

Annual Report 2020–2021

New South Wales
Law Reform Commission



Annual Report 2020 – 2021

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Table of contents

| | |
|---|-----------|
| The year in review | 4 |
| The NSW Law Reform Commission | 5 |
| Roles and responsibilities | 5 |
| Services and activities | 5 |
| Commissioners | 6 |
| Performance for 2020 – 2021 | 8 |
| Completed references | 9 |
| Consent in relation to sexual offences | 9 |
| Implementation and government responses | 11 |
| Engagement | 11 |
| Priorities for 2021 – 2022 | 12 |
| Court and tribunal information: access, disclosure and publication | 12 |
| People | 14 |
| Staff | 14 |
| Farewell to Erin Gough | 14 |
| Internships | 15 |

The year in review

We have continued our work this year on references received from the Attorney General in previous years.

The Hon Justice Carolyn Simpson AO led our work on the reference on consent in relation to sexual offences received in May 2018. We received numerous submissions, held workshops and consultations in Sydney, regional NSW and interstate, and published draft proposals late in 2019.

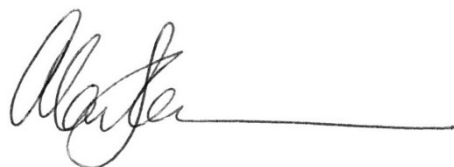
The report was tabled in Parliament in November 2020, and the Attorney General has announced that the government plans to introduce legislation later this calendar year.

The reference received in February 2019 with respect to open justice, which involves both the regime concerning suppression orders around court proceedings, and access to information held on court files, continues to receive our attention.

A consultation paper was published in December 2020, workshops were held virtually early in 2021, and draft proposals were released in June 2021. The report is expected to be delivered later this calendar year. The Chairperson is leading this review.

As always, I am grateful for the energy, service and expertise displayed by the Commission staff. I take this opportunity as well to acknowledge our Deputy Chair, the Hon Justice Paul Brereton AM RFD, and especially Justice Simpson, whose term on the Commission expired in November 2020, who made an extraordinary contribution to our work on the consent reference.

My term as Chairperson is due to conclude in November 2021, and this will therefore be my final report. It has been an honour and a privilege to serve in this role, and I thank the government for entrusting me to do so.



Alan Cameron AO

Chairperson

The NSW Law Reform Commission

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 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 assessing 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 2021, the Commission comprised a Chairperson and a Deputy Chairperson.



Chairperson Alan Cameron AO FAAL FAICD*Life*

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. In October 2020 he was appointed Chair of the Legal Services Council. He serves part time at the Commission and is also a company director. His present term expires on 26 November 2021.



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 a solicitor from 1982 to 1987, and then a barrister until 2005, when he was appointed a judge of the Supreme Court. He was appointed a Judge of Appeal in 2017. He is also Deputy President of the Defence Force Discipline Appeals Tribunal, and an Assistant Inspector-General of the Australian Defence Force. Justice Brereton was appointed a Member of the Order of Australia (Military Division) in 2010 and was awarded the Reserve Force Decoration in 1995. His present term expires on 30 June 2023.



Commissioner Acting Justice Carolyn Simpson AO

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 from 1994. In 1999, she was one of the three judges who formed the first all-female bench to sit in an Australian court. Before this, Justice Simpson was appointed Queen's Counsel in 1989 and was admitted as a barrister in 1976. She was appointed an Officer of the Order of Australia (General Division) in 2019. Justice Simpson's term was completed in November 2020.

Performance for 2020 – 2021

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

| Measure | 2014-2015 | 2015-2016 | 2016-2017 | 2017-2018 | 2018-2019 | 2019-2020 | 2020-2021 Target | 2020-2021 Actual | 2021-2022 Target |
|---|-----------|-----------|-----------|-----------|-----------|-----------|------------------|------------------|------------------|
| Number of consultation papers and reports published | 3 | 2 | 9 | 6 | 2 | 2 | 2 | 4 | 2 |
| Number of consultation events/meetings held | 13 | 10 | 23 | 13 | 23 | 10 | 15 | 37 | 20 |
| Law Reform Commission mentions in court decisions | 35 | 21 | 32 | 32 | 28 | 23 | 25 | 31 | 25 |
| Number of legislative amendments based on LRC reports | 0 | 1 | 3 | 4 | 3 | 5 | 4 | 0 | 4 |
| Email subscribers | 265 | 359 | 475 | 539 | 504 | 1101 | 1200 | 1143 | 1300 |
| Twitter followers | 555 | 1070 | 1630 | 2090 | 2367 | 2526 | 2700 | 2709 | 2900 |
| Facebook followers | - | - | 1035 | 1176 | 1574 | 1946 | 2300 | 2608 | 2900 |

Completed references

We completed one reference in 2020-2021: *Consent in relation to sexual offences*.

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) (now s 61HE), which deals with consent in relation to sexual offences. In undertaking this review, our terms of reference required us to consider:

- 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.

In October 2018, we released a consultation paper that provided an overview of the law of consent and asked how the law should change. We received 36 submissions in response.

We also conducted an online survey from October 2018 to October 2019, which invited public comment on some key features of the law of consent. In total, 3858 people accessed the survey. About half of the participants (1904) completed at least one substantive question. Just under a third of participants (1078) completed all the substantive questions.

Between February 2019 and December 2019, we conducted 27 consultations, including with victims' advocates, prosecutors, defence lawyers, community legal centres, judges, police, academics, support services and health workers. We travelled interstate to consult with Tasmanian legal practitioners and Victorian County Court judges about the consent laws in those jurisdictions.

We released draft proposals in October 2019 and invited public responses. Given the complex and controversial nature of consent law, this allowed people to consider the detail of our proposed changes and to provide feedback before we finalised our recommendations. We particularly encouraged views about the practical effect of the proposals and whether they would achieve our intended outcomes. We received 51 submissions in response.

We transmitted our final report to the Attorney General in September 2020. The report made 44 recommendations and included draft statutory amendments.

The report considers questions central to sexual assault proceedings in NSW courts, including: the structure, language and meaning of consent; when a person does not consent; knowledge of consent or non-consent; and the meaning of terms such as sexual intercourse, sexual touching and sexual act.

Key recommendations from the report aim to:

- simplify and modernise the structure and language about consent law in the *Crimes Act 1900* (NSW), including:
 - introducing objectives to explain the purpose of the law of consent
 - clarifying the meaning of consent
 - modifying the list of circumstances in which the law provides that a person does not consent, and
 - clarifying the law with respect to knowledge of non-consent
- make the definitions of the offences of "sexual intercourse", "sexual touching" and "sexual act" in the *Crimes Act 1900* (NSW) clearer and more inclusive
- introduce new jury directions about consent to the *Criminal Procedure Act 1986* (NSW) to address identified misconceptions about consent
- amend the *Criminal Procedure Act 1986* (NSW) to provide flexibility for the use of jury directions and to reinforce that judges may give and repeat the directions at any time
- provide for a statutory review of enacted recommendations after five years, and
- educate judges, lawyers, police and the community about changes to the law of consent.

The report was tabled in parliament on 18 November 2020.

Implementation and government responses

In the reporting year no government amendments were passed that implemented recommendations from our reports.

As at 30 June 2021, implementation action or responses are outstanding on the following recent reports (completed within the last three years):

- Report 148 – *Consent in relation to sexual offences*
- Report 147 – *Access to digital records upon death or incapacity*

Engagement

In 2020 – 2021, our community engagement activities were limited due to the impact of the COVID-19 pandemic.

We continued our social media engagement through Facebook and Twitter, where we regularly post about our projects and other news.

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

During 2020 – 2021, the Chairperson and Secretariat staff had limited opportunity to attend and present at events due to the COVID-19 pandemic.

Matthew Nelson, Senior Policy Officer, attended the UNSW Law Society's Careers in Public Policy and Law Reform Panel Event, which took place virtually on 18 March 2021.

Priorities for 2021 – 2022

We have one ongoing reference: *Court and Tribunal Information: Access, Disclosure and Publication*.

Court and tribunal information: access, disclosure and publication

In February 2019, the Attorney General asked us to review the operation of suppression and non-publication orders and the laws governing access to information held in NSW courts and tribunals. In undertaking this review, our terms of reference require us to consider:

- Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information, including:
 - *Court Suppression and Non-Publication Orders Act 2010* (NSW)
 - *Court Information Act 2010* (NSW), and
 - *Children (Criminal Proceedings) Act 1987* (NSW).
- Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.
- The effectiveness of current enforcement provisions in achieving the right balance, including appeal rights.
- The appropriateness of legislative provisions prohibiting the identification of children and young people involved in civil and criminal proceedings, including prohibitions on the identification of adults convicted of offences committed as children and on the identification of deceased children associated with criminal proceedings.
- Whether, and to what extent, suppression and non-publication orders can remain effective in the digital environment, and whether there are any appropriate alternatives.
- The impact of any information access regime on the operation of NSW courts and tribunals.
- Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.
- The findings of the *Royal Commission into Institutional Responses to Child Sexual Abuse* regarding the public interest in exposing child sexual abuse offending.
- Comparable legal and practical arrangements elsewhere in Australia and overseas.

To help us identify issues and concerns relevant to the review, we invited preliminary submissions on our terms of reference. We received 45 preliminary submissions.

On 16 December 2020, we published a consultation paper for public comment. Submissions closed on 19 February 2021. We received 33 submissions in response.

We also held roundtables and consultations with key stakeholders from March to April 2021, conducting 20 consultations with a wide range of individuals and groups. These included judicial officers, court and tribunal administration staff, legal practitioners, government representatives, journalists, community organisations and academics.

In April 2021, we also published an online survey to encourage people who otherwise might not participate in the law reform process to have their say about issues relating to open justice. We received 189 responses.

On 28 June 2021, we published a proposals paper. The paper gives people the opportunity to consider our proposals for reform, as well as the appropriateness of existing provisions that we propose be retained.

We are working towards delivering the final report by the end of 2021.

People

Staff

The Law Reform Commission and Sentencing Council Secretariat, which is part of the Law Reform and Legal Services Division of the Department of Communities and Justice, supports the work of the NSW Law Reform Commission. The following people were staff of the Law Reform and Sentencing Council Secretariat over the reporting period:

| | |
|------------------------|---|
| Ms Erin Gough | Policy Manager (to January 2021) |
| Ms Alexandra Sprouster | Policy Manager (from May 2021) |
| Mr Joseph Waugh PSM | Senior Policy Officer A/Policy Manager (from January 2021 to May 2021) |
| Dr Jackie Hartley | Senior Policy Officer |
| Ms Emma Holloway | Senior Policy Officer |
| Mr Matthew Nelson | Senior Policy Officer (from September 2020 to May 2021) |
| Ms Kathryn Birtwistle | Policy Officer |
| Ms Arizona Hart | Policy Officer |
| Ms Ya'el Frisch | Policy Officer (from December 2020) |
| Ms Anna Williams | Research Support and Librarian |

Farewell to Erin Gough

Erin Gough resigned as Policy Manager of the Secretariat in January 2021.

Erin joined the Secretariat in 2016. Over the course of five years, she made a tremendous contribution to the work of both the Law Reform Commission and the Sentencing Council.

Erin's work has been integral in delivering on a number of high quality reports. Some of the notable projects in this period include Report 145: *Review of the Guardianship Act 1987* and Report 148: *Consent in Relation to Sexual Offences*.

Alan Cameron AO, the Chairperson of the Law Reform Commission, said:

“While research is at the heart of what the Commission does, dealing with stakeholders and writing a convincing report, are at least as important. Erin's exemplary interpersonal skills, and her talents as a published author, have helped to make her five years at the Commission an unqualified success.

She has been energetic, enthusiastic, and hard working throughout. She has the respect, appreciation and thanks of the Chair and all the Commissioners with whom she has worked.”

We wish Erin all the best for her future.

Internships

Student interns greatly assist our work. They work principally to further their education through our internship program during the winter vacation.

The student internship is a paid position.

Student interns are engaged directly on references and have made significant contributions to our research and writing, including to our publications.

Unfortunately, due to the impact of the COVID-19 pandemic, we were unable to offer any internships during 2020 – 2021.

Within the reporting period, we commenced recruitment for our internship program in the second half of 2021.

