Eve"; and
- (c) that the applicant be authorised to consent to a tribal ligation operation (i.e. sterilization) being performed on "Eve".

The evidence was that little is known of the cause or of any remedy for the condition of expressive aphasia, in which the sufferer is made to communicate her thoughts or concepts. "Eve" was not capable of informed consent, her condition was probably non-inheritable, and she was incapable of using effective alternative means of contraception.

Held-

- (i) the question of consent by or on behalf of a mentally incompetent appears to be a very grey area where the proposed procedure is only marginally therapeutic or is strictly contraceptive;
- (ii) while "Eve" might not be able to understand and fully appreciate the fulfillment and privilege of procreation, the court must be scrupulously cautious before depriving her of them;

- (iii) an order appointing a person to be the committee of a person in need of guardianship has effect in the words of the Mental Health Act (R.S.P.E.1,1974,Cap M-9), "in the same manner as a grant to the committee of the person and estate of a lunatic made by and under the order and direction of the Lord Chancellor of England would have done at the time of the passing of the Act 15 Victoria, Chapter 36"
 - (iv) it appears doubtful whether, in early Victorian times, the direction of the Lord Chancellor would have encompassed sterilization procedures;
 - (v) by s.45 of the Criminal Code, sterilization performed for purely contraceptive purposes is not illegal if (a) it is voluntarily submitted to by the patient, (b) with informed consent, and (c) it can be found to be for the benefit of the patient. Dame Cataford et al v Docteur Moreau (noted at Canadian Bar Review Vol LVII No.1.p89) does not go so far as to say that purely contraceptive sterilization is necessarily legal, even with consent, in all circumstances;
 - (vi) the decision to carry out a non-therapeutic operation on a minor or a mentally incompetent is not within the parent's subjective judgment, or the doctor's clinical judgment;
 - (vii) the court was invited to invoke its traditional jurisdiction as *parens patriae*, there being no clear statutory procedures, and the fact that there may be no precedent for this should not in itself be a deterrent;
 - (viii) the court should not exclude the possibility of medical advances discovering a remedy for "Eve's" condition, and as the operation would be irreversible, to permit it to be performed could be to deny her the privilege and right to bear children;
 - (ix) regardless of how retarded they may be, the "Eves" were persons with rights which the courts must preserve and protect.
- In the matter of "Eve" Judgment delivered 14th June 1979
(C.L.B., January 1980, pp.77-78)

UNITED KINGDOM

Abortions-whether nurses' participation in termination of pregnancy lawful
 The Court of Appeal allowed an appeal by the Royal College of Nursing from the refusal of Mr. Justice Woolf to grant them a declaration that a statement as to the legality of the role of nurses in the termination of pregnancy by medical intervention contained in a letter and annexes thereto dated 21 February 1980, and circulated by the Department of Health and Social Security, was wrong in law. Giving his reasons for so holding he said, "Where a nurse participates in the process of abortion by medical practitioner as long as the process is initiated by a registered medical practitioner who remains responsible throughout for its conduct and control in the sense that any actions needed to bring it to a conclusion are done by appropriately skilled staff acting on his specific instructions, and he or another registered medical practitioner is available to be called

if required".

Section 1(1) of the Abortion Act provides -

".... a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner....."

The Court of Appeal held that-

- (i) under the Abortion Act 1967, an abortion must be carried out by a registered medical practitioner;
- (ii) it is not sufficient that it is carried out by a qualified nurse or midwife in accordance with his written instructions;
- (iii) accordingly, in the case of an abortion by means of medical induction the whole of the process of administering the abortifacient drugs must be carried out by the practitioner personally.

The Court also ruled that a letter sent by the department to regional medical and nursing officers, with copies to the boards of governors of the specialist postgraduate teaching hospitals, was an attempt to amend the law by means of a departmental circular.

Note: consequently, the advice to doctors, nurses and midwives about the role of nurses involved in abortions, contained in Circular CMO(80)(2) issued February 1980, is to be withdrawn, though it is still possible that the department may appeal to the House of Lords.

Royal college of Nursing of the United Kingdom v. Department of Health and Social Security (The Times newspaper: 10 November 1980)
(C.L.B., January 1981, pp118-119)

Industrial Relations

AUSTRALIA

New South Wales

Complaint of victimisation and "Sexual harassment" - whether amounts to discriminatory behaviour

The New South Wales Industrial Tribunal, which is presided over by a Judge, had occasion to consider whether the complainant, a female lift operator in a Department of State of the New South Wales Public Service, had been the victim of discrimination by the defendant, who is the Permanent Head of that Department.

The complainant complained of being made the victim of sexual harassment, and the Judge found that jurisdiction existed in the Tribunal to hear the complaint.

In so doing the Judge observed, inter alia-

- (1) there is no reference in the Anti-Discrimination Act to sexual harassment, and therefore no statutory definition of it. Accordingly an appropriate starting point is to define sexual harassment. In view of the nature of this preliminary enquiry. I propose at this stage to place the widest possible meaning upon that phrase. I then propose to examine it, so defined, together with the relevant sections of the Anti-Discrimination Act, in order to determine whether, and to what extent, sexual harassment is capable of amounting to a contravention of the Act.

Ascribing then the widest possible meaning to the words, I adopt as a starting point that a person is sexually harassed if he or she is subject to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.

The above definition is obtained from a reading of the relevant literature and case law on the subject. Issues relating to the extent to which sexual harassment is proscribed by anti-discrimination laws have arisen on a number of occasions over recent years in both the United States and Canada. However, I am aware there are no prior occasions on which a Court or tribunal in this country or the United Kingdom has been called upon to make such a determination. It is largely for this reason that this preliminary question has been treated by all parties, and by the Tribunal itself, as one of great importance.

- (2) it follows from the above provisions that a complainant alleging sexual harassment must, in order to establish a contravention of the Act, prove the following:
 - (i) that he or she has been treated less favourably than in the same circumstances, or in circumstances which are not materially different, a person of the opposite sex would have been treated;
 - (ii) that the ground upon which he or she received that treatment was either his or her sex, or a characteristic appertaining generally to persons of that sex, or a characteristic that is generally imputed to persons of that sex;
 - (iii) that the person committing the act of harassment was either the employer or the complainant or a person made liable by sec. 52 of the Act; and
- (3) the essence of sexual harassment is that the sexual conduct was neither solicited nor incited, and was regarded by the complainant as undesirable and offensive. It goes without saying that the Anti-Discrimination legislation was never intended to proscribe sexual relationships, whether inside or outside the workplace,

which are or have the potentiality of being, consensual. As Spottwood Circuit Judge, said in Barnes v Costle 46 ALR Fed 198 at p. 223: "Sexual advances may not be intrinsically offensive and no policy can be derived from the equal opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorisation cards, which serve no-one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm".

We are assuming, for the purposes of this preliminary enquiry, that the complainant will be able to establish the factual basis of her complaint. If she does, then it will be likely to indicate heterosexual tendencies on the part of the respondent. The only situation in which male employees could also be subjected to similar treatment would be if the employer were bisexual. I think it is an appropriate matter for the taking of judicial notice that heterosexual people substantially outnumber bisexual people in the community and that therefore heterosexual activities are much more likely to be undertaken by heterosexual persons than by bisexual persons.

As to the homosexual employer, if an employee were to be sexually harassed by an employer of the same sex, then in my view, that employee would have precisely the same rights under the Anti-Discrimination Act as the complainant has in this case.....

After considering the case of Ministry of Defence v Jeremiah, (1979) 3WLR p.857 the learned judge went on:-

This Tribunal is not bound by decisions of the English Court of Appeal, but they must be highly persuasive. In the circumstances, I consider that we should adopt the meaning ascribed to the word "detriment" by Brandon L.J., and treat it as requiring that a complainant has been placed under a disadvantage in comparison with employment of the opposite sex.

The disadvantage must be a matter of substance; the legislation is not directed to trivial distinctions in the treatment afforded to men and women. Subject to that it is difficult to define the limits of a concept which is, as Brandon L.J. said, essentially a matter of fact to be determined in each individual case.

I therefore consider that this Tribunal should not, in this inquiry, try to establish the boundaries of what might amount to a "detriment" under sec. 25(2)(c). This is the first case in which we have been called upon to define that concept, and there are no facts before us upon which to base our determination.

However, I can say this: that in the context of sexual harassment, the type of conduct which I described as creating an "unwelcome feature of the employment" and therefore falling under s.25(2)(a)

would also, in my view, lead to a "detriment" under s.25(2)(c).
Callaghan v Loder (1983) 25 Australian Industrial Law Review 318
(C.L.B., January 1984, ppl81-186)

INDIA

Air hostesses-retirement in the event of marriage or on first pregnancy-whether regulations discriminatory-guidelines for determining discrimination in service matters

The Supreme Court, in dismissing the writ, held that, having regard to the various circumstances, incidents, service conditions, promotional avenues, etc of the Assistant Flight Purser and Air Hostesses of Air India, the inference is irresistible that Air Hostesses though members of the cabin crew are an entirely separate class governed by different sets of rules, regulations and conditions of service. Therefore, though peculiar conditions did form part of the regulations governing Air Hostesses, that could not amount to discrimination as as to violate Article 14 of the Constitution.

In so holding the Supreme Court also laid down guidelines, for determining the question of discrimination in service matters, in the following terms-

- (i) In considering the fundamental right of equality of opportunity a technical, pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc. are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport or spirit. Article 14 cannot be attracted.

- (ii) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the object sought to be achieved so that in such cases Article 14 will be completely out of the way.
- (iii) Article 14 certainly applies where equals are treated differently without any reasonable basis.
- (iv) Where equals and unequals are treated differently Article 14 would have no application.
- (v) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(iv) In order to judge whether a separate category had been carved out of a class of service, the following circumstances have generally to be examined-

- (a) the nature, the mode and the manner of recruitment of a particular category from the start;
- (b) the classifications of the particular category;
- (c) the terms and conditions of service of the members of the category;
- (d) the nature and character of the posts and promotional avenues;
- (e) the special attributes that the particular category possess which are not to be found in other classes, and the like.

Air India v Nergesh Meerza AIR 1981 Supreme Court 1829
(C.L.B., July 1982, pp.1013-1014)

UNITED KINGDOM

Concession given to wives of retired employees not extended to husbands-whether discriminatory

The railways' policy of not allowing the husbands of women employees to continue their concessionary free travel after retirement while allowing the wives of male employees to continue to enjoy the privilege has been held by the Employment Appeal Tribunal to be unlawful discrimination on the grounds of sex and within the meaning of the Sex Discrimination Act 1975.

Garland v British Rail Engineering Ltd. (Times newspaper, 15 November 1977)

(C.L.B., January 1978, p.91)

Employment-age limit on applicants-whether discriminatory on grounds of sex
The applicant, aged 35 and a married woman with children, complained to an industrial tribunal that the Civil Service Commission was unlawfully discriminating against her on the ground of her sex contrary to s.1(1)(b) of the Sex Discrimination Act 1975, in that the condition imposing an upper age limit of 28 (that the candidate for appointment as an Executive Officer in the Civil service should be "at least 17½ and under 28 years of age") was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, and was therefore discriminatory within the meaning of s.1(1)(b)(i) of the Act.

The industrial tribunal dismissed the complaint on the ground that the phrase "can comply with it" in the said section was to be strictly construed as meaning physically able to comply, and since the total number of men and women in the population was not very different, it was impossible to say that the proportion of women who could comply with the age requirement was considerably smaller than the proportion of men.

On appeal, the Employment Appeal Tribunal, allowing the appeal, held by a

majority-

- (i) "can" in s.1(1)(b)(i) of the Sex Discrimination Act 1975 should not be construed so as to mean "theoretically possible" but that it was necessary to see whether the condition could be complied with in practice;
- (ii) accordingly, it was relevant in determining whether women could comply with the condition imposing an upper age limit of 28 to take into account the usual behaviour of women.
- (iii) since a considerable number of women aged between 25 and 35 were occupied rearing children, there were, therefore, a certain number of women who could not comply with the condition because they were women; and
- (iv) since the industrial tribunal had made no findings on the further question, namely, whether the proportion of women who could comply with the condition was considerably smaller than the proportion of men who could comply with it, the case would be remitted to an industrial tribunal for rehearing.

Price v Civil Service Commission and another (1977) 1 W.L.R. 1417 (E.A.T.) (C.L.B., April 1978, pp310-311)

Discrimination in employment-seniority requirement in allocation of postal walks-whether unlawful discrimination

Under a system operated by the Post Office vacant postal walks were awarded according to seniority in terms of permanent status. The complainant had worked as a temporary post woman for some period and then as a permanent full-time post woman. Her application for a vacant postal walk was refused on the ground that she lacked the necessary seniority for the job. The walk was given to a man whose total employment was shorter, but who had achieved permanent status earlier. She complained to an industrial tribunal alleging discrimination contrary to ss.1(1) and 6(2) of the Sex Discrimination Act 1975, but as she stressed that the complaint was against the union not the Post Office, her complaint was dismissed.

The Employment Appeal Tribunal, allowing the appeal, held-

- (i) the requirement that postal walks were awarded according to seniority was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so within the meaning of s.1(1)(b)(i) of the Act, and the requirement was to her detriment within s. 1(1)(b)(iii);
- (ii) unless the Post Office could show that s.1(1)(b)(ii) did not apply on the ground that the requirement was justifiable irrespective of sex, there had been an act of discrimination against the complainant.

Since the industrial tribunal had not made a finding whether the Post Office could justify the requirement or condition as to seniority under s.1(1)(b)(ii), the case was referred back to the industrial tribunal, to consider whether the Post Office could discharge the heavy onus of showing

that the needs, and not the convenience, of the enterprise outweighed the discriminatory effect of the requirement of seniority.
Steel v Union of Post Office Workers (1978) 1 W.L.R. 64 (E.A.T.)
(C.L.B., April 1978, pp311-312)

Equal pay-whether less work a 'material difference'
Section 1 of the Equal Pay Act provides-

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his.

Article 119 of the EEC Treaty provides-

Each member state shall ensure and subsequently maintain the principle that men and women should receive equal pay for equal work.

The Employment Appeal Tribunal allowed an appeal by the employer, Albion Shipping Agency, from a decision of a Hull industrial tribunal that the employee, Mrs. Lynn Arnold, was entitled to pay equal to that previously paid to a male employee. The employer had appealed on the ground that the tribunal had erred in law in failing to determine the application by reference to Article 119.

The Tribunal held that-

- (i) it was open to an employer to justify paying a woman employee a lower wage for doing the same job as her male predecessor by relying on a reduction in the volume of work and profitability of the business as being a "material difference" other than sex, within the meaning of s.1(3) of the Equal Pay Act 1970;
- (ii) that was so whether the claim for equal pay was to be considered under Article 119 of the EEC Treaty alone, or under the Equal Pay Act 1970 as impliedly amended by the Treaty.

Albion Shipping Agency v Arnold EAT, 21 October 1981 (The Times newspaper: 24 October 1981)
(C.L.B., April 1982, p564)

Discrimination in rail travel facilities granted to employees-whether "pay"
The appellant, Mrs. Garland, is a married woman employed by the respondents. During the period of their employment all employees of British Rail Engineering enjoy certain valuable travel facilities which are also extended to their spouses and dependent children.

On retirement former employees, men and women, continue to enjoy travel facilities but they are reduced in comparison with those which they enjoyed during the period of their employment. However, although male employees continue to be granted facilities for themselves and for their wives and dependent children as well, female employees no longer have such facilities granted in respect of their families.

According to the House of Lords: "These facilities are not enjoyed by former employees as a matter of contractual right, but employees have a legitimate expectation that they will enjoy them after retirement and it would be difficult in practice for the respondents to withdraw them 'unilaterally' without the agreement of the trade unions of which its employees are members."

Mrs. Garland commenced proceedings complaining that the respondents were discriminating against her contrary to the provisions of the Sex Discrimination Act 1975.

The issues of Community law were raised in the House of Lords which referred the following questions to the Court of Justice of the European Communities-

- (1) Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees in the manner described above, is this contrary to-
 - (a) Article 119 of the EEC Treaty?
 - (b) Article 1 of Council Directive No. 75/117/EEC?
 - (c) Article 1 of Council Directive No. 76/207/EEC?
 - (2) If the answer to questions (1)(a), (1)(b), or (1)(c) is affirmative, is Article 119 or either of the said directives directly applicable in member States so as to confer enforceable Community rights upon individuals in the above circumstances?
 - (a) In its judgment in Case 80/70 Defrenne (1971) ECR 445, at p451, it stated that the concept of pay contained in the second paragraph of Article 119 comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.
 - (b) It appears from a letter sent by the respondents to the trade unions that the special travel facilities granted after retirement must be considered to be an extension of the facilities granted during the period of employment.
 - (c) It follows from those considerations that rail travel facilities such as those referred to by the House of Lords fulfil the criteria enabling them to be termed pay within the meaning of Article 119 of the EEC treaty.
 - (d) The argument that the facilities are not related to a contractual obligation is immaterial. The legal nature of the facilities is not important for the purpose of the application of Article 119 provided that they are granted in respect of the employment.
- The Court of Justice of the European Communities held that-
- (i) where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination

within the meaning of Article 119 against former female employees who do not receive the same facilities;

- (ii) where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the grant of special travel facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.

Eileen Garland v British Rail Engineering Ltd. Court of Justice of the European Communities, 9 February 1982 (Case 12/81: Preliminary ruling under Article 177 of the EEC Treaty on a reference by the House of Lords) (C.L.B., April 1982, pp760-763)

Discrimination on sex on retiring ages-whether unlawful

The appellant was employed by the British Railways Board, the respondent, who offered voluntary redundancy to some of its employees and a memorandum was drawn up embodying the terms of a collective agreement between management and trade unions on reorganisation which included the following paragraph: "Staff aged 60/65 (male/female) may leave the service under the redundancy and resettlement arrangements when the function in which (they are) employed has been dealt with under organisation planning."

He applied for voluntary redundancy but was refused because he was under 60 and he complained unsuccessfully to an industrial tribunal under the provisions of the Equal Pay Act 1970, as last amended by the Sex Discrimination Act 1975. He appealed to the Employment Appeal Tribunal where it was conceded on his behalf that by virtue of s.6(4) of the 1975 Act it was not contrary to the Act for an employer to treat a male employee less favourably than he treated a female employee as regards access to voluntary benefit. He contended however that s.6(4) had to be construed in the light of European Community law and the Employment Appeal Tribunal requested a preliminary ruling concerning inter alia Directive No. 76/207/EEC of 9th February 1976.

The principal issue raised by the Employment Tribunal's questions was whether the requirement that a male worker should have reached the age of 60 in order to be eligible for payment of a voluntary redundancy benefit whereas women workers became eligible at the age of 55 amounted to discrimination, and, if so, whether the relevant provision of Community law might be relied upon in the national courts.

The Court of Justice of the European Communities had held that-

- (i) in deciding whether the difference in treatment of which the appellant complained was discriminatory within the meaning of the directive, account had to be taken of the relationship between measures such as that at issue and national provisions on normal retirement age. Under United Kingdom legislation the minimum qualifying age for a State retirement pension was 60 for women and 65 for men. Council Directive No. 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, provided that the Directive should be without prejudice to the right of member States to exclude from its

scope the determination of pensionable age for the purpose of granting old-age and retirement pensions and the possible consequences thereof for other benefits: it followed that the determination of a minimum pensionable age for social security purposes which was not the same for men as for women did not amount to discrimination prohibited under Community law;

- (ii) the principle of equal treatment contained in Article 5 of Council Directive No. 76/207 of 9 February 1976 applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment;
- (iii) the fact that access to voluntary redundancy is available only during five years preceding the minimum pensionable age fixed by national social security legislation and that that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive No. 76/207.

Burton v British Railways Board of Court of Justice of the European Communities, 16 February 1982 (Case 19/81: Preliminary ruling under Article 177 of the EEC Treaty on a reference by the Employment Appeal Tribunal)

Land

AUSTRALIA

Western Australia

Joint tenants-husband and wife-action by wife to sell and distribute property-whether a severance of joint tenancy

This action concerned property which was owned by a husband and wife as joint tenants. In 1977, the defendant wife instituted proceedings in the Supreme court under s.126 of the Property Law Act, seeking an order that the land be sold and the proceeds of sale distributed. After the writ was issued no further action was taken.

In 1978, the marriage was dissolved and the defendant wife made an application to the Family Court for an order that the land be sold and she be paid \$5,250 from the proceeds, with the balance being divided equally. This application was supported by affidavit and notice of the application and a copy of the affidavit was served upon the husband.

In 1979, the husband died, and letter of administration of his estate were granted to the plaintiffs. Meanwhile the defendant formally withdrew her application in the Family Court, no further action having taken place on it.

The plaintiffs in this action sought a declaration that the joint tenancy was severed by the action taken by the defendant in 1977 or by the application

to the Family Court in 1978, thereby defeating the defendant's right to take the husband's interest in the land by survivorship. The arguments presented to the court by the plaintiffs centred around the proposition that in the absence of any statutory provision a declaration by any one of a number of joint tenants of an intention to sever the joint tenancy, when communicated to the other joint tenants, operated as a severance.

The Court distinguished and disapproved the authorities in favour of this proposition which were presented to the court by the plaintiffs and held that a mere declaration by a joint tenant of an intention to sever a joint tenancy when communicated to the other joint tenant was insufficient to operate as a severance.

Davies v Davies (1983) WAR 305
(C.L.B., October 1984 p.1611)

Private International Law

BELIZE

Petition for divorce-domicile-whether court has jurisdiction

This was a petition for a divorce by a wife. They were married in 1977 in the USA the country of their birth and domicile of origin. There were two children of the marriage both in the USA. The family moved to Belize in 1980. While the wife brought all her belongings with her the husband didn't do so then. They ceased living together as man and wife. The husband and the two children lived together after he brought them back to Belize in 1981 when he also brought his tools of trade. The question of domicile was put in issue. The Court ruled that on the evidence the husband had not abandoned his domicile of origin therefore the Court had no jurisdiction to hear the petition.

On appeal against this ruling it was held, dismissing the appeal, that the husband did not on the evidence, made Belize his domicile of choice: In re Estate of Fuld (No. 3) (1968) P675 followed. Appeal was therefore dismissed. Dixie Westerhold v John Westerhold Court of Appeal (Civil Appeal No. 1 of 1982)
(C.L.B., October 1982, ppl398-1399)

Torts

AUSTRALIA

Damages for death of wife-whether husband can sue for damages for loss of consortium

The appellant authority appealed to the New South Wales Court of Appeal

against the judgment of a Judge of the Supreme Court of New South Wales awarding the first-named respondent damages following the death of his wife in a serious railway accident in which the respondent's wife had been killed.

Section 4(1)(a) of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) provides that a cause of action exists in respect of a statutory wrong.

The Court of Appeal, in dismissing the appeal, held that-

- (i) a husband's action for loss of consortium lies against anyone who has wrongfully injured the wife with the consequence that she is rendered less able than previously to provide domestic services and conjugal society to her husband; and
- (ii) accordingly, a husband may sue for damages for loss of consortium in respect of an injury (albeit mental and nervous shock only) actionable by his wife under the section.

In so holding, one of the members of the Court, with whom the other members concurred, observed, *inter alia*, as follows:-

It can scarcely now be suggested that the law does not recognise a psychological, psychogenic, psychoneurotic, psychosomatic or functional injury (whatever the correct term may be) as of equal potency in the production of compensatable detriment as a direct physical trauma. We all know now that a neurotic illness may be just as incapacitating as a direct physical injury. To ignore this well established medical fact would be to add unwanted emphasis to Windeyer J's aphorism in Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383, at p. 395: "Law, marching with medicine but in the rear and limping a little" There his Honour referred to Victorian Railways Commissioners v Coultas (1888) 13 App Cas 222 where the Privy Council decided that damages sought for nervous shock or mental injury caused by fright at an impending collision were irrecoverable as too remote. It is noteworthy, however, that in the Full Court of Victoria Coultas v Victorian Railways Commissioners (1886) 12 VLR 895, their Honours not only held those damages recoverable, but awarded the husband the amount of the expenses which he had incurred as a consequence of his wife's illness. I do not think that Coultas can be regarded as having survived Chester v Waverley Corporation (1939) 62 CLR 1, at p.46, where Evatt J said: "I am of opinion that the Privy Council decision should not be regarded as ruling that in the absence of physical impact to the plaintiff, damages for illness caused by nervous shock can never be recovered."

In Hambrook v Stokes Brothers (1925) 1 KB 141, at pp 153, 154, Atkin LJ as he then was, described the theory that damages at law could not be proved in respect of personal injuries unless there was some injury which was called "bodily or physical" thus "There can be no doubt at the present day that this theory is wrong". And he mentions that Coultas (1888) 13 App Cas 222 had been pronounced by Lord Shaw to be no longer a decision of binding authority.

State Railway Authority of New South Wales v Sharp and Another (1981) 1 NSWLR 240

(C.L.B., April 1982, pp138-139)

HONG KONG

Fatal in traffic accident-claim for "lost years"

A young married woman was killed when the motor-cycle on which she was passenger collided with a Kowloon Motor Bus. Negligence was apportioned between the Bus Company and the motor cyclist. The plaintiff (widower and administrator) and the deceased's parents made a claim under the Fatal Accident Ordinance (Cap. 22) based on lost dependency.

The Court held that-

- (i) the deceased's mother received \$2,000 per month from the deceased. "Little is to be achieved by scrutinising accounts in the name of husband and wife when the reality of the situation is that all family resources were pooled." The loss of the plaintiff and the plaintiff's two parents was fixed at \$500 each per month, 8 years was the multiplier: "I realise that this is a somewhat rough and ready approach but I am doubtful if it is possible to deal with the matter with much greater precision".
- (ii) applicant propose the "lost years" claim. The approach of the Chief Justice "what seems to me can best be described as robust common sense" in Yeung Wing v VSL Engineers (HK) Ltd and Technic Construction Co Ltd (Civil Appeal 27/80) was followed-to estimate a percentage of earnings which might have been saved was the only realistic way. Here the figure was 20 per cent of monthly income as compared to 10 per cent in the VSL Case.

Cheung Kun-yeu v The Attorney General (sued on behalf of the ICAC), Tam Tak-sun, The Kowloon Motor Bus Co. (1933) Ltd and Tong Hoi Civil Case No. 5581 of 1980.

(C.L.B., July 1982, pp1030-1031)

NEW ZEALAND

Husband injured in accident-wife also his business partner-whether wife can sue

Held-

- (i) no claim exists at common law for a wife to sue based on injuries suffered by her husband to recover loss of profits in a business partnership;
 - (ii) the wife could not recover by virtue of any duty of care owed to her by her husband
- Coleman v Millar (Supreme Court, Beattie, J.) Noted at (1976) Butterworths Current Law page 254.
(C.L.B., January 1977, pp90-91)

UNITED KINGDOM

Conspiracy-whether husband and wife can be sued in tort

The Court of Appeal has held that although a husband and wife cannot conspire together in criminal law this immunity does not extend to liability for the tort of conspiracy.

Midland Bank Trust Co. v Breen (No. 3) (1981) 3 All ER 744 (CA); (1982) 2 WLR 1 (C.L.B., April 1982, p585)

Damages-public policy-child born after sterilisation

In October 1977, the plaintiff underwent a sterilisation operation which was performed by a surgeon employed by the defendants. Due to the surgeon's negligence, clips which should have been placed on both her fallopian tubes were incorrectly located so that one was placed on a ligament and the other was found wandering free in her abdomen. For several months after the operation the plaintiff suffered pain and discomfort and was prescribed painkillers, tranquilisers and other drugs. The symptoms continued and in June 1978 she was diagnosed as being 16 weeks' pregnant. Thereafter she suffered acute anxiety lest the drugs she had been taking before the pregnancy was diagnosed had harmed the unborn child. In November 1978 the plaintiff gave birth to a normal, healthy boy and she and her husband, who had four daughters and no sons, were delighted. She then had to undergo an operation for resterilisation and a further operation to remove the last vestiges of the unsuccessful operation in 1977. In an action against the defendants for negligence, the plaintiff claimed damages for her pain and discomfort, particularly the fears and anxieties engendered by the unsuccessful operation, her loss of earnings during the pregnancy, birth and early rearing of the baby, the cost of enlarging the family home to accommodate the new baby and the cost of the child's upbringing until the age of 16 years. The defendants admitted liability.

On the quantum of damages, the Court held that-

- (1) although, as it was conceded, the plaintiff was entitled to damages for her pain and suffering and her loss of earnings during pregnancy, the measure of damages should also reflect the disturbance to the family finances that the unexpected pregnancy caused;
- (2) it was contrary to public policy as being disruptive of family life and contrary to the sanctity of human life that damages should be recoverable for the costs arising from the coming into the world of a healthy, normal child; and that, therefore, the plaintiff's claims for the cost of the child's upbringing from birth to the age of 16 and for the enlargement of the family home were irrecoverable.

Dicta of Lord Denning MR in Spartan Steel & Alloys Ltd. v Martin & Co (Contractors) Ltd. (1973) QB 27, 37 (CA); Lord Wilberforce and Lord Edmund-Davies in McLoughlin v O'Brian (1983) 1 AC 410, 420, 427 (HL) and McKay v Essex Area Health Authority (1982) QB 1166 (CA) applied.
Updale v Bloomsbury Area Health Authority (1983) 1 WLR 1098 (C.L.B., January 1984, pp.216-217)

Damages for personal injuries-plaintiff severely injured due to defendant's negligence-break up of marriage because of injuries-whether extra expense of maintaining wife and family in separate establishments recoverable

The plaintiff was severely injured in a road accident caused by the negligence of the defendant. As a result of his injuries the plaintiff became incapable of managing his property and affairs and his marriage broke up. Agreement was reached between the parties for damages for future loss of earnings. The plaintiff claimed further damages for sums likely to be awarded against him to his wife and children in the matrimonial proceedings for the dissolution of the marriage. At the hearing of the action on 5 November 1982 the Court held that, although any increase in the expenses of maintaining his former wife and children in a separate establishment was not too remote to be recoverable by way of damages, no such damages were recoverable as the plaintiff had failed either to prove or quantify any such loss. On 19 February 1983 a consent order was made in the matrimonial proceedings whereby the plaintiff was ordered to make periodical payments to his wife of £2,445 per annum less tax, £64.75 a month to each of his two children and to make a lump sum payment to his wife of £25,000. The lump sum payment was used to purchase a house for the wife and children.

On the plaintiff's appeal on the ground, inter alia, that evidence of the sepcific loss caused to him as a result of his marriage breaking up was now available the Court of Appeal, in allowing the appeal, held that-

1. since the plaintiff's marriage had broken up because of injuries that he had suffered, the defendant was liable in respect of any loss to the plaintiff that was a reasonably foreseeable consequence of that break up: any loss to the plaintiff that was caused by the additional cost of maintaining his wife and children under the orders for periodical payments was not quantifiable and could not be recovered, but that the loss to the plaintiff of making the lump sum payment to his wife for the provision of a separate establishment flowed from the divorce and could be recovered;
2. accordingly, after making a deduction for a sum that the plaintiff might reasonably have been expected to give to his wife out of the damages awarded to him had she remained with him, he was entitled to an award of £15,000.

Jones v Jones (1984) 3 WLR 862 (CA)
(C.L.B., January 1984, p.107)

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 inter-spousal 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 ancillary 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.

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 clientele of

massage parlours, which were often picketted and forced 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.

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) or 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 Court, (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 clearly 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 ponceing where the ponce plays no part in the prostitution. Some of our members, however, would continue to penalise ponceing 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 prosecution 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 complainant 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 complainant 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 complainant 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 complainant, 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 complainant 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 father’s 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 Dependents) 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.

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.

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 consultations 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)

AUSTRALIA

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 possibility 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 patriarchal 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 indispensable 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 agricultural 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 termination 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 proprietary 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 tentative 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 accountments 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 variant 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.

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 contributory 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 Columbia 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 ancillary 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 Jamaica 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 marital 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 petitioner 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 woman 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.

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)

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 furnishings 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 woman 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?
 - (i) 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.
 - (ii) 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 legitimization 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] preceded 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 of 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.

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 Scots 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.⁶ 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 programme, 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-ownership 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.

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.257)

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)

International Developments

Conventions and Agreements

U.N. Convention on the Elimination of All Forms of Discrimination against Women

The six-part, 30 Article Convention was adopted by the U.N. General Assembly on 18 December 1979. Discrimination against women is defined as - "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The first 16 articles of the Convention cover measures to be taken by States to eliminate discrimination in various fields, including political and public life, the right to nationality, education, employment, health, marriage and family. The rights of rural women are given special attention, as are the elimination of stereotypes and the suppression of prostitution.

Among the specific duties required of States party to the Convention is legislative action against laws, regulations, customs and practices which discriminate against women. States are required to modify social and cultural patterns of conduct to eliminate prejudices or practices based on the idea of the inferiority or superiority of either sex or on stereotyped roles for men and women. States must ensure that education includes a proper understanding of maternity as a social function and the common responsibility of men and women in the upbringing of their children.

States are also bound to suppress traffic in women and the exploitation of prostitution of women. They must grant women equal rights with men to acquire, change or retain their nationality and ensure that neither marriage to an alien nor change of the husband's nationality during marriage would automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband.

The Convention also deals with marriage and family relations. It binds States to ensure that men and women have the same right to freely choose a spouse and enter into marriage with only their free and full consent, the same rights and responsibilities during marriage and at its dissolution, equal rights as parents including the right to decide on the number and spacing of their children, and the same rights with regard to guardianship, trusteeship and adoption, in all cases keeping the interest of the children paramount.

In the areas of health, education and employment, which are the sub-themes of the World Conference for Women, States are required to ensure on the basis of equality of men and women, access for women to health care services, including those relating to family planning.

Regarding education, the Convention binds States to give women equal access to educational establishments, to the same curricula as men, and to scholarships and programmes of continuing education, particularly

those aimed at reducing any existing gap in education between men and women. It also requires States to eliminate stereo-typed concepts of the roles of men and women.

In the area of employment, the Convention establishes the right to work as an inalienable right of all human beings. It requires States to give women the right to the same employment opportunities as men, to free choice of profession, to equal remuneration, promotion and job security. States are also required to prohibit the dismissal of women on the grounds of pregnancy, to introduce maternity leave with pay and to encourage the development of child-care facilities.

The rest of the Convention concerns the establishment of a Committee composed of 23 experts "of a high moral standing and competence" who would serve in their personal capacity to monitor the implementation of the Convention. States party to the Convention are required to report to the Committee in the first year and then every four years on the measures they have taken to put into effect the provisions of the Convention.

The Convention also includes articles covering the settlement of disputes between States over the interpretation or application of the Convention.

(C.L.B. April 1980 pp.643-644)

Intensifying the promotion of family planning as a basic human right

The International Planned Parenthood Federation 1982-84 Plan states that while most governments have signed international instruments recognizing family planning as a basic human right within the context of the United Nations Declaration of Human Rights, some still do not facilitate or even allow the exercise of this right. Restriction of family planning for demographic, political, religious, ethnic or social reasons continues. In many societies the exercise of family planning as a human right is inhibited by discriminatory attitudes. Organized opposition to family planning is increasing in several countries, jeopardizing the availability of family planning to those who need it most.

The Plan includes the following recommendations:-

- (1) To focus attention of those prevented from exercising the human right to family planning and take action to assist them.
- (2) Enlist the support of key international opinion leaders in promoting understanding of the health and social benefits of family planning.
- (3) Join forces with other international organizations to counteract organized opposition to family planning.
- (4) Increase the commitment of governments and other organizations to the provision of family planning information and services.

Further details of the Plan are set out in the Commonwealth Law Bulletin.

(C.L.B. July 1981 pp.1081-1083)

International Code of Marketing Breast-milk Substitutes: implementation

More than 100 member States of the World Health Organization are taking action to implement the International Code of Marketing of Breast-milk

Substitutes, which was adopted by the thirty-fourth World Health Assembly in May 1981. Of these, some 40 States have adopted legislation or other measures to ensure compliance with the Code. More than 60 others are in the process of enacting a variety of measures to implement it.

The status of compliance with and implementation of the Code was the subject of a Report by Dr. Halfdan Mahler, W.H.O. Director-General which was presented to the W.H.O. Executive Board at its seventy-first session in January 1983 and to the thirty-sixth World Health Assembly in May 1983, together with a summary of the present global nutritional situation, with particular reference to infants and young children and a report on steps taken in compliance with the Assembly's resolution concerning the nutritional value and safety of products specifically intended for infant and young child feeding.

National authorities have taken steps to reinforce and protect breast-feeding while monitoring marketing practices where breast-feeding substitutes are concerned. The Code stresses that breast-feeding is an unequalled way of providing ideal food for the healthy growth and development of infants.

While noting that infant formula and suitable ingredients from which to prepare it should be made accessible to those who need them the Code calls for the elimination of director consumer promotion, including advertising, gifts and samples, and labelling practices which may interfere with the protection and promotion of breast-feeding.

(C.L.B. July 1983 p.1051)

AUSTRALIA

Convention on the Political Rights of Women

The Convention was opened for signature in New York on 31 March 1953. Australia acceded to the Convention on 10 December 1974. The Convention entered into force for Australia on 10 March 1975.

Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value

The Convention was adopted at Geneva by the International Labour Organisation Conference on 29 June 1951. Australia ratified the Convention on 10 December 1974. The Convention entered into force on 10 December 1975.

(C.L.B. July 1976 p.247)

United Nations Convention on the Elimination of All Forms of Discrimination Against Women

The Hague Convention on the Celebration and Recognition of the Validity of Marriage

In July 1980 Australia signed the Convention. The major benefit from the move is in the area of foreign marriages. Under the Convention, Australia can refuse to recognise a marriage only if either of the parties is already married; the parties are in a prohibited relationship; or either party does not freely or effectively consent to the

marriage.

(C.L.B. January 1981 p.304)

Convention of the Recovery Abroad of Maintenance 1956

The Federal Attorney-General has announced that Australia is to become a party to the International Convention providing for the Reciprocal Enforcement of Maintenance Orders. He added that Australia would accede to the United Nations Convention on the Recovery Abroad of Maintenance, probably early in 1983.

The Attorney-General said that the Government had allocated \$A60,000 in the Budget to implement the Convention.

At present Australia has reciprocal maintenance provisions with the Commonwealth countries and it is virtually impossible to enforce maintenance orders made by the Family Court of Australia where the party against whom the order is made goes to a non-Commonwealth country.

(C.L.B. January 1983 p.222)

CYPRUS

European Convention on the Legal Status of Children born out of Wedlock.

This Convention which was signed on 1 December 1978 has been ratified by the European Convention on the Legal Status of Children born out of Wedlock (Ratification) Law 1979 (No.50 of 1979)

(C.L.B. October 1979 p.1233)

Convention on the Recognition of Divorces and Legal Separations (Ratification) Law 1982 (No.63 of 1982)

This Law ratifies the Convention which applies to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings officially recognised in that State and which are legally effective there.

(C.L.B. April 1983 p.620)

INDIA

Indian National Code for Protection and Promotion of Breast-feeding

The Ministry of Social Welfare, by a Resolution of 19 December 1983 adopted the Code for the Protection and Promotion of Breast-feeding. The Code is reproduced in full in the Commonwealth Law Bulletin.

(C.L.B. April 1984 pp.949-954)

KENYA

Convention on the Elimination of All Forms of Discrimination against

Women 1979

The Convention entered into force on 3 September 1981. Kenya acceded to the Convention on 9 March 1984. The six-part, 30 article-convention sets forth measures to be taken to eliminate discrimination against women in various fields. The Convention has so far (27 March 1984) been ratified or acceded to by 56 States.

(C.L.B. July 1984 p.1319)

MAURITIUS

Convention on the Elimination of All Forms of Discrimination against Women 1979

Mauritius acceded to the Convention on 9 July 1984.

(C.L.B. January 1985 p.208)

NIGERIA

Convention on the Elimination of All Forms of Discrimination against Women 1979

Nigeria acceded to the Convention on 23 April 1984.

The Convention so far (8 October 1984) has been ratified or acceded to by 59 States including: Australia, Barbados, Canada, Dominica, Guyana, Kenya, Mauritius, Saint Lucia, Saint Vincent and Sri Lanka.

(C.L.B. January 1985 p.208)

NEW ZEALAND

Convention on the Elimination of All Forms of Discrimination Against Women 1979

The Human Rights Commission of New Zealand has recommended ratification of the Convention. The new Government has announced its acceptance of the Commission's recommendation. There has been widespread campaigning among some sections of the community to reject the Convention on ethical grounds.

(C.L.B. October 1984 p.1862)

PAPUA NEW GUINEA

The Convention on the Political Rights of Women

This Convention opened for signature in New York on 31 March 1953. The instrument of accession on behalf of Papua New Guinea was deposited on 27 January 1982.

(C.L.B. April 1982 p.749)

SAINT LUCIA

Convention on the Elimination of All Forms of Discrimination against Women 1979

The instrument of accession on behalf of St. Lucia was deposited on 8 October 1982.

(C.L.B. April 1983 p.618)

UNITED KINGDOM

Convention on the Recovery Abroad of Maintenance (New York 1956)

This Convention entered into force in the United Kingdom on 12 April 1975.

(C.L.B. October 1975 p.38)

European Convention on the Legal Status of Children born out of Wedlock

The United Kingdom instrument of ratification was deposited on 24 February 1981 and the Convention entered into force for the United Kingdom on 25 May 1981.

(C.L.B. October 1981 p.1481)

Legal Profession

Other Developments

International Association of Young Lawyers

The 18th Congress of the Association (Philadelphia, 2 - 6 September 1980) adopted two resolutions one of which was :-

- (ii) Resolution on the Rights and Duties arising out of Co-habitation

The AIJA proposes:

1. that countries where sexual relations between un-adults of the opposite sex is still a criminal offence should be urged to abolish it as such;
2. that the courts that refuse to apply normal rules of civil law to people living together outside marriage but condemn such a situation as immoral, should be urged to adopt a neutral approach in future and not to impose their own subjective standards; and
3. that lawyers should be urged to advise unmarried couples living together of their economic rights and obligations and in particular to advise the use of contracts drafted according to the normal civil law dealing with the particular situation.

(C.L.B. April 1981 pp.714-715)

Women lawyers as partners - a legal remedy for discrimination by law firms?

For women lawyers, sex-based discrimination is not a new subject. But a recent decision by the US Supreme Court raises the possibility that women who believe that their advancement in a law firm has been delayed or denied because of discrimination may seek a legal remedy.

In the American case, Elizabeth Hishon, who was for seven years an associate with the blue-chip Atlanta firm King & Spaulding, sued the firm under a section of the US Civil Rights Act barring discrimination in employment by firms with more than 15 employees. Hishon was required to leave after she was twice considered and rejected for partnership.

King & Spaulding, which has been described as an archetype of the white, male-dominated large urban law office, did not admit its first woman partner until 1980, after Hishon had initiated her suit.

Two lower courts had held that U.S. anti-discrimination laws do not apply to partnerships. But the U.S. Supreme Court unanimously disagreed, holding that if the firm pledged to consider all associates

for partnership, then Federal law required that those decisions be made without regard to sex. The merits of Hishon's claim against King & Spaulding were not before the court but the decision means that she will be able to proceed with the suit.

(C.L.B. October 1984 p.1772)

AUSTRALIA

Women Judges

Mr Justice Murphy, a member of the High Court of Australia and a former Federal Attorney-General, has criticised what he says is discrimination against women and ethnic groups in the selection of judges in Australia.

Speaking on an Australian Broadcasting Commission television programme, Mr. Justice Murphy said there had never been a woman judge in the High Court or Federal Court of Australia and out of more than 100 Judges in Australian State Supreme Courts there was only one woman.

He said that the restrictions on the selection of judges in Australia had been taken too far, eliminating solicitors, almost all government lawyers and about 90 per cent of barristers. "We have gone to extreme lengths in restricting appointments to the Bench. You have only to look at the people who are there to see that the most glaring discrimination is against women all through the judiciary equally so if you look at the people that are described as ethnics. It is a terrible word but again they are dreadfully unrepresented in the ranks of the judiciary." he said.

(C.L.B. January 1983)

CANADA - ONTARIO

Women seek admission in greater numbers

The February 1982 issue of the National notes an increase in the proportion of women being admitted in Ottawa from one in 54 to about one in 3 in just ten years. A recent survey shows that 90 per cent of practising women lawyers in Canada in 1979 had graduated within the past five years. The articles also shows that women have done disproportionately well in collecting academic honours.

(C.L.B. April 1982 p.727)

NEW ZEALAND

Discrimination in the legal profession against women practitioners

At the 19th Conference of Law Societies held in Surfers Paradise earlier this year, the Society's President, Bruce Slane, reported on the position of women in the legal profession in New Zealand.

Since November 1982 there has been in New Zealand an amended Rule 3 of the Code of Ethics which now reads -

3.1.1.

A practitioner shall treat professional colleagues with the utmost courtesy and fairness.

3.1.2.

A practitioner shall not discriminate against nor treat any practitioner unfairly by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief of that other practitioner.

In addition, the New Zealand Law Society's Council adopted a guidance note indicating its special concern as to the position of women.

A report from the Committee on Women in the Profession, established by the Auckland District Law Society, has observed that -

(1) Sexual discrimination is a form of discrimination which has been demonstrated to exist within the profession. Women practitioners were facing significant difficulties in certain areas.

(2) The numbers of women are increasing to the point where they represent a substantial proportion of the profession. Women currently holding practising certificates account for over 8 per cent of practitioners in Auckland City. That proportion seems likely to increase given the almost equal division of the sexes in the Auckland Law School.

(3) The perception of discrimination by the large number of women polled should also be a matter of concern. Significant numbers of women within the profession did not feel fully accepted and were looking for a firm indication that they in fact belong.

(4) The injustice of discrimination on the basis of sex is not as widely acknowledged as other forms of discrimination. For some reason discrimination on the basis of race or religion is much less readily condoned than discrimination on the ground of sex.

(C.L.B. January 1984 pp.368-369)

Articles

UNITED KINGDOM

Barristers and gentlemen: a critical look at sexism in the legal profession (Rose Pearson and Albie Sachs) (1980) 43 Modern Law Review 400

"The law as a sex-typed profession" (D. Podmore and A. Spencer) (1982) 9 Journal of Law and Society 21

"Who is my client? husband and wife as clients" (Alec Samuels) (1983) 80(No.4) Law Society's Gazette 223

Miscellaneous

Some Notes

COMMONWEALTH

Survey of Abortion Laws in the Commonwealth discussed

The Commonwealth Parliamentary Conference in Jamaica in September Discussed the subject: "the need for up-dating medical legislation on abortion in the Commonwealth".

Introducing the subject, Senator Michael Beaubrun, Professor of Psychiatry at the University of the West Indies, Trinidad, noted the gradual liberalising of laws relating to abortion over the past decades. He observed that in many parts of the Commonwealth, laws remain which are not only out-dated but have become virtually unenforceable because of the advance of new technologies.

"Modern medical technology has blurred the distinction between between contraception and abortion so that some of the new family planning techniques might technically offend against existing laws," he said.

He cited, as one instance, the "morning after" pill and noted that, although technically an offence against abortion laws in most Commonwealth countries, its use was virtually impossible to detect so that there was an unenforceable law, which was ipso facto a bad law.

Referring to the recent birth of a "test-tube" baby in the United Kingdom, he said this showed that contraception or fertilisation can take place actually outside the woman's body, which was quite beyond the capacity of existing laws to deal with.

Although he himself felt the need for increasingly permissive abortion laws, Dr. Beaubrun stated that the purpose of his presentation was more modest.

"It would be both presumptuous and unwise for me to urge you to accept my view. Every country has its peculiar circumstances to consider. The attitudes of its people are born of different social, political, religious, economic and other considerations. As parliamentarians, it is true that we lead the people but we also serve the people, and we must take into account their views and even their prejudices," he explained.

He said his object was merely to draw to delegates attention the Commonwealth Secretariat publication, "Three Studies of Abortion Laws in the Commonwealth". While the Preface to that Report stated that it was recognised that some countries were confident that their laws were already adequate and reflected the values and needs of their own society, and that the Report had little relevance for them, Senator Beaubrun urged delegates not to jump to this conclusion too readily - even those who had advanced laws.

The Senator concluded by inviting delegates to push for the establishment of revision or reform committees in their respective countries to bring their laws up-to-date. He said that he would not

suggest what those reform committees would find, but merely that if the reform committees were filled with women, countries were unlikely to go wrong.

Senator Jean Melzer, Australia, supported Dr. Beaubrun, arguing that women had the right to decide for themselves. "I don't think the father of the child has the rights to decide, and I do not think the legislators have the right to decide," she said.

Not all the Australian Senator's colleagues agreed on the degree to which men should be involved in abortion decisions. One delegate said that where a married couple was involved, it should be a joint decision.

Other delegates pointed to the present laws as legislating mostly against the poor, since the rich could always get abortions, and to the results of unwanted children in countries and regions with problems of over-population in relation to their economic and employment resources.

The Maltese delegation, the Hon. Daniel Micallef, expressing a contrary viewpoint, suggested that there was a vacuum in the Declaration of Human Rights, as the rights of the unborn child were not protected.

"Most countries seem to agree that the rights of the unborn child do not matter," he said, "To my mind and conscience this is a compromise between justice and convenience".

(C.L.B. January 1979 pp.282-283)

AFRICA

Vasectomy in the Polygamous Marriage

The Africa Regional Law Panel has endorsed the policy statement on sterilization adopted by the International Planned Parenthood Federation's Management and Planning Committee - namely, that doctors should, where possible, consult with the other spouse before carrying out a sterilization operation but that consent should not be a legal requirement: in polygamous marriages, doctors should consult all the wives before a vasectomy.

The Panel also recommended that where voluntary sterilization is against the law, Family Planning Associations should lobby for change. Similarly, any barriers should be removed from offering contraceptive advice to adolescents, whether married or unmarried.

(C.L.B. January 1978 p.158)

AUSTRALIA

Discrimination in Industry

The Federal Minister for Employment and Industrial Relations has appointed five new Committees on Discrimination.

Funded by the Australian Government, the Committees are constituted from representatives from government, employers' and employees' organizations, women, migrants and Australian Aborigines and will seek to overcome problems of discrimination in industry by the processes of conciliation.

Family Law Council

The Federal Attorney-General Has announced the names of the persons he has appointed to be members of the Family Law Council.

The Council, which is established under the Family Law Act 1975-1976, has the function of advising and making recommendations to the Attorney-General, either on its own or by request, concerning the working of the Act and other legislation relating to family law, as well as the working of legal aid in proceedings in matters of family law.

(C.L.B. January 1977 p.151)

AUSTRALIA-
WESTERN AUSTRALIA

Rape Penalties

The Western Australian Attorney-General has stated that it is most unlikely that his government will adopt the New South Wales proposals to introduce a lower maximum penalty for certain categories of rape. The Attorney-General stated that although the State's Criminal Code provided for a maximum penalty of life imprisonment for rape, this sentence was not mandatory. Further, there was no evidence that Western Australian juries were reluctant to convict males charged with rape on the ground of the severity of the sentences that could possibly be imposed.

The Attorney-General added that he believed that the New South Wales proposals would the undesirable effect of down-grading the seriousness of the charge of rape and in a technical sense they would mean that some rape cases would no longer be tried by that State's Supreme Court.

(C.L.B. April 1978 p.425)

AUSTRALIA-
NEW SOUTH WALES

Countering Sexual Offences

The New South Wales Government is to establish special referral centres in five hospitals in Sydney and Newcastle for the victims of sexual offences. This decision was brought about as a result of a recommendations by a government task force that was appointed last year to report on the care of victims of sexual offences. The task force concluded that there were shortcomings in the existing methods and procedures adopted by health authorities and the police force in such cases.

The task force recommended that -

- (i) greater emphasis should be placed on crisis care counselling in university medical courses;
- (ii) sexual offence referral centres should be established in hospitals to provide medical treatment and follow-up counselling and changes in police procedures in dealing with these cases;

- (iii) a special police "rape squad" or "sexual offences unit" as used in other states and overseas be not established;
- (iv) a reduction in the time taken before victims of sexual offences received medical attention;
- (v) wherever possible after initial interview, victims of sexual offences should be transferred to referral centres and given immediate treatment before further police questioning;
- (vi) sexual offences "evidence kits" should be made available to all referral centres, country police stations and Government medical officers; and
- (vii) training courses for the treatment of sexual victims should be held for Government medical officers in country areas.

(C.L.B. July 1978 pp.703-704)

Family Law - de facto relationships

The New South Wales Anti-Discrimination Board has issued its First Annual Report under the State's Anti-Discrimination Act 1977.

In its Report the Board has recommended, inter alia, that a de facto relationship should be accorded the same legal status as that of marriage.

In allowing the Board's Report to lie on the table of the State Parliament for six months before it is debated, the State Premier expressed the view that it would be difficult to translate this aspect of the Board's Report into legal definition so as to define a de facto relationship and elevate it to the status of a de facto marriage.

(C.L.B. January 1979 pp.294-295)

AUSTRALIA

Family Law

The Chief Judge of the Family Court of Australia has announced that the Court is planning to establish a counselling programme for parties who are considering divorce; a pilot programme would be established at which the parties attending would be encouraged to join in a series of group sessions with a Family Court Counsellor and a lawyer. The parties would there learn about and discuss the legal and social implications of marital breakdown and the alternatives available to them.

The Chief Judge stated that there was no statistical or other evidence to support the view that the Family Law Act 1975 had had an impact on the rate of marriage breakdown.

(C.L.B. October 1979 p.1353)

AUSTRALIA- VICTORIA

Discrimination Against Women

The Chairman of the Victorian Equal Opportunities Board has suggested

that some form of positive discrimination may be necessary if the promotion of equal opportunity does not progress at a reasonable rate under existing legislation.

This suggestion was contained in the Second Annual Report of the Board which has been tabled in the State Parliament. After reviewing the Board's operations over the past year, the Chairman concluded that some minor amendments to the Equal Opportunity Act 1978 were needed.

"It is preferable that the community be given the opportunity of eliminating discrimination within the framework of the existing Act with the modifications already suggested", she said. She added that: "If, however, research indicated that the promotion of equality of opportunity is not progressing at what may seem to be a reasonable rate and that the reason for this is that indirect forms of discrimination are being used to avoid treating people equally then the Board may well conclude and recommend that the Act be extended to render unlawful indirect discrimination.

And that in certain areas, at least "affirmative action" should be introduced, for example, to offer a financial incentive to an employer who engages a trainee, be the trainee male or female, in an area in which the great majority of employees are persons of the sex opposite to that of the trainee."

The Report of the Commissioner showed an increase in the number of complaints about discrimination and a fall in discriminatory job advertisements to two per cent.

According to the Report sexual harassment continues to be a serious problem in the workplace. The Victoria Commissioner for Equal Opportunity said that the range of problems involving sexual harassment was wide. But the problem was not specifically covered by the Equal Opportunity Act 1978(Vic) under which she worked.

She said complaints had been few but recent publicity had drawn many unquiries, particularly from careers advice teachers. These inquiries had indicated that young school-leavers in need of jobs faced sexual exploitation. This also confirms a pattern reported by colleagues from other States and suggests that some employers may be exploiting the current employment position for women to obtain sexual favours in return for a job. Overall, despite the small number of substantiated cases, the frequency and source of reports suggests that sexual exploitation could be widespread.

(C.L.B. July 1980 pp.1067-1068)

AUSTRALIA

Rape Law Reform

Agreement is widening among women's groups, lawyers, social workers and criminologists in Australia that Australia's laws on rape require drastic reform. A National Conference on Rape Reform held at Hobart urged State and Federal Governments to increase efforts for a complete overhaul of the rape laws.

Speakers at the Conference claimed that rape is one of the most regularly occurring but unpunished crimes in Australia and that the continuing high incidence of rape and the few convictions in the courts

underlined the lack of deterrent effect the law has at present.

The Conference was intended to initiate debate on specific proposals for legislative reform which are overdue and are technically complicated. It also studied American experience which has shown that increased public awareness is important if changes in rape laws are to be effective. It was the first time that Australian judges, lawyers, social workers and politicians had met in national forum to discuss guidelines for change in this area of the law and delegates overwhelmingly acknowledged the present weaknesses of the law.

The Conference concluded by calling on State and Federal Governments actively to continue to search for reforms in rape and sexual laws. In a 17-point motion it said the Australian Institute of Criminology should act as a clearing house for statistics and research data and that the Commonwealth and State Attorneys-General meet in three years time to consider and evaluate progress.

(C.L.B. October 1980 pp.1494-1496)

AUSTRALIA - A.C.T.

Rape: Prosecution of Husbands

A draft Bill for the Australian Capital Territory proposes that women will be able to prosecute their husbands or de facto husbands for rape under some circumstances.

A spokesman for the Federal Attorney-General's Department, the drafter of the Bill, has stated that the draft Bill as it applies to the Australian Capital Territory was being considered by the Federal Attorney General. The parts of the Bill which have been approved by the Federal Attorney-General include those which provide (a) that consent should be irrelevant in offences involving the use of violence, threats, false pretences or drugs; (b) that there should be no distinction in penalty between cases where penetration was effected and those where it was attempted; (c) that there should be no distinction between sexual penetration of a male and a female; and that there should be a range of offences reflecting the severity of harm caused.

Terms of imprisonment ranging between life imprisonment and seven years were proposed to cover varying sets of severe circumstances in which the offence was either committed or attempted. The Bill also incorporates the proposals of a paper previously agreed to by the Territory's House of Assembly recommending that women should be able to prosecute their husbands for rape within marriage. The Bill proposes to limit the defences of husbands or de facto husbands in the prosecution of rape.

(C.L.B. April 1981 pp.791-793)

AUSTRALIA -
NEW SOUTH WALES

Rape and sexual assaults

The New South Wales Government has approved amendments to the State laws

relating to rape so that men who rape their wives will no longer be immune from prosecution. Announcing the Cabinet decision the State Premier said that the proposal had widespread support within the community.

Although the removal of immunity against prosecuting husbands is the most controversial aspect of the proposed legislation, it contains other far-reaching provisions. The term "rape " itself will disappear from the statute books and will be replaced by a graded scale of sexual assaults, ranging from an act of intercourse without consent to brutal attacks.

Accordingly, prison sentences will vary from a maximum of seven years for the least serious charges to twenty years maximum for the most vicious.

(C.L.B. April 1981 p.794)

AUSTRALIA

Property Rights of Husbands and Wives

The Federal Attorney General has responded to the recommendations of the Federal Parliament's Joint Select Committee concerning family law. A specialist Committee of Inquiry will investigate whether there should be new laws in Australia to clearly define the property rights of husbands and wives.

The Committee is required to investigate whether there should be a fixed set of rules about the ownership of property so that spouses will become more aware of what property they owned during a marriage or how they could expect such property to be divided if their marriage breaks down.

The Attorney-General stated that he hoped to introduce legislation soon to amend the Family Law Act 1975 which would incorporate 27 of the Joint Select Committee's recommendations.

(C.L.B. January 1982 pp.392-394)

AUSTRALIA - VICTORIA

Women Prisoners Increase dramatically

According to the Victorian Minister for Community Welfare the number of women in Victorian prisons has increased dramatically. The Minister said that the increase in the number of women prisoners was partly due to the courts' changed attitude to sexual equality. In addition, women had begun to commit crimes traditionally committed by men.

The Minister was replying to a call by the Acting Director of the Australian Institute of Criminology for a second women's prison in Victoria. The Minister stated that Victoria still had the lowest prison rate of all Australian States with about 47 prisoners per 100,000 people compared to the national average of 67 per 100,000.

(C.L.B. January 1982 p.406)

AUSTRALIA

Human Rights - Status of Women

The Australian Human Rights Commission has endorsed the Australian National Women's Advisory Council Plan of Action which is primarily a statement of suggested principles and objectives necessary to raise the status of women in Australia. In a foreword to the Plan, the Chairman of the Human Rights Commission stated that Plan was directed not only at the Australian Government but also at Australian State and local governments, non-government organisations and the community generally.

The Australian Plan is an adaptation of the United Nations World Programme of Action which was adopted at the World Conference of the United Nations Decade for Women held in Copenhagen in July 1980 to mark the mid-point of the Decade for Women (1976-1985)

The contents of the Plan are divided into three parts: Part A deals with the targets and strategies for accelerating the full participation of women in Australia's economic and social development; Part B covers national development plans and policies; and Part C deals with Australia's role in international development.

The World Programme of Action states that "improvement in the status of women requires action at the national, local and family levels. It also requires a change of men's and women's attitudes towards their roles and responsibilities in society. The joint responsibilities in society. The joint responsibility of men and women for the welfare of the family in general and the care of their children in particular must be reaffirmed."

(C.L.B. July 1982 pp.1208-1209)

AUSTRALIA- NEW SOUTH WALES

Sexual Discrimination

A Report by the New South Wales Anti-Discrimination Board has disclosed that widespread discrimination exists against women in relation to financial matters.

The investigation by the Board, which is the first of its kind in Australia, shows that -

- (i) marital status affects many lending decisions;
- (ii) the sex of the applicant determines some decisions; and
- (iii) some apparently fair criteria for borrowing discriminates indirectly against women.

The Board's community relations officer said that although discrimination based on sex was illegal in New South Wales, financial institutions continued to get away with such discrimination because they could claim that they were refusing women loans or credit for other reasons. Further, many women lacked confidence in their financial dealings and were reluctant to insist on their rights.

She said the existence of discrimination was partly a result of the conservatism of middle-management executives. It was an extremely serious form of discrimination because it held back women in so many fields.

(C.L.B. October 1982 p.1577)

AUSTRALIA

Test Tube Babies: Ethical, Legal and Moral Questions

The Deputy Chairman of the New South Wales Law Reform Commission, Mr. Russell Scott, has stated that a national standing committee should be established to check on the continuing ethical, legal and moral questions raised by test-tube baby programmes and similar medical research.

Mr Scott said that Australia's prominence in experiments on in vitro fertilization and embryo transfer gave an outstanding opportunity for leadership. "A national standing committee would mean that practices and developments in this field can be monitored," he said. "We might be able to avoid the sterile, entrenched attitudes that seem to characterise the abortion debate," Mr Scott told the Australian Society of Legal Philosophy in Sydney.

Mr. Scott said that the moral, ethical and social problems created by the modern medical advances, such as test-tube babies and cloning would not go away. "Somehow we must achieve a balance between the desire to ignore the advances on the one hand and getting the benefits for the society which they offer on the other.

Mr. Scott was a member of the medical and legal Working Party which recently revised Australia's guidelines for research on humans. The Working Party's guidelines, which were released after they had been accepted by the National Health and Medical Research Council, are the first to be produced by any country.

Mr. Scott said that the Working Party was aware that its findings could be controversial. "Our first decision was that in vitro fertilization can be a justifiable medical practice", he said. "It has developed as a means of alleviating infertility in marriage which can be a serious, even tragic, problem for many couples. We are aware that some people strongly oppose in vitro fertilization. However, we took account of the fact that such an approach has also been brought to other practices which are clearly now acceptable to our society, such as contraception." Mr. Scott said that the Working Party was faced with several novel issues, including the ethics of long-term sperm banks and ovum banks. "Who should own them? Should the State be allowed to assert ownership or control over these potential citizens?"

In his call for a national standing committee, Mr. Scott said it would not only be necessary for in vitro fertilization problems but for the whole range of ethical issues in medical research on humans.

(C.L.B. January 1983 pp.302-303)

AUSTRALIA - SOUTH AUSTRALIA

Women Discriminated Against in the Police Force

The South Australian Sex Discrimination Board has held that successive State Police Commissioners have unlawfully discriminated against female members of the Police Force. The decision by the three-member Board, headed by a District Court Judge, followed hearings lasting nearly two years.

The Police Department had discriminated against women in recruitment, allocation of duties, promotions and transfers. The Board said

that women were still seen and treated as a separate group within the Force from the moment they were asked to fill out "pink" application forms while men filled out "blue" forms. Among the breaches of the Sex Discrimination Act 1975 found by the Board were: the policy of the Commissioner in not allowing females to be recruited as cadets from 1976 until March 1979; the differences in duties between male and female patrol officers; and the policy of regarding solo motorcycle duties, accident investigation and prevention, the traffic task force and the police dog squad as being unsuitable for females.

(C.L.B. April 1983 p.742)

AUSTRALIA

Passports: Abolition of consent of spouse

The former Australian Minister for Foreign Affairs announced in January 1983 that married and previously married persons will no longer be required to obtain the consent of their spouse or ex-spouse before being issued with an Australian passport.

The requirement of consent has become a frequent source of complaint from passport applicants and others for many years and it no longer served the purpose for which it was originally intended, that is, to prevent the desertion of either married partner and to safeguard maintenance obligations in the event of the dissolution of the marriage. The Minister said that the abolition of the consent requirement would not deprive a person to restrain the departure from Australia of a spouse or ex-spouse with maintenance obligations. There were now adequate provisions in the Family Law Act 1975 to cover those who might attempt to avoid payment of maintenance.

(C.L.B. July 1983 pp. 1097-1098)

Discrimination in Employment and Occupation

The Australian Government's National Committee on Discrimination in Employment and Occupation has published its Tenth Annual Report covering the period 1982-1983.

Full details of the Report appear in the C.L.B. as referred to below.

(C.L.B. October 1984 pp. 1906-1913)

Guidelines on Sexual Harrassment

The New South Wales Anti-Discrimination Board has drawn up a series of formal guidelines on sexual harrassment. They are designed to show employers in the private sector how to deal with and eliminate the problem in the workplace. The move to produce the guidelines follows an extensive programme initiated by the Office of Equal Opportunities in Public Employment which aimed to control and eliminate sexual harrassment in the State's public sector.

The Board's guidelines define sexual harrassment as "any unwanted and unreturned sexual conduct including unwanted physical contact,

verbal comments, abuse or gestures". The draft guidelines recommend that employers -

1. to issue a strongly-worded policy statement to all employees, making it clear that sexual harrassment would not be tolerated under any circumstances;
2. to emphasise to all employees that the company would regard harrassment grievances seriously, sympathetically and impartially;
3. to educate employees on the nature of sexual harrassment and the procedures to deal with grievances;
4. to nominate an employee to receive grievances and appoint a senior staff member to investigate and resolve the grievances;
5. to draw up a set of guidelines on how to investigate complaints and resolve them internally.

(C.L.B. October 1984 p.1922)

Prostitution and Human Rights

The Australian Human Rights Commission has commissioned a study of the human rights implications of legislation dealing with prostitution. The study will be conducted on behalf of the Western Australian Council of Civil Liberties.

The Chairman of the Human Rights Commission said that the study would involve contact with prostitutes, their clients and community groups with strong views on the issue and would canvass general community attitudes.

(C.L.B. January 1985 p.249)

BANGLADESH

Late Marriage in Bangladesh

A national youth organisation in Bangladesh, Jatio Tarun Sangha, has been running a nationwide late marriage movement with full government support in order to create favourable public opinion leading to new legislation on the age of marriage. The target of the campaign is to establish the age of marriage as 23 for girls and 28 for boys. The Bangladesh Family Planning Association has supported the campaign.

(C.L.B. October 1977 p.715)

BARBADOS

Survey of Abortion Law Attitudes

A national survey of doctors, nurses and social workers on the liberalising of the Barbados abortion law carried out by the University of the West Indies has found that 85 per cent of doctors and social workers were in favour of liberalisation, while only one third of nurses favoured liberalisation. On the question of abortion being freely available at the request of the patient, doctors and social workers showed reservations and sixty per cent of them were against this. 60 per cent of the nurses as compared with 25 per cent of doctors and 6 per cent of

social workers felt that there would be less interest in contraception if abortion were more readily available.

(C.L.B. July 1977 p.526)

CANADA

Abortion

The Committee on the Operation Law, appointed in September 1975 is conducting a fact-finding study to determine whether the therapeutic abortion procedure provided for in the Criminal Code (section 251) is operating equitably across the country. Rather than appoint a Royal Commission that would be asked to make recommendations on the policy underlying the law, it was decided to establish a Committee to undertake a scientific study of the way in which the present law is operating.

Tax and the Family

Family Law and the Native People

These are two background research papers, not published, but available for reference in the library of the Law Reform Commission. The first studies the effects of the family on the federal income tax and conversely the effects of the tax on the family. It includes a survey of the amendments to the tax system required if the basic thread of the current system, the individual as the only personal tax unit, is maintained and a review of the desirability of adopting the family, or part of it, as an additional unit of tax liability and measurement.

The second paper studies customary family law as it obtains amongst the Indian population of Canada in relation to marriage, divorce, inheritance and adoption. It further examines the status (or membership system under the Indian Act and the situation in regard to child welfare.

(C.L.B. January 1976 p.54)

Major Amendments to Divorce Law

The Justice Minister, Mr. Mark MacGuigan, has tabled in Parliament a Bill to revise Canada's divorce law to make it more consistent with current social needs and realities.

When the Divorce Act was passed in 1968, the then Minister of Justice, the Right Honourable Pierre Trudeau, promised that amendments to the Act would be brought forward as required by evolving social conditions. "In the light of recent studies on divorce, not to mention the many representations I have received from concerned groups and individuals, it is evident that the time has now come to fulfil that promise," said Mr. MacGuigan. The Minister stated that the new divorce law would promote mediation and counselling services at any stage of the divorce proceedings, to help prevent impetuous divorces where there was hope of saving the marriage.

The proposed changes strive for a more humane resolution of marital differences as promised in the speech from the Throne. For, example, fault grounds would be eliminated and the waiting period for seeking a divorce on the basis of marriage breakdown would be one year. In addition, procedural changes to the law are expected to make the divorce process more efficient. In uncontested cases new rules of court could allow a divorce to be granted without requiring that the case be brought to trial. This would not only reduce the backlog in Canadian courts but would also reduce costs for taxpayers as well as for those seeking a divorce.

A summary of the proposed amendments are set out as referred to below.

(C.L.B. April 1984 pp. 1003-1004)

CANADA-ONTARIO

Legal Specialists on Domestic Violence

The Attorney-General, the Hon. Roy McMurty has announced the appointment of more than 50 specifically designated Crown legal officers throughout Ontario to deal with domestic assault matters. It is part of a continuing initiative to give the problem of family violence a high priority within the justice system. The Attorney-General said he will be designating more than 50 lawyers to further develop expertise on domestic violence with the aim of improving assistance to victims and prosecuting officers where appropriate.

This means that in the office of the Crown Attorney in every County and District of Ontario at least one prosecutor will be designated the specialist in family violence. The specialist will be either the Crown Attorney or an Assistant Crown Attorney. In larger centres more than one person may be designated to ensure that the service is available to all who need it. The designated person will receive training in dealing with the special problems faced by victims of domestic violence through regional seminars to be conducted by the Ministry of the Attorney-General, the Ontario Women's Directorate, the Ministry of the Solicitor General and the Justice Secretariat.

The specialists will be available to offer advice, assistance and prosecutorial expertise to victims of domestic assault. As specialists, they will be familiar with local resources available to victims and will help obtain assistance from other appropriate social agencies in the community. In addition, the specialists will work closely with police forces to ensure the active and vigorous investigation and prosecution of domestic assault charges. If advice on other legal matters is required and the victim is unable to afford a lawyer, the specialist will assist in obtaining legal assistance through the Ontario Legal Aid Plan.

The Attorney-General pointed out that the appointment of these specialists is in addition to his plans to greatly improve services to all victims of crime. Mr McMurty said, "As Attorney-General, my policy has been to vigorously prosecute incidents of domestic violence and to lessen wherever possible the apprehension many ordinary citizens have of the court system. Our new programme to develop specialists in domestic violence cases is evidence of the government's commitment in this regard.

(C.L.B. October 1984 p.1931)

GHANA

Ghana Branch of the International Federation of Women Lawyers

The International Federation of Women Lawyers (Ghana Branch) was inaugurated by the Chief Justice on 4 April 1975. F.I.D.A. seeks to promote the principles and aims of the United Nations in their legal and social aspects and to embrace and promote the welfare of women and children, realizing that on women and children's well-being depends the happiness of the home and the strength of society.

(C.L.B. May 1975 p.66)

INDIA

Family Courts

The Indian Parliament has approved the establishment of family courts to settle marital disputes expeditiously.

"The Courts would preferably be headed by lady judges," the Law Minister, the Hon. Jagan Nath Kaushal, told the Lower House. He described the legislation as "progressive and revolutionary". The courts will initially be set up in cities with populations of more than one million and will exclusively handle issues relating to separation, divorce, alimony and conjugal rights. The courts will later be established in smaller cities. "The emphasis in the family courts will be on reconciliation," the Minister told the House.

The National Parliament has also passed legislation imposing harsher penalties on dowry-greedy relatives in a move to curb harassment of younger married women. The traditional practice of dowry, although outlawed in 1961, has continued because of social pressures on parents to marry off their daughters at a young age.

In recent years there have been many cases of "bride-burning" in which dowry-hungry relatives have been accused of killing or driving young wives to suicide. Police say brides are subject to increasing harassment by in-laws not satisfied with the size of the dowry given by parents.

The new legislation increases terms of imprisonment for the acceptance of dowry from six months to two years. Husbands and in-laws suspected of dowry-connected violence will be liable to immediate police arrest without warrant or bail.

(C.L.B. October 1984 p.1932)

NEW ZEALAND

Reform of Maintenance and Property Linked

The Minister of Justice has told a public meeting that there is a close link between matrimonial property and maintenance reform.

He said that the division of property does not necessarily abolish the need for maintenance, because in most marriages the only asset is the earning capacity of one spouse. However, where there was a large amount of income-producing property the need for financial support was much reduced by its division. He said that in modern times the end of marriage should mean "just that" and should not continue indefinitely for maintenance purposes when it is otherwise finished.

However, the Minister said that this does not mean that there should be an abrupt end to maintenance, particularly where young children are involved.

Proposed Matrimonial Proceedings Changes

Possible changes in the field of matrimonial proceedings have been outlined by a Government spokesman. Instead of applying for separation and other orders spouses would ask for a reference to a conciliator. If the consultation is not successful, the parties will attend a compulsory conference chaired by an independent person to seek agreement on some of the matters in dispute and to identify those matters on which there is no agreement. Only after that will the matter go before a court for contested hearing - and then only on those questions still in dispute.

The spokesman also says that the Government intends to remove from the law any possible suggestion of bias in favour of the mother in custody proceedings.

Female Offending

The level of female offending in New Zealand appears to have escalated dramatically. The Secretary for Justice had this to say in his latest annual report to Parliament:-

"Little has been written or mentioned on this subject since the publication of Crime in New Zealand in 1968. However, an examination of the available information indicates that, as is the situation in society in general, the position and status of women as offenders has changed dramatically over the last ten years.

During this period the rate of total charges brought against women has increased by 94 per cent. In 1967 the number of charges per 1000 female population was 17. Within 10 years this figure has virtually doubled and in 1976 stood at 33. The actual number of charges against women in this period has increased from 22,736 to 51,464. By way of comparison the number of charges against males over the same period has increased by 32 per cent although the male rate per 1000 of population is still very much higher than females. In 1976 females were responsible for 13 per cent of the criminal workload of Magistrates' Courts.

Within the total framework of criminal offending women do still play a comparatively minor role. But the facts as I have outlined them raise issues and questions that should not go unnoticed. This is

particularly so when an analysis of the nature of offending is made. Most offences committed by women (and by men) are traffic offences but the rate of more serious female offending has increased still more since 1968. Moreover, vagrancy and "victimless" offences traditionally associated with women's offending now play a much less prominent part in the total picture. We find an emerging pattern of female offending involving more serious crimes such as aggravated robbery, assaults, burglary and false pretences. Theft (which includes shoplifting) still figures prominently in the total number of offences by women but has not increased proportionately to overall offending. The involvement of females in drug offending has also become apparent. In 1976, 190 women were convicted for drug offences compared with only 2 in 1967.

What the figures creating this portrayal of females offending do not disclose is whether the increase is real in the sense that women are actually committing more offences, perhaps because of their changing role in society. A writer commenting on the criminality of women contended that the tendency to crime between the sexes was not significant but that the "masked" criminality of women hides many offences committed by women from detection. Perhaps the "mask" has been removed and society is general now has less reluctance to report and prosecute offences where women are involved. No doubt the actual reasons are many and complex. However, whatever the reasons this development poses problems that cannot be ignored."

(C.L.B. October 1978 pp. 1034-1036)

Exemption of Women's Clothing from Price Freeze held to be Discriminatory

The exemption of women's fashion clothing from the Price Freeze Regulations amounts to discrimination, the Human Rights Commission has said. The Commission has recommended that the Government remove the exemption unless it can be proved that the industry cannot continue without it. The Commission said that a remedy might be to give similar exemption to men's fashion clothing. "It is wrong in principle to make a distinction on the basis of sex unless this is clearly a matter of business inevitability. It is not enough to say that this is to be presumed. Much of the existing discrimination between the sexes is based on presumption and on examination most of these are found to be traditional prejudice without any rational basis of necessity," the Commission said.

The real issue was that the exemption was a carry-over from the period before the idea of equality between the sexes was understood as it was now.

(C.L.B. April 1983 pp.742-743)

Rape: Submissions on the Rape Study

The Department of Justice has released an Analysis of the Submissions to the Rape Study and its publication includes the formal study of the experience of rape victims. It attempts to identify the principal concerns of those who have made submissions and to summarise the views

expressed on how best to improve the law on rape and the way the criminal justice system deals with complaints of rape.

It is noted that there is a large measure of consensus on the general point that existing police and criminal justice system procedures for dealing with rape cases can cause unnecessary distress to the victim of the offence. All but a few submissions asked for changes of some description to the law. There were several issues on which there was sharp disagreement. Notable among these is that of "spousal immunity" to a charge of rape which is both attacked and defended in strong terms.

(C.L.B. October 1983 p.1552)

TRINIDAD AND TOBAGO

Abortion Law and Public Opinion

Controversy over abortion is mounting in Trinidad and Tobago, sparked off by a survey carried out by a doctor at the University of the West Indies, Dr. Syam Roopanrinesingh, which indicated that public opinion is in favour of liberalisation of the abortion law. Currently the law is the same as the prohibitive United Kingdom legislation on abortion of 1861, except for the fact that penalties imposed have been considerably reduced. The Archbishop of the Port of Spain, Mr Antony Patin, has spoken out against liberalisation and the Prime Minister has spoken against abortion and sterilisation. However, the President of the Family Planning Association, Mr. Emile Elias, has said that any move which takes abortions "out of the back room" would be welcome. Data provided by the F.P.A. indicates that there were an estimated 12,500 illegal abortions in 1963 (noted in IPPF "Law File").

(C.L.B. July 1977 pp.528-529)

UNITED KINGDOM

Laws to Protect Women Can Work Against Them

Legislation intended to safe-guard the conditions of women at work serves to discriminate as much as protect, the Chairman of the Equal Opportunities Commission has said. In particular it had prohibited night work, shift work, early starts and late finishes, she said. Women were unable to work with lead or radiation, and, except in certain circumstances could not work underground in mines.

Pointing out the thin line that existed between discrimination and protection, she said: "For the Equal Opportunities Commission shift work and overtime represents one of the main methods of maintaining a large differential between men's and women's pay. Management is on occasions manipulating the protective legislation to oust women from jobs, or to stop them getting jobs, or to keep them on low pay without any legal remedy."

(C.L.B. January 1978 p.182)

Equality in Benefits for Women

The European Economic Community has approved legislation ensuring women equality with men in social security benefits. The member States have six years within which to implement the measures in their national legislation. The directive will enable women to claim on the same basis as men, social security, family income supplements and unemployment and sickness benefits for their husbands and children.

(C.L.B. April 1979 p.480)

'Morning After' Pill

In a written question the Attorney General was asked how many complaints have been received, either by himself or by the Director of Public Prosecutions, which relate to the supply of what is commonly called the 'morning after' pill and whether he proposes to institute criminal proceedings in connection with any of the complaints.

The Attorney General replied that on May 10, 1983 one complaint had been made to his Department and three to the Director of Public Prosecutions. Each complaint alleged that the supply and administration of such post-coital medications contravenes sections 58 and 59 of the Offences against the Persons Act 1861 and that a woman using such medication may commit an offence under section 58 of the Act.

Such pills are intended to be taken by women following unprotected intercourse to inhibit implantation in the womb of any fertilised ovum. The sole question for resolution therefore is whether the prevention of implantation constitutes the procuring of a miscarriage within the meaning of sections 58 and 59 of the Offences against the Person Act 1861. The principles relating to the interpretation of statutes require that the words of the statute be given the meaning which they bore at the time the statute was passed. Further, since the words were used in a general statute, they are prima facie presumed to be used in their popular, ordinary or natural sense.

In this context it is important to bear in mind that a failure to implant is something which may occur in the manner described above quite spontaneously. Indeed in a significant proportion of cases the fertilised ovum is lost either prior to implantation or at the next menstruation. It is clear that, used in its ordinary sense, the word 'miscarriage' is not apt to describe a failure to implant - whether spontaneous or not. Likewise, the phrase 'procure a miscarriage' cannot be construed to include the prevention of implantation. Whatever the state of medical knowledge in the 19th century, the ordinary use of the word 'miscarriage' related to interference at a stage of pre-natal development later than implantation.

"In the light of the above", the Attorney General said, "I have come to the conclusion that this form of post-coital treatment does not constitute a criminal offence within either sections 58 or 59 of the Offences against the Person Act 1861. No proceedings are to be instituted."

(C.L.B. January 1984 p.470)

"Rent-a-womb" Schemes Should be Avoided

The British Medical Association has recommended that doctors should have no involvement with any scheme involving "surrogate" mothers.

The association's stand comes as the first commercial "surrogate" agency is proposing to start a "rent-a-womb" scheme for childless couples in Surrey and as the government-appointed Warnock committee is preparing to make recommendations on this issue this summer. The committee is considering making the charging of fees for such a service illegal.

The B.M.A.'s council is expected next month to approve advice from its central ethical committee that doctors should not become involved in any procedure in which a woman bears a child for another woman and then hands it over after birth. That should apply whether the treatment is done privately, where the mother who bears the child is paid a fee for her services or even if it were to be attempted under the National Health Service with no fees involved.

The committee is also opposed to such treatment whether it is undertaken by artificial insemination, where the husband's sperm is inserted in the child-carrying woman or by the test-tube baby technique. In the latter case, the egg from the woman who cannot bear a child would be mixed in the laboratory with the husband's sperm and the resulting embryo implanted in the woman who is to carry the child. That process offers the advantage that the resulting child is genetically the offspring of the parents who are to bring it up, as opposed to the surrogate child produced by artificial insemination where half the genes will have come from the father but half from the woman bearing the child.

Both techniques are surrounded by serious legal and ethical dilemmas, but the least question of to whom the child belongs if the mother who has borne it changes her mind about handing it over.

Dr. John Dawson, head of the BMA's professional division said: "The committee feels strongly that doctors should have nothing to do with any process that will produce a surrogate child, whether by artificial insemination, the test-tube baby technique or by any other method. Once a woman is pregnant, however, doctors would have an obvious duty to care for her and the baby."

Some have argued that surrogacy can offer hope of a child to a woman who cannot bear children and that the test-tube baby technique, by making the offspring genetically the product of its parents, even though another woman produces it, makes the technique ethically more acceptable.

The BMA's committee is not opposed to the test-tube baby technique being used to allow another woman to donate an egg to a woman whose ovaries no longer function, allowing her to produce the child. That is seen as no different from the widely practised artificial insemination by donor, where donated sperm is used to make a wife pregnant if her husband is infertile.

(C.L.B. April 1984 pp.1014-1015)

Reviews

COMMONWEALTH

Three Studies of Abortion Laws in the Commonwealth

by Mostyn Embrey, Victor Tunkel, Rebecca Cook and Bernard Dickens
(Commonwealth Secretariat, London 183 pp. £3.00 incl. postage) reviewed
by Lesley Vick.

(C.L.B. April 1979 pp.581-584)

Family Law in the Commonwealth Caribbean

by Gloria Cumper and Stephanie Daley (Department of Extra Mural Studies,
University of the West Indies, 1979)
Reviewed by the Editors Commonwealth Law Bulletin.

(C.L.B. October 1981 pp.1607-1608)

AUSTRALIA

Women and Crime

Edited by Satyanshu K. Mukherjee and Jocelyne A.Scutt (Australian
Institute of Criminology: Paperback \$A8.95 Hardback \$A16.95
Reviewed by the Editors of the Commonwealth Law Bulletin

(C.L.B. January 1982 p.425)

Sex Discrimination Legislation in Australia

Current Issues Brief No.9 of 1983 (Australian Federal Department of the
Parliamentary Library).
Reviewed by the Editors of the Commonwealth Law Bulletin.

(C.L.B. October 1984 pp.1958-1959)

CANADA

The Morgentaler case: criminal process and abortion law

by Bernard M. Dickens (1976) 14 Osgoode Hall Law Journal 229.
Reviewed by the Editors of the Commonwealth Law Bulletin.

(C.L.B. January 1977 p,165)

JAMAICA

Current Trends in Social Legislation

A paper presented by Mr. Justice Watkins (1976)
Reviewed by the Editors of the Commonwealth Law Bulletin.
(C.L.B. October 1976 pp466-468)

NEW ZEALAND

Family Law 1981

by Prof. P.R.H. Webb and J.G. Adams (Legal Research Foundation Inc.
Auckland: 128pp.)

Reviewed by the Editors of the Commonwealth Law Bulletin

(C.L.B. July 1982 p.1223)

UNITED KINGDOM

Women and Crime: A Cropwood Round Table Conference

edited by Alison Morrison and Loraine Gelsthorpe (University of Cambridge: £3:50)

Reviewed by the Editors of the Commonwealth Law Bulletin

(C.L.B. January 1982 pp.420-422)

Matrimonial Proceedings in Magistrates' Courts

by W.A.W. Strachan (Sweet & Maxwell: 169pp. £10:75)

Reviewed by the Editors of the Commonwealth Law Bulletin.

(C.L.B. July 1982 p.1222-1223)

Articles

AFRICA

Abortion Laws in African Commonwealth Countries

(Rebecca J. Cook and Berbard M. Dickens) (1981) 25 Journal of African Law 60.

AUSTRALIA

The Position of Ex-nuptial Children in Victoria

(M.A. Neave) (1976) 10 Monash University Law Review 330

Consent in Rape

(Jocelynn A. Scutt) (1977) 3 Monash University Law Review 255

Rape: changing the law (and attitudes....?)

(Duncan Chappell) (1977) 2 Legal Service Bulletin 302

Law and the Battered Wife

(Anwar Khan and Jeanette Hackett) (1978) 3 Legal Service Bulletin 5.

Injuries to Unborn Children

(Peter F. Cane) (1977) 51 Australian Law Journal 704

The Recognition of Overseas Divorces under the Family Law Act 1975

(J.L.R. Davis) (1978) 8 Federal Law Review 231

The Equal Opportunity Act -tokenism or prescription for change?

(W.B. Creighton) (1978) 11 Melbourne University Law Review 503

Principles of Property Distribution on Divorce - compensation need or community?

- (Rebecca J. Bailey) (1980) 54 Australian Law Journal 190
Custody of Children in Divorce, Separation and Similar Disputes
(The Hon. Mr. Justice Barblett) (1980) 54 Australian Law Journal 489
Void and de facto Marriages
(John H. Wade) (1981) 9 Sydney Law Review 356
Sexual Offences: N.S.W. reforms
(Meg Wallace) (1981) 6 Legal Services Bulletin 139
Financial Implications of Family Law
(Malcolm D. Broun) (1981) 55 Australian Law Journal 424
Breast-milk Substitutes: bioethics and law reform
(Hon. Mr. Justice M.D. Kirby) C.L.B. April 1983 pp.671-690
The Mental Element in Rape in the Criminal Code
(John B. Blackwood) (1982) 56 Australian Law Journal 474
Towards Non-adversary Procedures in Family Law
(H.A. Finlay) (1983) 10 Sydney Law Review 61
Sexual Harassment as Sex Discrimination
(Helen Mills) (1984) Legal Service Bulletin 5

CANADA

Legal Abortion Services in Canada

- (Professor Bernard M. Dickens) C.L.B. April 1977 pp.298-305
Civil Actions for Discrimination
(Ian A. Hunter) (1977) 55 Canadian Bar Review 106
Variation of Final Orders under Maintenance Reciprocity Legislation
(Cornelia Schuh) (1977) 25 Chitty's Law Journal 159
Maintenance Rights and Obligations: a search for uniformity
(Julian D. Payne) (1978) 1 Family Law Review 2
Alimony: dum casta and the smart woman
Henry H Foster, Jr. and Doris Jonas Freed) (1978) 1 Family Law Review 26
An Act to Reform the Law Respecting Property Rights and Support Obligations : a critique
(Jennifer Bankier) (1978) 1 Family Law Review 33
Summary Maintenance for Bigamous and Illegitimate Children
(Gary McClelland) (1978) 1 Family Law Review 58
Desertion: the Family Court approach
(Norris Weisman) (1978) 1 Family Law Review 64
The Unified Family Court
(Patrick Gravely) (1978) 12 Law Society of Upper Canada Gazette 90
Canadian Abortion Law: obstacle for safer management of Canadian women
(Dr. C.A. Douglas Ringrose) (1978) 2 Legal Medical Quarterly 97
Liability to the Unborn
(L.C. Green) (1978) 2 Legal Medical Quarterly 82
The Female Offender
A series of articles on this topic is published in the February 1979 issue of Liaison published by the Ministry of the Solicitor-General, Ottawa.
The Mathematical Calculation of Child Support
(Maurice R. Franks) (1979) 2 Family Law Review 260
The Jamaican Women case and the Canadian Human Rights Act: Is Government subject to the principle of equality?
(Anne Bayefsky) (1980) 18 University of Western Ontario Law Review 461
Reform of Family Law in Quebec

An article under this title but with no named author appears in the C.L.B. October 1982 pp.1561-1567

The Variation, Enforcement and Interpretation of Maintenance Orders in Canada: some new aspects of an old dilemma

(Keith B. Farquhar) (1982) 60 Canadian Bar Review 585

GHANA

Judicial Development of Customary Law: the case of marriage law in Ghana and Nigeria

(Gordon Woodman) (1977) 14 University of Ghana Law Journal 115

MALAYSIA

The Family Law Curriculum and the Population Problem: another look at an old problem

(D.C. Jayasuriya) (1982) 24 Malaya Law Review 264

MAURITIUS

Recent Developments in the Family Law of Mauritius

An article under this title with no named author appears in the C.L.B. October 1982 pp.1567-1569

MONTSERRAT

Tourist Divorces and the Abuse of a Small State's Legal System: the Montserrat Matrimonial Causes for Foreigners Ordinance 1978

(K.W. Patchett and J.R. Young) American Journal of Comparative Law, Vol.XXX, No.4

NEW ZEALAND

Character Evidence in Rape Cases

(I.R. Davis) (1976) New Zealand Journal 178

The Matrimonial Property Bill - misguided chivalry?

(R.L. Fisher) (1976) New Zealand Law Journal 253

The Standard of Consent in Rape

(Jocelynn A. Scutt) (1976) New Zealand Law Journal 462

Reform of Matrimonial Property in New Zealand

A paper under this title by the Minister of Justice the Hon. D.S. Thomson appears in C.L.B. October 1977 pp.703-709

Matrimonial Property Act 1976

(Pauline Tapp) (1977) New Zealand Recent Law 66

Maintenance - from the husband or the State?

(Joan Lunn) (1978) New Law Journal 1112

Protecting the Victims of Domestic Violence: the Domestic Protection Act 1982

(W.R. Atkin, Diane Sleek and Vivienne Ullrich) (1984) 14 Victoria University of Wellington Law Review 119

Proposed Reforms of the Law of Rape

(M.W. Frawley) (1983) Otago Law Review 489

PAPUA NEW GUINEA

Aspects of the Legal Status of Women in Papua New Guinea
(Dianne Johnson) (1979) 7 Melanesian Law Journal 5

UNITED KINGDOM

The Limits of Legislating for Equality for Women
Human Rights Review, Vol.1 No.1 p.47 (1976)
Family Cases and Enforcement of Orders Between Countries
(Mr. Justice Latey) C.L.B. October 1977 pp.689-696
Sex Discrimination and Equal Pay
(Alec Samuels) (1977) New Law Journal 929
Jurisdiction in Matrimonial Causes: Scottish reforms and Commonwealth examples
(R. Reid) (1977) 22 Journal of the Law Society of Scotland 409
Sex Discrimination Law: success or failure
(Jane Fortin) (1978) New Law Journal 700
Sexual Offences and the Trend in Crime 1949-76
(Helena Campbell) (1978) New Law Journal 748
Rape-in-marriage: Law and law reform in England, the United States and Sweden
(Gilbert Geis) (1978) 6 Adelaide Law Review 284
Compelling Disclosure of Invisible Assets upon Divorce
(Bernard Berkovits) (1980) 130 New Law Journal 648
The Codification of Family Law
(S.M. Cretney) (1981) 44 Modern Law Review 1
Divorce and the Right to Life-long Maintenance
(J.C. Metcalf) (1981) 131 New Law Journal 669
Defining a Parent: the new Biology and the rebirth of the Filius Nullius
(David S. Rosettenstein) (1981) 131 New Law Journal 1095
Down's Syndrome and the Duty to Preserve Life
(Glanville Williams) (1981) 131 New Law Journal 1020
A Note on the British Nationality Act 1981
(Philip Baker) C.L.B. April 1982 pp.780-794
Limited Purpose Marriages
(John H. Wade) (1982) 45 Modern Law Review 159
Recent Cases on Discrimination and Equal Pay
(John Bowers) (1983) 80 Law Society's Gazette 597
Rape: the intention of Parliament and the Practice of the Courts
(Zsuzsanna Adler) (1982) 45 Modern Law Review 664
Bankruptcy and Matrimonial Assets
(Charles Bennett) (1982) 132 New Law Journal 991
The Matrimonial Lawyer: a new breed ready for change
(Ian J. McKillop) (1983) 80 Law Society's Gazette 1217
Human Rights and Welfare in Divorce
(David Couling) (1984) 134 New Law Journal 747

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