

around Australia from May to July. The ALRC is due to complete its inquiry and report to the Attorney-General by 31 December 1997. Dr Jim Stokes at the ALRC can be contacted concerning this inquiry by phone on (06) 257 7029.

### **Australian Law Reform Commission – Review of the adversarial system of litigation – Release of Issues Paper**

On 30 April 1997, the Commission released its first Issues Paper in response to its reference on review of the adversarial system.

The text of the Commission's Media Release at the time of release of the Issues Paper is set out below.

#### **“Legal mindset hindering reform, Commission warns**

The Australian Law Reform Commission has questioned whether the mindset of the legal profession is contributing to excessive costs and delays, overservicing, a lack of accountability and an unduly confrontational approach to resolving disputes.

A “legal culture” among judges and lawyers could be one of the major barriers to effective reform of the Australian civil justice system, the Commission has warned in its Issues Paper *Review of the Adversarial System of Litigation: Rethinking the federal civil litigation system*.

“Our system of civil justice is said to be in crisis but significant and effective long term reform may rely as much on changing the culture of legal practice as it does on procedural or structural change,” Commission President Alan Rose said.

“Many judges are reluctant to take a more managerial approach to judging, or to using alternative dispute resolution procedures. This may be because they come from the ranks of litigation lawyers and predisposed towards courtroom dynamics that minimise judicial participation. It may be that they don't want to gain a ‘reputation’ as a judge who unduly interferes.

“This ‘adversarial mindset’ extends to lawyers who always anticipate litigation. Such a perspective necessarily brings with it a time-consuming, complex and costly regime directed at covering every possible circumstance,” Mr Rose said.

The release of the Issues Paper is the first stage in extensive public consultations on a wide-ranging Commission inquiry into the Australian civil litigation system. As part of the inquiry, due to be completed in 1998, the Commission will examine civil, administrative and family law proceedings before courts and tribunals exercising federal jurisdiction.

The Issues Paper also examines basic procedural matters such as pleadings, discovery, interrogatories, interlocutory hearings and subpoenas and the taking of evidence.

Mr Rose said federal courts are shifting away from oral evidence and advocacy. But while written evidence and argument may save time and money for the courts, oral examination has traditionally been an important way to assess witness credibility.

Allied to this, is the use of expert witnesses in cases where a specialist opinion is required. “There is a difficulty in ensuring that expert witnesses are independent and without bias, given the tendency to ‘shop’ for the expert that will best suit a particular case,” Mr Rose said.

Many proposals to reform the use of expert witnesses concentrate on increasing court control, for example, by introducing rules that provide explicitly that the expert's responsibility is to help the court impartially and that this responsibility overrides any duty to the client.

Mr Rose said an important aspect of the Commission's review was an examination of alternative or assisted dispute resolution (ADR).

“What role should courts have in encouraging ADR? One view is that ADR processes should be kept quite separate from litigation but the Commonwealth, States and Territories have, to varying degrees, enacted legislation designed to encourage ADR, including ADR that is facilitated by the courts,” Mr Rose said.”

A list of the planned Issues Papers and Interim Reports or Discussion Papers was provided in the last edition of *Admin Review*. The Commission is required to make preliminary recommendations on the conduct of civil litigation by 30 September 1997 and a final report on the conduct of civil, administrative review and family law litigation by 30 September 1998.

**Australian Law Reform Commission/  
Human Rights and Equal Opportunity  
Commission - Release of Draft  
Recommendations Paper on Children  
and the Legal Process**

In late May, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission released draft recommendations from their joint inquiry into the impact of legal processes on children. Their joint Media Release provides further information on the proposals.

**MEDIA RELEASE**

May 20, 1997

**“Office for Children needed to overcome  
‘appalling’ children’s services**

An Office for Children (OFC) should be established to develop policies to overcome the appalling state of Australian systems for the care and protection systems of children, serious deficiencies in children’s services and the marginalisation of children involved in legal processes.

The OFC, which would operate within the Prime Minister’s Department, is one of the major draft recommendations arising from a joint inquiry by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) into the impact of legal processes on children.

The draft recommendations paper *A matter of priority: Children and the legal process* was prepared after extensive community consultation. Further submissions are sought before the final report is provided to the federal Attorney-General later in the year.

Releasing the paper today, ALRC President Alan Rose said the OFC would be part of a comprehensive structure to support and coordinate programs for young people and to ensure children’s issues are a matter of priority at all levels of government.

“Giving Australia’s children the best chance possible to develop into mature, responsible citizens by age 18 is a national responsibility. By signing the international Convention on the Rights of the Child, the federal Government, on behalf of all Australians, has made a firm commitment to make essential children’s services and programs a priority.

“While governments invest significant funds in a range of children’s programs, the Commissions have received extensive evidence that legal processes and government services are failing children badly. In some cases, the very systems which seek to support children become yet another disadvantage.

“The Commissions are also disturbed by the discriminatory impact of legal processes, particularly on Indigenous children in the juvenile justice and care and protection systems,” Mr Rose said.

Human Rights Commissioner Chris Sidoti said the Commissions were also concerned by the shift to more punitive, less effective regimes for young offenders in juvenile justice systems.

“This has been justified by a so-called juvenile crime wave when, in fact, there has been no significant increase in juvenile crime in Australia over the past decade. Our consultations have made it clear, that poor police/youth relations are endemic in Australia,” he said.

Mr Rose said legislation allowing children considered “at risk” of offending to be removed from public places should be repealed. “This type of legislation allows police to monitor youth behaviour that is not criminal. It allows police to act on stereotypes about young people but provides little or no police accountability,” he said.