NOTE: LAW REFORM COMMISSION WORKING PAPER NO. 4 - DECLARATION AND DEVELOPMENT OF UNDERLYING LAW.

Section 9 of the Constitution of the Independent State of Papua New Guinea provides that the laws of Papua New Guinea shall consist of only the Constitution, Organic Laws, Acts of Parliament, Emergency Regulations, subordinate legislation made under the Constitution or other laws, and the *underlying law*.

Section 20 of the Constitution provides that an Act of Parliament shall declare the underlying law of Papua New Guinea, and provide for its development. Until the promulgation of such an act, the underlying law is prescribed by the transitional provisions of Schedule 2 of the Constitution.

Schedule 2.1 provides that "custom is adopted, and shall be applied and enforced, as part of the underlying law", except in respect of a particular custom which is inconsistent with a Constitutional law or statute, or is repugnant to the general principles of humanity. Schedule 2.2 adopts the principles and rules of the common law and equity of England in existence at the time of Independence, notwithstanding statutory revision, as another part of the underlying law, except where such principles and rules are inconsistent with a Constitutional law or statute, or are inapplicable or inappropriate to local circumstances, or are inconsistent with a custom already adopted as part of the underlying law under Sch. 2.1.

An affirmative duty is placed on the National Judicial System,[1] particularly on the Supreme and National Courts, to further develop an appropriate underlying law, having regard to the National Goals and Directive Principles and the Basic Social Obligations outlined in the Preamble to the Constitution,[2] the Basic Rights set out in Part III Division 3 of the Constitution,[3] analogies to be drawn from relevant statutes and customs, legislation and case law from other countries with similar legal systems, and the circumstances of the country from time to time'.[4]

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1. Established under s.155 of the Constitution, and consisting of the Supreme Court, the National Court, and such lower courts as may be established by Parliamentary enactments pursuant to s.172 of the Constitution; e.g. the District Courts, the Local Courts, the Land Courts, and the Village Courts.

2. The National Goals and Directive Principles, which are based loosely on the earlier Eight Point Improvement Plan, and the Basic Social Obligations are non-justiciable, under ss. 25 and 63 of the Constitution, respectively, except that it is nevertheless the duty of all governmental bodies "to encourage compliance with them as far as lies within their respective powers", and that all laws should be "understood, applied, exercised, complied with or enforced" so as to give effect to them, wherever possible, and that the Ombudsman Commission shall take them into account whenever it is appropriate. See Sch. 1.7 regarding non-justiciability.

3. Sections 32-58.

4. Schedules 2.3 - 2.5.

The Law Reform Commission[5] is also given a "special responsibility" under the Constitution to:

> investigate and report to the Parliament and to the National Executive on the development, and on the adaptation to the circumstances of the country, of the underlying law, and on the appropriateness of the rules and principles of the underlying law to the circumstances of the country from time to time.[6]

In this connection, the then Minister for Justice, the Hon. Ebia Olewale, officially referred the matter of preparing legislation on the underlying law, pursuant to s.20, to the Law Reform Commission for consideration, in 1976.[7] Later in that year the Commission released its 'Working Paper No. 4: Declaration and Development of Underlying Law", which consists largely of an annotated Draft Underlying Law Bill. The following is a brief outline of the most important sections[8] of the Bill.

Section 3 lists as the sources of the underlying law (1) the customary law of Papua New Guinea, subject to qualifications and conditions set out in the Draft Bill, and (2) the common law and equity in force in England at the time of Independence.[9] In listing

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5. Schedule 2.13 provides that an Act of Parliament shall make provision for a Law Reform Commission.

6. Schedule 2.14. See also s.21.

7. The Hon. Ebia Olewale, "Reference on Customary Law", reprinted in D. Weisbrot, *Customary Law in Papua New Guinea: A Cases and Materials Source Book* (1977), at pp. 42-54.

8. Technically, the term "clause" should be used in reference to a component part of a bill prior to its enactment, but for clarity the term "section' will be used in this Note.

9. This same cut-off date for the common law is used in Schedule 2 of the Constitution, and eliminates an earlier controversy as to what effect English statutory modification of the common law had on Papua New Guinea's received law. See *Booth v. Booth* (1935) 53 CLR 1 (High Court of Australia) and *In Re Johns* [1971-72] PNGLR 110, which supported the proposition that statutory modification did concurrently alter the received law in Papua New Guinea, and *Murray v. Brown River Timber Co.* [1964] PNGLR 167, which strongly opposed that notion. The Draft Bill contains a number of alternative formulations which vary the effect of English statutory modification on the common law which will be utilised as a source of underlying law. It is unlikely, however, that any of these alternatives will find their way into the final version of the Bill.

these two bodies of law as *sources* of underlying law, the section makes it clear that they are not in themselves the underlying law, absent specific judicial application.

Section 4 governs the application of the sources of the underlying law, and largely restates the general qualifications contained in Schedule 2 of the Constitution, and with respect to custom restates the general qualifications contained in s.6 of the *Native Customs (Recognition) Act*, 10 in terms of specific Constitutional guidelines. It provides that the customary law *shall* apply unless (a) it is inconsistent with the written law; or (b) its enforcement would be contrary to the National Goals and Directive Principles and Basic Social Obligations; or its enforcement would be contrary to the Basic Rights guaranteed by the Constitution.11 Common law, on the other hand, *shall not* be applied unless (a) it is consistent with the written laws; (b) it is applicable and appropriate to the circumstances of the country; (c) and its enforcement would not be contrary to the National Goals and Directives Principles and Basic Social Obligations, (d) nor to Constitutional Basic Rights.12

The wording of the section was carefully chosen to establish a new priority of sources of the underlying law. Thus the application of customary law is phrased in the positive, while the application of common law is phrased in the negative, with the aim of reversing the current practice of relying heavily on common law precedent from England and Australia.13 This new priority is further enforced by the requirement that a court which *refuses* to apply a rule of customary law must expressly state its reasons for so refusing, whereas a court which decides that common law *shall* apply must expressly justify such application.14 Clearly, the burden is on those who would seek to adopt common law principles at the expense of the customary law.

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10. No. 28 of 1963. Under this section custom may be recognised or enforced except where (a) it is repugnant to the general principles of humanity; (b) it is inconsistent with the written law; (c) it would not be in the public interest or would result, in the opinion of the court, in injustice; or (d) it would adversely affect the welfare of a minor.

11. Section 4(1).

12. Section 4(2).

13. The bench in Papua New Guinea has come into some criticism in recent years for its eagerness to find the common law "applicable and appropriate", without giving due consideration to the extent to which rules or principles of customary law might be employed. See, e.g. NKF O'Neill, "The Judges and the Constitution - The First Year", 4 Melanesian L.J. 242, 245, 249, and 252-258 (1976); and B.M. Narakobi, "The Adaptation of Western Law in Papua New Guinea" (Unpublished paper presented at the Third South Pacific Judicial Conference, held in Port Moresby, April 1977), pp. 5 *et. seq.*

14. Section 4(3) and (4).

Another important feature of s.4, as noted above, is its elimination of "repugnancy to the general principles of humanity" and "inconsistent with the public interest" as qualifications upon the recognition, application and enforcement of custom. Both qualifications, but particularly the former are regarded as unwelcome reminders of the colonial era, when traditional practices could be blithely referred to by colonial authorities as "repugnant". The new qualifications, drawn from Papua New Guinea's autochthonous Constitution are far more satisfactory, in that they offer much more specific guidelines for the court, leaving less room for individual bias, and that they are particularly suited to local needs, conditions and aspirations.

Section 6, which establishes the regime the courts must employ in declaring and developing the underlying law, is probably the key section of the Draft Bill. It provides that where the written law does not apply, the court shall apply the underlying law. If an already existing principle of the underlying law does not exist with reference to the subject matter of the proceedings, then the court shall develop a new principle of the underlying law. In so doing, the court shall look first to customary law, unless:

> (a) the court is satisfied that the parties intended that customary law should not apply to the subject matter of the proceedings; or (b) the subject-matter of the proceedings is unknown to customary law and cannot be resolved by analogy to a rule of customary without causing injustice to one or more of the parties.15

If neither existing underlying law nor a rule of customary law are found to be applicable, only then shall the court consider applying the common law under the criteria set down in s.4(2).16 If the common law is likewise found inapplicable as a source of underlying law, then the court is directed to formulate a new rule of underlying law appropriate to the circumstances of the country, having regard to (a) the National Goals and Directive Principles and Basic Social Obligations; (b) the Basic Rights; (c) analogies to be drawn from relevant written law and customary law;17 and (d) the law of foreign countries.18 Thus

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15. Section 6(2).

16. Section 6(3). See text accompanying fn. 12, *supra*.

17. It is unclear how the court could resort to analogy from customary law at this stage, having previously concluded, under 6(2), that such analogy would result in injustice. See text accompanying fn. 15, *supra*.

18. These sources are substantially similar to those mentioned in Sch. 2.3. See text accompanying fn. 4, *supra*. There is no requirement under this section, however, that the foreign legal systems looked at be "similar" to Papua New Guinea. Apparently the court would be free to look to civil legal systems, socialist

the courts will be given wide powers to develop the underlying law - in fact, this section gives the courts a quasi-legislative function in certain instances.

The section goes a long way towards elevating the role of custom in the legal system and shifting the current emphasis on the adaptation of common law principles. Problems may arise, however, over the opt-out provision of s.6(2)(a) which allows the court to look away from sustom if it is satisfied that the parties did not intend custom to apply.19 It is easy to anticipate that a common feature of future business contracts, insurance policies, etc., will be a clause expressly stating that customary law is not to apply in the resolution of a dispute arising out of the agreement. In most commercial law cases, therefore, the courts will be barred from employing or analogising to custom and will thereby lose the opportunity to develop the underlying law and create a body of Melanesian jurisprudence. This would effectively undercut the spirit of the Draft Bill. It may be sufficient to give the courts the discretion to pass over custom where its application would cause hardship or injustice, or is clearly inappropriate, rather than allowing the parties to a contract to determine whether or not the underlying law of the nation shall apply.

Section 7 empowers the Supreme Court and National Court to formulate a new rule of underlying law, where an existing rule is no longer appropriate to the changing circumstances of the country.19A

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18. continued

legal systems, etc., as well as to other common law systems. Section 18 of the Draft Bill provides that:

> Nothing in this part shall prevent a court from considering the decisions of foreign courts or the decisions of any of the courts exercising exercising jurisdiction in Papua New Guinea before Independence but none of these decisions are of binding or persuasive effect.

Thus the courts may seek guidance from foreign law, but they need not, for obvious reasons, "distinguish", "consider" or "reject" foreign cases in working towards developing the underlying law.

19. Such an opt-out provision is not a feature of the Commission's Fairness of Transactions Draft Bill, a discussion of which may be found in this edition of the *Melanesian Law Journal*.

19A. Sections 15 and 16 of the Draft Bill deal with the issues of *res judicata* and *stare decisis*, respectively. Section 15, which is adapted from Sch. 2.8 of the Constitution, provides that the common law rule of *res judicata* shall be part of the underlying law, subject to its variation or repeal by the Supreme Court or National Court or by operation of a written law. Section 16 substantially recreates Sch. 2.9 of the Constitution, and provides that all decisions of law made by the Supreme Court are binding on the lower courts but not on itself; decisions of law of the National Court are binding on the lower courts but not on itself or the Supreme

Section 8 makes it clear that the development of the underlying law includes the creation of remedies, which, as with any principle of underlying law, may be drawn from customary law or the common law, or formulated with regard to the criteria set out in s.6. Section 155(4) of the Constitution already gives the Supreme Court and National Court wide latitude in the area of remedies, providing that the Courts:

> have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs *and such other orders as are necessary to do justice in the special circumstances of a particular case*. (Emphasis supplied).

Given the ostensibly predominant position accorded to customary law as a source of the underlying law, another key section of the Draft Bill is s.13, dealing with the difficult questions of ascertaining customary law. The major innovation of s.13 is found in sub-section (1) which provides that:

> Any question as to the existence or content of a rule of customary law is a question of law and not a question of fact.

This is a reversal of the position taken by s.5 of the *Natives Customs Recognition Act*, which currently governs the ascertainment of customary law in court proceedings, and which specifies that the existence and nature of custom "shall be ascertained as though they were matters of fact".20

19A. continued

Court; and all decisions of law of another court are binding on those courts whose decisions may be appealed to, or reviewed by, it. The philosophy behind those provisions is that the concept of binding precedent is necessary to assist in the coherent developments of the underlying law through the courts, but that the superior courts should be free to adapt the law to changing circumstances without being tied to stale decisions. Section 17 of the Draft Bill provides that where there is an apparent conflict of binding precedent, the court shall resolve the conflict by applying that decision which is most compatible with the National Goals and Directive Principles and Basic Social Obligations.

20. This is a keeping with the Privy Council's ruling in a landmark case of the colonial era, *Kobina Angu v. Cudjoe Attah*, (1916) P.C. '74-'28, at p. 43, which held that:

> As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.

This decision, which came to the Privy Council from the Gold Coast Colony was widely followed by the courts in the other British territories of Africa and was incorporated into the evidence codes of most of those territories. See A. Allot, *Essays in African Law*

In practice, this reversal will probably have little immediate effect on the methods or problems involved in ascertaining custom, other than the psychological effect of further enforcing the new primacy of customary law. The ascertainment of a particular rule of custom will still, in most cases, require judicial sifting of conflicting testimonial evidence presented at trial. The major difference is that once a particular custom has been judicially ascertained as a matter of law, this will form part of the *ratio decidendi* of the opinion, and will thus contribute to the body of law which is binding precedent on the lower courts. At such time as a significant portion of customary law has been judicially ascertained, the courts will be in a position to use their powers of judicial notice in many cases, and avoid the cumbersome process of ascertaining custom through evidence at every trial.

Where the court must proceed with the ascertainment process, the Draft Bill directs that the court shall consider the submissions of the parties, and may (a) refer to case, books, treatises, reports or other works of reference;21 and (b) refer to statements and declarations of customary law made by local, provincial or other authorities in accordance with any law22 empowering them to make such statements and declarations;23

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(1960), at p.77. It was not until fairly recently that a number of common law states have moved away from the rule in *Angu v. Attah*, and have statutorily designated questions of the existence and nature of custom as questions of law. See T. Verhelst, *Safeguarding African Customary Law: Judicial and Legislative Processes for Its Adaptation and Integration* (1968), at p.10.

21. This provision is lifted from s.5(3)(a) of the *Native Customs (Recognition) Act*.

22. This is probably an oblique reference to the *Organic Law on Provincial Government*.

23. Since custom would only be ascertained in the absence of written law, the "statements and declarations" of local and provincial authorities referred to in this section must, of necessity, be only advisory and not binding on the court. That being the case, it is not clear why such statements and declarations could not be issued and considered without a special law authorising the practice. Section 5(3)(a) of the *Native Customs (Recognition) Act* does currently permit the court to refer to:

> statements by Native Local Government Councils, or committees thereof (whether published or not), and may accept any matter or thing stated therein as evidence on the question.

and (c) consider evidence and information concerning the customary law relevant to the proceedings presented to it by a person whom the court is satisfied has knowledge of the customary law relevant to the proceedings,24 and (d) of its own motion obtain evidence and information and obtain the opinions of persons as it thinks fit.25

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24. Since matters relating to the existence and nature of custom would now be matters of law, witnesses as to custom would technically be expert witnesses, and must therefore lay the foundation to satisfy the court as to their expertise before being allowed to testify.

25. The courts also have this power under s.5(3)(b) of the *Native Customs (Recognition) Act*, although it is not often used. In *Avi Guikau v. Heau Ederesi* (1972) (Supreme Court, unreported) the Supreme Court upheld the action of a District Court Magistrate who appointed four elders to assist him in arriving at a decision about the bride-price custom of a traditional society, which was the subject matter of the dispute, on the grounds that s.5 of the *Native Customs (Recognition) Act* gave the court very wide discretion in obtaining evidence or information about custom.

The Draft Bill does not make specific provision for the use of assessors, although such a provision may be included in the Final Report. In the Territory of New Guinea, legislation established an assessor system in 1925. See the *Central Court Assessors Act* 1925 (No. 42 of 1925), which is amended by the *Supreme Court Assessors Act* 1938 (No. 28 of 1938). In addition, the *Rules of the Supreme Court (Queensland Adopted)*, adopted by the *Judiciary Act* 1932 (No. 23 of 1932), provide at Order 39, Rule 40, that "Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge may direct". In the Territory of Papua, no legislation regarding assessors was enacted or applied; in practice, however, Village Councillors were often used in that capacity in the Courts of Native Affairs.

The *Supreme Court Assessors Act* 1925-1938 remains in force in what was New Guinea but not in what was Papua, and has recently been re-inforced, at the behest of the Chief Justice, by the *Supreme Court Assessors Regulations* 1975 (No. 35 of 1975), which provide for the qualifications of assessors. Assessors have been used sporadically in recent years in National Court proceedings held in Lae, Rabaul and Kieta. The Constitution, at s.186, provides that a system of juries or assessors may be established by or under an Act of Parliament, but no action has been taken in this action to date. It would be most appropriate for the Underlying Law Bill to include a provision on the use of assessors (or the abolition of the practice), to clear up the present confused situation.

Where there is a conflict between different regimes of customary law, that is, where the parties to a dispute are members of different traditional communities, s.14 of the Draft Bill directs the court to resolve the conflict by application of the following rules: (a) where the parties belong to communities with different rules on the matter, the customary law that the parties intended to govern the matter; or (b) where the matter concerns a question of succession, the customary law of the community to which the deceased belonged, except with regard to interests in land, in which case the customary law of the *situs* is applied,25A or (c) in all other cases the court has the discretion to apply the customary law regime which it considers most appropriate to the particular case.26

Where a case involving a customary law element arises on appeal, s.13(3) of the Draft Bill specifies that the court hearing the appeal or conducting a review may make further enquiries into customary law using the same guidelines set out by s.13(2) for trial courts. The need for such a provision is questionable - under the Draft Bill, matters of customary law are to be treated as matters of law, and although appellate courts generally accept the findings of fact of the trial court, unless manifestly incorrect,27 they are always free to question determinations of law.28 Perhaps the intent

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25A. Disputes regarding ownership of customary land are governed by the provisions of the *Land Disputes Settlement Act* 1975 (No. 25 of 1975), which establishes mediatory processes,and local land courts which arbitrate when mediation breaks down.

26. The conflicts rules under the *Native Customs (Recognition) Act*, s.10, provide that "the court shall consider all of the circumstances and may adopt that system which it is satisfied the justice of the case requires", or may "*mutatis mutandis* and as nearly as may be, apply the ordinary rules of law and of equity".

27. The present situation with respect to findings of custom is different, however. Section 5(4) of the *Native Customs (Recognition) Act* provides that notwithstanding the provisions of s.5(1), which declare that questions as to the nature and existence of custom shall be ascertained as if they were matters of fact,

> where an appeal is made from a decision of a court, the court which hears the appeal may, if it thinks fit, consider *de novo* a question referred to in that subsection and which arises in the appeal.

28. The annotation to s.13(3) found in the Working Paper suggests that this provision was included to "overcome the limitations on accepting fresh evidence that the Supreme and National Courts may impose on themselves", and cites *R. v. Ivoro* [1971 72] PNGLR 374 as a foreshadowing of such limitations. In fact, the *Ivoro* case deal with the question of whether evidence showing extenuating circumstances which was not presented at trial could be presented upon appeal against sentence. No customary element was involved in this murder case, and the governing statute was the *Supreme Court (Full Court) Act* 1968, s.15(1)(c), rather than the *Native Customs (Recognition) Act* s.5(4). Further, the Full Court in this case held that the fresh evidence *was* admissible.

of the drafters of this provision was to indicate to the superior courts that where trial level ascertainment of custom appears faulty, the superior courts should take on the responsibility of making the proper determination by going through the ascertainment process themselves, rather than by remanding cases back to the lower courts.

Another provision of the Draft Bill which will affect the ascertainment process is s.9, which relaxes the rules of evidence in proceedings where the court is deciding whether to apply a rule of customary law or common law or to formulate a new rule of the underlying law. Since the courts will often wish to hear arguments regarding social policy in formulating rules of underlying law, and since much of the evidence necessary to ascertain customary law would technically contravene the hearsay rule, such a provision is necessary if the courts are to be able to obtain information sufficient to allow themselves to progressively develop the law.[29]

In order to ensure that the law does develop in accordance with the spirit of the Draft Bill, an express duty is placed on both the bench and bar to assist in the process. Section 5 provides that:

> It is the duty of all courts in the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country

Section 12 provides that:

> Counsel appearing in proceedings in which a question of customary law arises are under

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29. The ascertainment of custom under the present law is likewise accomplished under relaxed rules of evidence. Section 5(2) of the *Native Customs (Recognition) Act* states that in considering questions of custom,

> a court is not bound to observe strict legal procedure or apply technical rules of evidence, but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion), and shall otherwise inform itself as it sees fit.

Similarly, section 31 of the *Village Courts Act* 1973 (No. 12 of 1974) provides that:

> In any proceedings before it, a Village Court shall not apply technical rules of evidence but shall admit and consider such information as is available.

> a duty to assist the court by calling evidence and obtaining information and opinions that would assist the court in determining - (a) the nature of the relevant rules of customary law; and (b) whether or not to apply those rules in the proceedings.

For the first time, then, lawyers would be under an affirmative duty to conduct research into customary law and introduce evidence regarding custom wherever possible.30 At present, the bar surpasses even the judiciary in its lack of enthusiasm for customary law.

The process of developing the underlying law in the lower courts31 will be subject to review by the Chief Justice and the Chairman of the Law Reform Commission32 under the scheme proposed by the Draft Bill.33 Where a lower court makes a decision under s.6, applying or formulating a rule of the underlying law, the court shall forward copies of the decision to the Chief Justice and the Chairman. Under s.10(2) the Chief Justice shall consider the decision and if he determines that it should be reviewed, he refers it to a National Court proceeding for arguments by the parties, and other appropriate persons, regarding the appropriateness of the decision. The National Court may change the decision and formulate a more acceptable rule of the underlying law. If the National Court does change the decision, the aggrieved party may appeal to the Supreme Court, such appeal being conducted as if it was an appeal made under the *Supreme Court Act* 1975.34 The Chairman may make a similar referral to the National

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30. The *Native Customs (Recognition) Act* allows for the recognition and enforcement of custom in certain circumstances, but does not *require* that custom be introduced in a legal proceedings, even where clearly applicable.

31. A court other than the Supreme Court or National Court. In his Remarks opening the Law Reform Commission's Seminar on the Underlying Law, April 1977, the then Chief Justice, Sir Sydney Frost, commented that the majority of cases involving customary law never reach the level of the National Court, and that the Local and District Courts have much greater opportunity to develop customary law.

32. In accordance with the special responsibility for overseeing the development of the underlying law placed on the Commission by Sch.2.14 of the Constitution. The Commission is also empowered, under s.19(3)(e) of the Constitution to challenge in the Supreme Court the constitutional validity of any law or proposed law.

33. Schedule 2.3(2) of the Constitution permits the National Court, and requires the lower courts, to refer to the Supreme Court a question that arises which would require formulation of a new rule of the underlying law under Sch. 2.3(1) (custom and the common law having both been found to be inapplicable). The Draft Bill contains no such provision, instituting instead the system of review.

34. No. 104 of 1975.

Court, under s.(11)(1), if, after consultation with the Law Reform Commissioners, he believes that the decision is "inconsistent with the proper development of the underlying law".

The Commission is expected to release its final report on the underlying law in early 1978.

--- DAVID WEISBROT.