



New South Wales
Law Reform Commission

2017-18

Annual Report



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The year in review

This has been a year of significant achievement. The Commission celebrated its fiftieth anniversary, delivered three Reports, saw the implementation of three substantial past reports, farewelled a Commissioner, welcomed another, and received two new references. I describe these highlights briefly; details are contained in the remainder of this Report.

I am grateful to the Attorney General, the Hon Mark Speakman SC MP, for hosting an event at Parliament House in September 2017 on the occasion of the 50th anniversary of the Proclamation of the Act setting up the Commission. We are the oldest continuing law reform body in Australia, and one of the oldest in the world. Many past members of the Commission as well as leading members of the profession attended, and the milestone was appropriately marked.

We completed three references with the delivery of reports to the Attorney General. All three reports have now been tabled in Parliament. We completed Report 144 on aspects of the laws relating to beneficiaries of trusts in May 2018, 12 months after we received the reference. We also completed Report 145, in May 2018, the result of more than two years work on the laws of Guardianship. Finally, we completed and delivered Report 146 on statutory dispute resolution in the state in June 2018.

The reporting period saw a series of criminal justice reforms that implemented significant portions of three major reports that we delivered in 2013–2015: *Sentencing* (Report 139), *Parole* (Report 142) and *Encouraging appropriate early guilty pleas* (Report 141).

Commissioner Tracy Howe completed her term with the Commission. Her particular interest and contribution was in connection with the *Guardianship* Report; she helped in a major way with our community consultations around that subject, and we thank her warmly for her service.

In March 2018, the Commission received a reference to review the laws around access to digital assets upon death or incapacity.

The Hon Justice Carolyn Simpson was appointed to the Commission to lead the new reference on consent in relation to sexual offences received in May 2018. We received numerous preliminary submissions following the announcement of the reference despite the Commission not yet having issued any consultation paper or other background information.

As always, I am grateful for the energy, service and expertise displayed by the Commission staff. Our two new references should ensure that we have a productive year.

Alan Cameron AO

Chairperson

NSW Law Reform Commission: profile

Roles and responsibilities

The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). We provide expert law reform advice to the Government through the Attorney General on matters that the Attorney General refers to us.

Services and activities

Our principal service is providing policy advice on law reform matters.

In undertaking this work, we:

- research the law, which includes accessing the relevant academic commentary
- conduct or commission empirical research where necessary, and
- consult with stakeholders, the community, and experts in the field.

The outcomes of our projects are contained in formal reports to the Attorney General, which are tabled in Parliament and considered by Government.

Commissioners

As at 30 June 2018, the Commission comprised a chairperson, a deputy chairperson and a commissioner.



Chairperson Alan Cameron AO

Alan Cameron was appointed Chairperson of the NSW Law Reform Commission on 26 November 2015. Alan has occupied a range of senior roles in both the private and public sectors, including Chairman of the Australian Securities and Investments Commission from 1993 to 2000, Commonwealth and Defence Force Ombudsman, Principal Solicitor of the NSW Aboriginal Legal Service in the mid-1970s and first national managing partner of Blake Dawson Waldron (now known as Ashurst Australia) from 1989 to 1991. He serves part time at the Commission, and continues as a company director of one listed company and several unlisted companies.



Deputy Chair Hon Justice Paul Brereton AM, RFD

Justice Brereton was appointed as a part-time Commissioner of the NSW Law Reform Commission on 1 June 2016 and took up the position of Deputy Chairperson on 1 July 2016. Justice Brereton was appointed as a Supreme Court judge in 2005 and worked as a barrister from 1987 to 2005. He is currently a member of the Defence Force Discipline Appeal Tribunal and has held several positions within the Army Reserve since 1994. Justice Brereton was appointed a Member of the Order of Australia (Military Division) in 2010 and was awarded the Reserve Force Decoration in 1995.



Commissioner Acting Justice Carolyn Simpson

Justice Simpson was appointed as a part-time Commissioner of the NSW Law Reform Commission in May 2018. Justice Simpson served on the NSW Court of Appeal from 2015 to 2018, having been a Supreme Court judge since 1994. In 1999, Justice Simpson was one of the three judges who formed the first all-female bench to sit in an Australian court. Before this, she was appointed Queen's Counsel in 1989 and was admitted as a barrister in 1976.

Performance for 2017-18

We measure our performance against a range of performance indicators, set out below.

Measure	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018 Target	2017-2018 Actual	2018-2019 Target
Number of consultation papers and reports published	10	11	3	2	9	5	6	5
Number of consultation events/meetings held	36	38	13	10	23	20	13	15
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	75%	50%	50%	66%	75%	75%	66%	75%
Law Reform Commission mentions in court decisions	15	22	35	21	32	20	32	25
Number of legislative amendments based on LRC reports	4	2	0	1	3	4	4	4
Email subscribers	107	204	265	359	475	550	539	600
Twitter followers	113	366	555	1070	1630	2000	2090	2400
Facebook followers	-	-	-	-	1035	1500	1176	1500

Completed references

We completed three references in 2017-2018:

- laws relating to beneficiaries of trusts (Report 144)
- review of the *Guardianship Act 1987* (Report 145), and
- statutory provisions on dispute resolution (Report 146).

Laws relating to beneficiaries of trusts

On 28 April 2017, the Attorney General asked us to review and report on two aspects of the law relating to beneficiaries of trusts:

- the liability of beneficiaries, as beneficiaries, to indemnify trustees or creditors when trustees fail to satisfy obligations of the trust, and
- whether oppression remedies available under company law should be extended to beneficiaries of trading trusts as recommended by the 2015 report of the Victorian Law Reform Commission: *Trading Trusts - Oppression Remedies*.

In response to the terms of reference, we received eight preliminary submissions. In October 2017, we released Consultation Paper 19, which set out our preliminary views. We received six submissions in response.

On 2 March 2018, we convened a roundtable of interested experts in the field. Following the roundtable, we received one further submission from a participant.

We transmitted Report 144 to the Attorney General on 2 May 2018.

On the question of liability of beneficiaries, the report considered the long-standing issue arising from a Privy Council decision more than a century ago, under which a beneficiary may be held personally liable to indemnify a trustee. We recommend amending the *Trustee Act 1925* (NSW) to abolish the rule and provide that beneficiaries of trusts are not, in their capacity as beneficiaries, personally liable to indemnify the trustee, unless they have expressly agreed to do so. Importantly, this will not affect a beneficiary's liability for unpaid calls (if any) under the terms of the trust, or the beneficiary's liability in any other capacity.

We also considered the recommendation of the Victorian Law Reform Commission that oppression remedies available to shareholders under company law should be extended to beneficiaries of trading trusts. We were not persuaded that there is a sufficient case for providing such a remedy. Such a remedy is inconsistent with a fundamental feature of a discretionary trust; namely, that the trustee has a discretion to discriminate between beneficiaries. We also believe that the law already provides adequate remedies for control of a trustee.

Review of the Guardianship Act

On 22 December 2015, the Attorney General asked us to review and report on the desirability of making changes to the *Guardianship Act 1987* (NSW). As currently drafted, the Act allows formal decision-makers to make personal, financial and medical decisions for someone who is incapable of making those decisions because of a disability.

The review's terms of reference required us, among other things, to consider recent developments in law, policy and practice, both in Australia and around the world, the United Nations *Convention on the Rights of People with Disabilities*, and NSW's changing demographics — in particular, the increase in the number of older people.

Throughout 2016 and 2017, we released a series of question papers on various elements of NSW's guardianship laws, specifically asking what should change. These included questions about decision-making models, the role of decision-makers and supporters, safeguards, tribunal procedures, and consent to healthcare. We also released six surveys; one alongside each Question Paper. We received 130 submissions in total, in response to the six question papers.

In addition, we consulted with the community through a series of roundtables and discussions with individuals who had made submissions, key community groups and government agencies. These sessions helped us develop and test our ideas.

We also held focus groups with members of the public in Sydney and Parramatta, where we heard about a range of guardianship-related issues people had faced.

In July and August 2017, we collaborated with the NSW Council of Social Services to hold consultations at their regional conferences in Orange, Kiama, Newcastle and Wagga Wagga.

In November 2017, we released a series of Draft Proposals. As our proposals represented a significant departure from the current guardianship framework, this step allowed people to consider all parts of the proposed new framework in context. It also allowed people to consider the appropriateness of the parts of the existing framework that we proposed be retained. We received 35 submissions on the proposals.

We transmitted Report 145 to the Attorney General on 21 May 2018. In this Report, we recommend a new Assisted Decision-Making Act, which establishes a framework for assisted decision-making in NSW that reflects the UN Convention and contemporary understandings of decision-making.

The key changes include:

- the introduction of a formal supported decision-making framework
- enhanced recognition for fair and effective informal arrangements
- the requirement that anyone operating under the new Act should give effect to a person's will and preferences wherever possible
- recognition that a person's decision-making ability can fluctuate over time and may differ depending on the subject matter, and
- improved safeguards for people entering into decision-making arrangements.

We also recommend a complete change to the terminology used. The new Act focuses on a person's decision-making ability rather than a "disability". We recommend other new

terms that are consistent with a framework designed to promote autonomy; for example, “representative” rather than “guardian” or “financial manager”.

We also recommend establishing a Public Advocate to carry out certain investigative and advocacy functions. We recommend that the Public Advocate is combined with the Public Guardian (to be renamed the Public Representative) to form a single agency with dual functions under the name of the Office of the Public Advocate.

Statutory provisions on dispute resolution

This project was referred to us on 1 March 2013. It aimed at improving legislative provisions dealing with dispute resolution.

Specifically, we were asked to review the statutory provisions in NSW that provide for mediation and other forms of dispute resolution with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution.

In April 2014, we released Consultation Paper 16, which provided an overview of the statutory provisions in NSW and asked what provisions are appropriate in the variety of contexts that the existing provisions cover. We received 14 submissions in response to the Consultation Paper, and mediation emerged as the focal point of stakeholder discussion.

In 2015-2016, we undertook no activity on this project due to competing resourcing priorities.

On 15 December 2016, we released Consultation Paper 18 – *Dispute resolution: model provisions*. This Consultation Paper presented a series of model mediation provisions relating to the following matters:

- definitions
- confidentiality and privilege
- mediators’ immunity
- termination of mediation, and
- enforcement of the mediation outcome.

These areas were identified in earlier submissions as being most in need of consistency and clarity. Based on earlier consultation with stakeholders, we were not persuaded that there would be significant benefit in attempting to consolidate these provisions into one or a small number of models. Rather we saw a benefit in developing model provisions that would apply to mediations taking place outside any statutory or judicial context, unless their application was excluded.

The model provisions were designed to apply to private mediations as well as to statutory dispute resolution unless excluded explicitly or by necessary implication, and would apply equally to the related processes known as neutral evaluation and conciliation.

Submissions to Consultation Paper 18 closed on 17 March 2017. We received 12 submissions in total. On 18 July 2017, we convened a roundtable of those who had made a submission.

After feedback from participants at the roundtable and some further consideration, we decided not to recommend the model provisions suggested in Consultation Paper 18 or any other changes to the law. We do not believe that statutory intervention is warranted for several reasons, including:

- mediation is context-specific, and what is appropriate in one context does not necessarily suit another
- it is a fundamental principle of voluntary mediation that the parties are in control of the process, and can decide on the terms and arrangements for mediation; including the mediator's rights and immunities
- any generic provision would require a common approach to what is mediation and who is an eligible mediator, and there was no consensus among stakeholders on these matters, and
- no sufficient harm has been identified as arising from the current diverse arrangements to warrant the imposition of a uniform statutory regime.

We therefore concluded that no sufficient benefit would be gained from adopting the model provisions. We consider the best course is to leave the existing statutory provisions unchanged and allow them to develop as the need arises.

We believe that cases of potential and actual confusion among users of different dispute resolution services may be resolved by providing better information about processes and encouraging better communication between parties and dispute resolution service providers. Such approaches do not need to be the subject of recommendations for law reform.

Engagement

In 2017–18, we continued to build on our community engagement processes.

We increased our social media engagement using our Facebook page, where we regularly post about our projects and other law reform news.

We continued to engage with stakeholders and the broader community through Twitter, sharing updates on our work, and papers and reports. Our number of followers is growing consistently.

We also continued our periodic email newsletter, containing updates about our work.

We personally engaged with stakeholders and the community in a variety of ways. In July 2017, the Chairperson addressed a delegation of judges from Bangladesh about our work.

On 16 October 2017, two members of the Secretariat presented to a delegation from Vietnam's Ministry of Justice about the process of law reform and our history.

On 7 March 2018, a group of Legal Studies students and teachers from Armidale High School visited us to learn about our work. The preliminary HSC Legal Studies course includes a module on the role of law reform in the legal system.

Conferences

During 2017-2018, our Chairperson spoke about the work of the Commission at a number of meetings and conferences, including:

- to the NSW branch of the Society of Trust Estate Professionals (September 2017)
- at the Inter School Justice Conference at Fort St High School (November 2017)
- by delivering the 2018 Gibson Oration on Assisted Decision Making in Newcastle (April 2018)
- at the Capacity Assessment Seminar in Newcastle (April 2018), and
- at the Specialist Legal conference organised by the College of Law (May 2018).

During the year, members of the Secretariat attended a number of events relevant to our review of the laws affecting access to digital assets upon death or incapacity. These included:

- the Digital Rights and Governance in Asia event hosted by the University of Sydney (April 2018)
- the Privacy in the Digital Age conference hosted by the NSW Information Privacy Commissioner (May 2018), and
- the University of NSW Research Workshop on Data Justice in the Age of Big Data and Artificial Intelligence (June 2018).

On 2-4 May 2018, our Research Support Librarian attended the 2018 Australian Law Librarians Association Conference, *Global Impact: Local Footprint*, in Darwin.

Priorities for 2018-19

We have two ongoing references:

- access to digital assets upon death or incapacity, and
- consent in relation to sexual offences.

Access to digital assets upon death or incapacity

On 26 March 2018, the Attorney General asked us to review and report on access to digital assets upon death or incapacity. “Digital assets” have no standard legal meaning, but may include assets such as digital photographs and videos, emails, online bank accounts, cryptocurrency, domain names, blogs, social media profiles and accounts, and online gaming accounts. Such assets can have significant personal, sentimental and even financial value. However, family members and fiduciaries can encounter barriers in gaining access, largely due to the terms of service agreements between users and service providers.

In undertaking this review, we have been asked to consider:

- the laws affecting access to a person’s digital assets after they die or become incapacitated, including those relating to intellectual property, privacy, contract, crime, estate administration, wills, succession and assisted decision-making
- the policies and terms of service agreements of social media companies and other digital service providers
- relevant jurisdictional issues, including the application of NSW laws, Commonwealth laws and the laws of other jurisdictions
- appropriate privacy protections for the electronic communications after a person dies or becomes incapacitated, and
- the Uniform Law Conference of Canada’s Uniform Access to Digital Assets by Fiduciaries Act (2016) and the American Uniform Law Commission’s Revised Uniform Fiduciary Access to Digital Assets Act (2015).

To help us identify issues and concerns relevant to the review, we invited preliminary submissions on our terms of reference. We also published some background information to our review on our website. We received 15 preliminary submissions.

Consent in relation to sexual offences

On 3 May 2018, the Attorney General asked us to review s 61HA of the *Crimes Act 1900* (NSW) which deals with consent in relation to sexual offences. In undertaking this review, we are considering:

- whether s 61HA should be amended, including how the section could be simplified or modernised
- all relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system

- sexual assault research and expert opinion, and
- the impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other states and territories of Australia, and internationally, on the content and application of s 61HA.

In response to the terms of reference, we received over 100 preliminary submissions.

Implementation and government responses

In the reporting year, the government passed the following legislation, which implemented recommendations from our reports:

- *Justice Legislation Amendment Act 2017* (NSW) schedule 1.10 implements some recommendations in Report 135 – *People with cognitive and mental health impairments in the criminal justice system: Diversion*.
- *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) implements many recommendations in Report 139 – *Sentencing*.
- *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) implements Report 141 – *Encouraging appropriate early guilty pleas*.
- *Parole Legislation Amendment Act 2017* (NSW) implements some recommendations in Report 142 – *Parole*.

Implementation action or responses are outstanding on the following recent reports:

- Report 138: *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*
- Report 137: *Security for costs and associated orders*
- Report 136: *Jury directions in criminal trials*
- Report 132: *Penalty notices* (Some aspects were implemented as a result of consultations during the preparation of the Report.)
- Report 129: *Complicity*
- Report 124: *Uniform succession laws: Administration of estates of deceased persons* (All other aspects of the uniform succession law project have been legislated.)
- Report 121: *Emergency medical care and the restricted right to practise*.

People

Staff

The Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Unit of the Department of Justice) supports the work of the Commission. The following people were staff of the Law Reform and Sentencing Council Secretariat as at 30 June 2018:

Ms Erin Gough	Policy Manager
Mr Joseph Waugh PSM	Senior Policy Officer
Dr Jackie Hartley	Policy Officer
Ms Kathryn Birtwistle	Graduate Policy Officer
Ms Anna Williams	Research Support Librarian

Internships

Student interns greatly assist our work. They work principally to further their education through our internship program during the winter vacation. Student interns contribute directly to references and have made significant contributions to our research and writing, including to our publications.

Name	University	Dates
Kathryn Birtwistle	University of Sydney	3 July – 29 July 2017
Paul Chalouhi	Macquarie University	16 June – 7 August 2017
Ruben Robertson	University of Sydney	19 June – 30 June, 10 July – 21 July 2017
Kate Thresher	Murdoch University	19 June – 13 July 2017
Rose Vassel	University of NSW	26 June – 24 July 2017



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