



New South Wales
Law Reform Commission

2016-17

Annual Report

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The year in review

This year, the NSW Law Reform Commission celebrates its 50th anniversary. On this occasion, we are particularly proud of our ongoing work and our history of delivering thorough research, detailed analysis, and high quality policy advice to government.

The Commission was established by administrative act on 1 January 1966, and by its own Act of Parliament on 25 September 1967. Undoubtedly, this was a momentous occasion. However, the establishment of the Commission sat comfortably within a strong tradition of law reform in NSW. In fact, the state's very first Law Reform Commission was set up in 1870, by letters patent. This early Commission was asked to review and consolidate statute law, reform the practice and procedure of courts, and remove inconveniences resulting from the separate law and equity jurisdictions. Several different iterations of the Commission appeared in the proceeding century – including the first broad-based (albeit part time) Law Reform Committee in 1961.

In 1966, the Commission's aims were reported to include eliminating “anachronisms and inconsistencies”, ensuring the law was “simple and logical” and inviting the community to share its “feelings and ideas” on matters of law reform. Today, we are pleased to continue NSW's worthy tradition of law reform. Over the past 50 years, we have completed over 130 references. In doing so, we have had a hand in the reform of limitation of actions, the legal profession, defacto relationships, and the law of evidence – to name a few. In June 2017, the Government implemented our recommendation to replace s 6 of the *Law Reform Miscellaneous Provisions Act 1946* (NSW) less than six months after we completed the reference, representing one of our speediest results yet.

As of June 2017, we have three ongoing references: one into guardianship law, one into the laws relating to beneficiaries of trusts, and one into alternative dispute resolution. These projects are complex in their own right. However, the general law reform process in the 21st century presents its own difficulties. Law reform commissions are no longer as well funded as they used to be. At the same time, the availability of information through technology means that we have more material to deal with. On one hand, this allows us to draw nearly endless inspiration from jurisdictions around the world. On the other hand, the development of international conventions like the *UN Convention on the Rights of People with Disabilities*, and the wealth of analysis that accompanies them, requires us to consider carefully how we reflect dynamic international norms and standards in our recommendations. Reconciling these different perspectives is a challenging, if ultimately rewarding, task.

Law reform is a process that requires us to hear from a broad range of voices so that our recommendations are informed by the experience of the community and stakeholders. This is particularly true of our major reference – the review of the *Guardianship Act 1987* (NSW). Guardianship law impacts a very significant portion of the NSW community and will continue to do so. As such, it is particularly important for us to develop recommendations that will afford dignity and respect to those experiencing reduced or fluctuating decision-making ability – as well as the opportunity to make choices and plan for the future. For this reason, I would like to take this opportunity to thank all of those who have provided us with their views and experience – this is the most needed ingredient for law reform.

As always, I am grateful for the energy, service and expertise displayed by the Commission staff. We have a significant amount of work ahead of us and I look forward to what promises to be an exciting and productive year.

Alan Cameron

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 and the community, and draw on 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 and staff

As at 30 June 2017, the Commission comprised a chairperson, a deputy chairperson and one commissioner. 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.



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. Justice Brereton 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

Tracy Howe

Tracy Howe was appointed as a part-time Commissioner of the NSW Law Reform Commission on 1 June 2016. Tracy is Chief Executive Officer of the NSW Council of Social Service. She is a legally trained advocate with a commitment to human rights, addressing community disadvantage and gender inequality. Previously, Tracy has worked in both government and non-government settings. Tracy currently sits on the NSW Government's Social Impact Investment Expert Advisory Group and, in May 2015, Tracy was appointed to the Prime Minister's COAG Advisory Panel on Reducing Violence against Women. Tracy is also an Ambassador of the Australian Centre for Leadership for Women.

Performance for 2016-17

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

Measure	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017 Target	2016-2017 Actual	2017-2018 Target
Number of consultation papers and reports published	14	10	11	3	2	10	9	5
Number of consultation events/meetings held	37	36	38	13	10	20	23	20
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	100%	75%	50%	50%	66%	75%	75%	75%
Law Reform Commission mentions in court decisions	23	15	22	35	21	20	32	20
Number of legislative amendments based on LRC reports	0	4	2	0	1	4	3	4
Email subscribers	-	107	204	265	359	500	475	550
Twitter followers	-	113	366	555	1070	1400	1630	2000
Facebook followers	-	-	-	-	-	-	1035	1500

Completed references

We completed one reference in 2016-2017.

Third party claims on insurance money

We transmitted *Report 143 - Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946* to the Attorney General on 22 November 2016. The Attorney General released it on 19 December 2016.

Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) allowed a plaintiff to access proceeds of insurance where proceedings against an insured defendant are not possible or would be pointless because, for example, the defendant is missing or insolvent.

It achieved this by a special “charge” that attaches to the money that the insurer would be required to pay under the insurance contract. The charge attaches “on the happening of the event giving rise to the claim for damages or compensation”.

The section had been generally criticised for its obscure drafting and the problems it presented for interpretation. Changes to the insurance market since it was enacted 70 years ago also made its effect unclear. There were many areas of uncertainty and inadequacy in its application.

Ideally, the Commonwealth should enact a general provision that covers all possible scenarios. However, pending such an outcome, we considered that NSW should legislate to provide a clearer, more effective provision than the current s 6. The new provision could provide a model for other States and Territories, or the Commonwealth, to adopt.

We, therefore, proposed a new provision to replace the current s 6 that clarifies areas of uncertainty and makes reforms where necessary. The new provision resolves the issue of payment of defence costs dealt with in the key case, *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212, while ensuring that a plaintiff can recover from an insurer in appropriate cases.

We also produced a Draft Bill giving effect to our recommendations. These were enacted in the *Civil Liability (Third Party Claims Against Insurers) Act 2017* which was assented on 1 June 2017.

Engagement

In 2016-17, we continued to build on our community engagement processes and develop new ways of interacting with the community through technology. For example, we produced and released a series of videos to accompany our Question Papers for the Guardianship Review. These videos provide a brief and accessible overview of the issues contained in the Question Papers. They are also subtitled to accommodate viewers who are deaf or hard of hearing.

In March 2017, we launched the NSW Law Reform Commission Facebook page. This has been a useful forum to promote our papers and public consultation events. The Commission posts about our projects and other law reform news once every 1-2 weeks and moderates the comments to ensure that any discussion is civil and relevant.

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We have also continued to build our social media presence using Twitter. The number of followers we have on Twitter is growing consistently. We use Twitter to engage with stakeholders and community members by sharing updates on our work, and papers, reports and videos we have published.

In 2016-17, we continued to produce a periodic email newsletter. Our email newsletter is a short email, every 2-4 weeks, which contains updates about the work of the Commission and about opportunities for people interested in working with us.

On 31 March 2017, Alan Cameron visited Randwick Boys High to talk to Legal Studies students about law reform. Incidentally, the preliminary HSC Legal Studies course includes a module on the role of law reform in the legal system. Alan's visit was an excellent opportunity for us to provide students with an overview of the work of the Commission and answer their questions about the law reform process.

On 29 March 2017, Katherine Lilly attended the Notre Dame Law and Business Career's Expo. Katherine also attended the Sydney University Law Society Publicly Interested Careers Fair on 30 May 2017. These events allowed us to meet with current law students and share knowledge about the work that we undertake. We were able to promote our Winter Internship Program, as well as the Graduate and Summer Clerkship Programs that we undertake in conjunction with the Strategy and Policy Branch of the Department of Justice.

Conferences

On 17–19 October 2016, staff members attended the Australian Guardianship Administration Council's National Guardianship Conference in Sydney. This conference explored a range of themes relevant to the Guardianship Review – including the will and preference approach to decision-making, and supported decision-making.

On 15 and 16 February 2017, staff members attended the Applied Research in Crime and Justice Conference hosted by the NSW Bureau of Crime Statistics and Research in Sydney. This conference was a useful opportunity for us to ensure that we are keeping abreast of developments in criminal justice and sentencing policy in Australia and overseas. Topics of discussion included family violence, parole, policing strategy, alcohol related crime, jury decision-making, and the backlog in the NSW District Court.

On 24 and 25 March 2017, Alan Cameron attended the Commonwealth Association of Law Reform Agencies Conference in Melbourne. Topics discussed at the conference included characteristics of good law reform, relations between law reform agencies and the Executive, and victims of crime.

Priorities for 2016-17

We have three ongoing references:

- review of the *Guardianship Act 1987* (NSW)
- statutory provisions for alternative dispute resolution, and
- review of laws relating to beneficiaries of trusts.

Review of the Guardianship Act 1987 (NSW)

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.

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

1. the relationship between the *Guardianship Act 1987* (NSW) and:
 - the *NSW Trustee and Guardian Act 2009* (NSW)
 - the *Powers of Attorney Act 2003* (NSW)
 - the *Mental Health Act 2007* (NSW), and
 - other relevant legislation.
2. recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas, including:
 - the 2014 report of the Australian Law Reform Commission: *Equality, Capacity and Disability in Commonwealth Laws*
 - the UN *Convention on the Rights of Persons with Disabilities*, and
 - the demographics of NSW and in particular the increase in the ageing population.

In 2016-17, we published six Question Papers containing information and questions relating to different areas of guardianship law:

- QP1 – Preconditions for alternative decision-making arrangements
- QP2 – Decision-making models
- QP3 – The role of guardians and financial managers
- QP4 – Safeguards and procedures
- QP5 – Medical and dental treatment and restrictive practices
- QP6 – Remaining issues

We also released six surveys alongside each Question Paper. The intention of these surveys was to help members of the community to express their opinions about guardianship law without making a formal submission.

Submissions for the last round of Questions Papers (QP4 – 6) closed on 12 May 2017. In response to the six Question Papers, we received a total of 132 submissions from stakeholders including peak disability bodies, the NSW Civil and Administrative Tribunal (NCAT), agencies such as the NSW Trustee and Guardian, and statutory appointees such as the NSW Public Guardian.

Additionally, we conducted 22 consultations with stakeholders – including 11 individual consultations, 9 roundtable consultations and 2 confidential consultations.

Like all of the publications we are producing as a part of the review, Question Papers 1 – 6 are available on our website in Easy English. Easy English is a format specifically designed to make sense to people who have difficulty reading and understanding English. It uses simple, everyday language and illustrations.

Alternative dispute resolution

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

Specifically, we were asked to review the statutory provisions in NSW that provide for mediation and other forms of alternative 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 undertaking this review, we were asked to have regard to:

- the desirability of just, quick and cheap resolution of disputes through the use of mediation and other forms of dispute resolution in appropriate contexts
- issues about the use of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution
- the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution, and
- any related matters.

We are not reviewing dispute resolution under the *Commercial Arbitration Act 2010* (NSW) or the *Industrial Relations Act 1996* (NSW).

In April 2014 we released a Consultation Paper that provided an overview of the statutory provisions in NSW and asked what provisions are appropriate in the variety of contexts which the existing provisions cover. We received 14 submissions in response to the Consultation Paper.

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 rationalise 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 ADR unless excluded explicitly or by necessary implication, and would apply equally to the related processes known as neutral evaluation and conciliation.

Submission to Consultation Paper 18 closed on 17 March 2017. We received 12 submissions in total.

The Commission plans to finalise this reference in the next reporting period.

Review of laws relating to beneficiaries of trusts

On 28 April 2017, the Attorney General asked us to review certain aspects of the law relating to beneficiaries of trusts. In particular, the Commission will have regard to:

- the perceived uncertainty of the case law on the liability of trust beneficiaries in NSW and elsewhere
- the widespread use of trusts in commercial contexts as well as in the community generally
- the need for safeguards to ensure that any legislation limiting or removing such liability does not support the avoidance of responsibility for insolvent trading.

In undertaking this review, we have been asked to report on whether:

- there is a need to enact statutory provisions to limit the circumstances, if any, in which the beneficiaries of trusts, as beneficiaries, should be liable to indemnify the trustee or creditors of the trust, if the trustee fails to satisfy obligations of the trust, or remove such liability
- it is appropriate for the liability of investors in unit trusts to be limited to the amount (if any) unpaid on their units in the same way that the liability of investors in shares is limited to the amount (if any) unpaid on their shares.

The Commission has also been asked:

- to propose the terms in which any legislation should be enacted, and
- to consult and report on whether NSW should adopt the recommendations of the *Report, Trading Trusts - Oppression Remedies*, January 2015, of the Victorian Law Reform Commission.

In 2016-17, we received three preliminary submissions on the terms of reference.

We expect to receive further preliminary submissions ahead of the deadline on 14 July 2017.

Implementation and Government responses

In the reporting year, the Government passed the following legislation, which implemented recommendations from Law Reform Commission reports:

- *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* (NSW) implements some recommendations in **Report 139 – Sentencing**.
- *Crimes (Domestic And Personal Violence) Amendment (Review) Act 2016* (NSW), implements some recommendations in **Report 128 – Family Violence: A National Legal Response** (jointly with the ALRC – ALRC Report 114)
- *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) implements **Report 143 – Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946**

On 9 May 2017, the Government announced a justice reform package that will implement recommendations from **Report 139 – Sentencing**, **Report 142 – Parole**, and **Report 141 – Encouraging appropriate early guilty pleas**.

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 135: *People with cognitive and mental health impairments in the criminal justice system: Diversion* (The Government, in 2014, convened a cross-agency working group to consider the report's recommendations.)
- 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 succession law project have been legislated.)
- Report 121: *Emergency medical care and the restricted right to practise*.

People

Commissioners

Mr Alan Cameron AO (appointed November 2015 to November 2018)

The Hon Justice Paul Brereton AM, RFD (appointed June 2016 to June 2020)

Ms Tracy Howe (appointed June 2016 to May 2018)

Staff

Law Reform and Sentencing Council Secretariat staff as at 30 June 2017:

Erin Gough	Policy Manager
Joseph Waugh PSM	Senior Policy Officer
Kathleen Carmody	Policy Officer
Nandini Bajaj	Graduate Policy Officer
Katherine Lilly	Graduate Policy Officer
Anna Williams	Librarian

Internships

Student interns greatly assist our work. They work principally to further their education, through university placements and through our internship programs 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	Reference	Dates
Samuel Hoare	University of Sydney	Alternative dispute resolution	27 June – 8 July, 26 July – 5 August 2016
Katherine Lilly	University of Technology	Guardianship	27 June – 22 July 2016
Andrew Roberts	University of NSW	Guardianship	27 June – 22 July 2016
Nandini Bajaj	Macquarie University	Guardianship	1 August – 26 August 2016



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NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

Internet: www.lawreform.justice.nsw.gov.au

Phone: 02 8346 1284
Email: nsw-lrc@justice.nsw.gov.au

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