



**New South Wales  
Law Reform Commission**

**2009-10**

**Annual report**

September 2010  
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## Highlights 2009/10

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- Six reports were released on workplace deaths, privacy, and succession law.
- Five consultation papers were released on family violence and people with cognitive and mental health impairments in the criminal justice system.
- One new reference was received on the law concerning security for costs.
- Two reports, dealing with jury selection and the offices of the Information and Privacy Commissioners were wholly or partly implemented by legislation. Legislation also implemented recommendations in a further four reports concerning relationships, adoption and court information.
- The Commission saw key personnel changes: Professor Michael Tilbury resigned as full-time Commissioner and Professor Hilary Astor joined the Commission in that role.

## Chairperson's report

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This past year has been one of major change for the NSW Law Reform Commission. We have completed three references, including two long running references involving multiple reports. We have seen some significant personnel change in the Commission, and have continued our path of revitalisation of the Commission's processes, structures and culture.

The role of the Commission is to advise government on law reform. In undertaking this task we draw on the expertise of our Commissioners and our staff, and on the knowledge of stakeholders and the broader community.

During this year we have completed references on

- Workplace deaths – a reference given to us under a statutory provision by the Parliament.
- Uniform Succession law – a reference we have been working on as part of a national project. The last report on this reference was published in December 2009 and relates to estate administration. It joins reports on wills, family provision and intestacy as part of a comprehensive modern blueprint for harmonised succession laws. I am pleased to say the Government has implemented the first three of these reports already and is currently considering the final report.
- Privacy – This reference was a comprehensive review of the law of privacy, and significant report dealing with invasions of privacy, privacy principles, the relationships between the Information and the Privacy Commissioners, access to personal information and the protection of privacy in NSW. Two of these reports require consideration at a national level. The government has moved to implement the main recommendations of the report on the Information and Privacy commissioners, and the others are under consideration.

I am pleased to note a strong record of implementation this year, including introduction or passage of Acts dealing with jury selection and privacy. It is a measure of the relevance, quality and integrity of the Commission's work that Government acts on our recommendations.

This year has also seen the release of four consultation papers in our reference on people with cognitive and mental health impairment in the criminal justice system covering: an overview of the system; criminal responsibility and consequences; diversion; and forensic procedures. A further paper focusing on the issues for young people is expected shortly. This is a significant and difficult area of law, and will be a major focus for us in 2010/11.

The strength of the Commission comes in large part from the contribution of its personnel. In this context, I would like to pay tribute to Professor Michael Tilbury who in January this year left the post of full-time Commissioner, which he had held since 2002, to take up a Chair at the University of Hong Kong. Professor Tilbury has had a long association with the Commission including previous service as a full-time and part-time Commissioner. He has been a close and valued colleague since I joined the Commission in 2006. He has offered rigorous intellectual leadership to the Commission and made an inestimable contribution to the strong quality and breadth of our work.

## **Annual Report 2009-2010**

Professor Hilary Astor joined the Commission as a distinguished and well-qualified successor to Professor Tilbury. She has already made a major contribution by leading our work on the joint reference on family violence, and I look forward to her contribution during her term at the Commission.

I would also like to record my gratitude to part-time Commissioners who departed this year: the Hon Justice David Hodgeson, the Hon David Hunt, and His Honour Judge Ken Taylor, for their contribution during their terms.

This year has also seen considerable changes at the staff level, notably the departure of Deborah Sharp as Acting Executive Director and the arrival of Paul McKnight as Executive Director in January 2010. I record my appreciation of the leadership shown by Ms Sharp during her tenure.

The task of law reform is to keep law relevant to an ever-changing world, responding to new challenges while keeping faith with enduring values and principles. In this context, the Law Reform Commission itself has been undergoing a period of renewal and revitalisation, changing the way we do things in order to reflect the need to improve our service and the timeliness of delivery of our reports. This process has led the Commission to reinforce its key values and its commitment to relevance and integrity.

During the next 12 months, I join the Commissioners and staff in a commitment to continuing this process, and in completing our current projects including references to reform the law in the areas of complicity, family violence (jointly with the Australian Law reform Commission), people with a cognitive or mental health impairment in the criminal justice system, penalty notices, security for costs, and jury directions.

I am delighted to present the annual report of the Law Reform Commission.

**The Hon James Wood AO QC**

# The NSW Reform Commission: Profile

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## Roles and Responsibilities

The NSW Law Reform Commission is an independent statutory body constituted under the Law Reform Commission Act 1967 (NSW). It provides expert law reform advice to Government through the Attorney General on matters referred to it by the Attorney General.

## Services and Activities

The NSW Law Reform Commission's principal service is the provision of policy advice on law reform matters. It undertakes work on references provided by the Attorney General.

In undertaking this work the Commission:

- broadly researches the law, and the academic and other commentary on it;
- can conduct or commission empirical research; and
- consults broadly with stakeholders and the community, and draws on experts in the field.

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

## Commissioners and Staff

As at 30 June 2010, the Commission comprised a Chairperson, the Hon James Wood AO QC, a full-time Commissioner, Professor Hilary Astor, and a number of part-time Commissioners. A profile of Commissioners during 2009-10 is included below under "People".

A small team of highly skilled staff supports the work of the Commission. A staff list and details of staff movements are included below under "People".

## Performance for 2009-2010

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The role of the NSW Law Reform Commission is to provide law reform advice. In this respect it contributes to a range of government priorities including: the NSW State plan goal of Keeping People Safe, and the Department of Justice and Attorney General strategic priority of an accessible and effective justice system.

Measuring performance in terms of quantity, quality and timeliness has been a challenge for Law Reform Commissions and similar bodies. The performance of the Commission is currently measured against 2 main performance indicators: number of papers published and number of consultations conducted. The table below sets out the Commission's performance against these measures.

Measure	06/07	07/08	08/09	09/10	10/11	11/12
	Historical Actuals				Targets	
Number of Consultation papers and reports published	7	8	6	10	10	10
TBD: Number of consultation events/meetings held* <i>(new performance indicator to be developed)</i>	12	15	21	53	20	-

During the coming year the Commission will review these performance measures and seek to institute new measures to capture the Commission's work better, including measures of quality, implementation, and timeliness.

## Progress on references

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Significant reports and consultation papers released or completed during 2009/10 are set out below. These represent the main body of work produced by the Commission during the year.

### Workplace deaths

The Commission completed its statutory reference on workplace deaths in 2009/10

#### ***Report 122: Workplace Deaths, July 2009 (Tabled December 2009)***

The *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* inserted a new part 2A into the principal act creating an offence of reckless conduct causing death at a workplace. The Amendment Act required the Commission to inquire into and report on the effectiveness of these provisions, beginning within three years of their commencement. This is a relatively unusual reference in that it



was not given by the Attorney General under the *Law Reform Commission Act 1967* (NSW).

Report 122 made no recommendations for change noting that

- no prosecution had been brought under the provisions, so they remained untested; and
- a national review had recommended the development and implementation of a national model occupational health and safety law, and that NSW had committed itself to national reform in this area.

The Commission concluded that given these factors, a full review involving extensive stakeholder consultation was unwarranted and that it should receive a new reference if the national approach is not proceeded with.

## Privacy

In April 2006 the then Attorney General, the Hon R J Debus, issued terms of reference for our review of privacy. The Terms required us to report generally on whether existing legislation in NSW provides an effective framework for the protection of the privacy of an individual. In doing so, we were to consider the desirability of privacy protection being uniform across Australia and across key legislative instruments dealing with privacy in NSW. We were also required to report on the desirability of introducing a statutory tort of invasion of privacy in NSW.

In June 2009, the Attorney General, the Hon J Hatzistergos, issued additional terms of reference requiring us, as part of our broader inquiry into privacy, to report on the legislation and policies governing the handling of applications for access to the personal information of people other than the applicant under the *Freedom of Information Act 1989* (NSW) (the "FOI Act") and any successor legislation (which refers in particular to the *Government Information (Public Access) Act 2009* (NSW) (the "GIPA Act")). We were also asked to consider the relationship between the Offices of the Privacy Commissioner and the newly established Information Commissioner. The particular focus of the additional terms of reference was the adequacy of those provisions in the GIPA Act which deal with access to personal information, in ensuring the effective protection of individuals' privacy.

In the year 2009-2010, five reports were released relating to NSW privacy and government information legislation.

### ***Report 120 – Invasion of Privacy, April 2009 (Released August 2009, tabled August 2010)***

This report (completed in 2008-09 but released in 2009-10) was the first report made under the Commission's reference on the law of privacy. An international advisory group including academics, jurists and journalists from various jurisdictions including Australia, the United Kingdom, the United States and Hong Kong assisted the inquiry.

The report recommends the enactment of a statutory cause of action for invasion of privacy. The report recognises that advances in technology allow moments, once considered private, to be captured and broadcast to the world. Yet, despite

increasing public concern about this gradual erosion of privacy, the law remained unclear. The proposed cause of action is only applicable where an individual has a reasonable expectation of privacy that is not overridden by public interests such as freedom of speech. In this regard, privacy interests are weighed against other important concerns such as the public's "right to know" and the protection of national security. The report proposes that the new cause of action only be introduced as part of national law reform so that privacy law would be uniform throughout Australia.

***Report 123: Privacy Principles, August 2009***

***(Tabled December 2009)***

Report 123 reviews the 11 Unified Privacy Principles (UPPs) proposed by the Australian Law Reform Commission (ALRC) in Report 108, *For Your Information: Australian Privacy Law and Practice*. The cornerstone of the ALRC Report is that privacy laws should be consistent across all Australian jurisdictions. The ALRC recommends that the UPPs serve as the framework for national consistency. Report 123 evaluates the UPPs for their feasibility and efficacy as principles to be incorporated into NSW's privacy legislation. We recommend a number of changes to improve the application of the UPPs in light of these considerations.

***Report 125: The Offices of the Information and Privacy Commissioners, December 2009***

***(Tabled March 2010)***

In Report 125 we explore different models for administering privacy and government information legislation, specifically looking at how the relationship between the two laws is addressed on an organisational level. We recommend the formation of a single office, the Office of the Information Commissioner, responsible for administering FOI and privacy law. Under our proposed model, the Information Commissioner would head this Office, which would also include a Privacy Division, led by the Privacy Commissioner. We recommend a number of consequential amendments as a result of this.

The Privacy and Government Information Legislation Amendment Bill 2010 (NSW) was introduced on 24 June 2010. The Bill adopts a number of the Commission's recommendations in Report 125, including the establishment of a single office to administer legislation governing privacy and access to government information. The Bill also adopts our recommendations in relation to the appointment of the Privacy Commissioner, enhancement of parliamentary oversight of privacy legislation, the establishment of an Information and Privacy Advisory Committee, as well as recommendations with respect to consultation requirements.

***Report 126: Access to Personal Information, February 2010***

***(Tabled March 2010)***

Report 126 focuses on the relationship between the competing policies of two legislative regimes: one dealing with access to government information and the other dealing with individual privacy. In developing this report we have taken as an obvious starting point that the legislation dealing with the two regimes should, so far as possible, operate as a "seamless code".

In this report we propose a revised definition of “personal information” and recommend that the number of exceptions to the existing definition be reduced. We also look at access to, and amendment of, personal information under both privacy legislation and the GIPA Act. To avoid conflict between overlapping regimes, we recommend that applications by an individual for access solely to his or her own personal information should be made under privacy legislation. Other applications should be made under the GIPA Act.

In order to simplify mechanisms for the amendment of personal information, we recommend that procedures relating to amendment, transferred from the FOI Act into privacy legislation, should be repealed. This recommendation is adopted in the Privacy and Government Information Legislation Amendment Bill 2010 (NSW).

***Report 127: Protecting Privacy in New South Wales***

***(Currently under consideration)***

Report 127 is the fifth and final report in the Commission’s review of the law of privacy in NSW. The focus of this report is the extent to which the current legislative regulation of privacy in NSW effectively protects individual privacy. In this report we consider whether legislation is effective, both in reaching all public sector agencies in this State, and in protecting individuals in circumstances in which they consent, or appear to consent, to the use of their personal information. Additionally, we examine exemptions from privacy legislation and consider how the operation of exemptions can be simplified. We also consider how enforcement mechanisms in privacy legislation can be improved.

**Uniform succession laws**

In 2009/10, the Commission completed its long-standing reference on the law of Succession. This reference was undertaken cooperatively by the National Committee for Uniform Succession Laws with all States and Territories involved under the direction of the Queensland Law Reform Commission. In all, four reports were published on the law of wills, the law of family provision, the law of intestacy and the law governing administration of estates. The first three of these reports have been implemented in the Succession Act 2006 (which dealt with wills) and its subsequent amendments in 2008 (covering family provision) and 2009 (covering intestacy).

***Report 124: Uniform Succession Laws: Administration of estates of deceased persons***

***(Tabled December 2009)***

The last of the four reports was completed in 2009/10. This report provides a commentary on proposed model legislation that deals with the transmission of the property after death, the payment of debts and other liabilities, the distribution to beneficiaries entitled under a will or according to the statutory regime on intestacy, the appointment of people to manage the process (usually either executors or administrators) and mechanisms for holding them to account.

The principles underlying the recommendations include:

- the need to simplify estate administration;

- recognising those who have an interest;
- giving greater opportunities for informal administration.

## **Family Violence – national frameworks**

The Family Violence reference is jointly undertaken with the Australian Law Reform Commission (ALRC). The NSW Commission is contributing resources and expertise to this broader project and is working cooperatively with the ALRC.

The focus of this reference is on the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence. As such the focus is on ensuring that there are no gaps in the legal protections that apply to keep women and children, in particular, safe from violence.

### ***Consultation Paper 9: Family Violence: Improving Legal Frameworks (Released April 2010)***

In April 2010, the NSW Law Reform Commission and the ALRC published a joint consultation paper, *Family Violence: Improving Legal Frameworks* (NSWLRC Consultation Paper 9). Following its publication, both law reform bodies have embarked on an extensive consultation process. We have, in particular, focused on consultations with NSW stakeholders, including consultations with relevant government agencies and non-government bodies, including the Department of Human Services, the Department of Justice and Attorney General and the Premier's Council for Women. The Commission has also consulted with magistrates and judges of the Local and Children's Court, the NSW Legal Aid Commission and other key stakeholders, in both metropolitan and regional areas. The NSW Commission led at least 16 consultations.

### ***Consultation Paper Summary: Family Violence: Improving Legal Frameworks (Released April 2010)***

In view of the wide scope and substantial length of the consultation paper the Commissions also published a summary of key issues.

## People with Cognitive and Mental Health Impairment in the Criminal Justice System

The terms of reference provide for a general consideration of the criminal law and procedure as it applies to people with cognitive and mental health impairments. In particular, the Commission was directed to have regard to:

- s 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990*;
- fitness to be tried;
- the defence of “mental illness”;
- the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000*; and
- sentencing practice and procedure.

Issues to do with mental illness and intellectual and other cognitive disabilities are among the most difficult concerns for law and policy makers to address. As a progressive, civilised society, we seek to provide adequate care and support services for those who are most vulnerable. People with mental illness and cognitive impairments unquestionably fall into this category.

The purpose of this reference is to examine the law and practice regulating what happens to people with a mental illness or a cognitive impairment, or both, who commit crimes. The law recognises that a defendant’s mental state may affect the nature of the criminal justice response that would ordinarily attach to his or her actions. This reference asks the Commission to assess the effectiveness of the current operation of the criminal justice system in its dealings with offenders who have cognitive or mental health impairments.

### ***Consultation Papers 5, 6, 7 & 8: People with cognitive and mental health impairments in the criminal justice system***

***(Released April 2010)***

These four consultation papers cover the law, practice and policy applying to people with mental health and cognitive impairments who are caught up in the criminal justice system. The term “mental health and cognitive impairment” is broad and includes people with a psychiatric or mental illness, brain injuries, dementia, and intellectual disability. The Commission is examining whether the law in this area is fair and up to date with scientific and medical knowledge.

The four consultation papers cover:

- an overview of the issues raised by the reference;
- criminal responsibility and consequences;
- diversion; and
- forensic samples.

The four papers ask over 160 questions, covering issues such as:

- How should people with mental health and cognitive impairments be treated if they do not have sufficient understanding to be tried?
- In what circumstances should people with a mental health or cognitive impairment have a defence to a crime?
- What should happen to people found not guilty by reason of a mental health or cognitive impairment?
- When should people with mental health or cognitive impairments be diverted from the criminal justice system and how can that process be made more effective?

A fifth paper is in preparation covering issues specific to young people with mental health or cognitive impairments.

Intensive consultation with stakeholders is expected to take place in the fourth quarter of 2010, and the first quarter of 2011.

### **Progress on other references**

In addition to the publications mentioned above, significant progress has been made during 2009/10 on reference including:

- **Complicity:** major work has been done towards a final report on the law of complicity.
- **Penalty Notices:** significant progress was made towards a consultation paper.
- **Security for costs:** some work has been done toward scoping the reference.

The status of and future steps in all of the Commissions reference are detailed below in “current priorities”.

### **Consultation and community engagement**

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Commissioners and staff gave a number of presentations and published papers on references and other matters of general interest. These activities are detailed in appendix A.

The Commission undertook major consultations on the family violence reference, including consultations with stakeholders in Sydney and, in relation to rural and regional issues and integrated services, in Wagga Wagga. The Commission also played a significant role in consultations on family dispute resolution, both in Sydney and Canberra. Consultations in this project will be used as a case study to help develop our consultation framework – see below.

The Commission also trialled a blog site - [www.lawreformnsw.com.au](http://www.lawreformnsw.com.au) - linked to the Commission’s Lawlink website. The first topic aimed to reach individuals with experience in making access applications for personal information of persons other than the applicant under the *Freedom of Information Act 1989* (NSW). The blog

operated as a pilot until the end of September 2009. The blog will be evaluated for effectiveness and consideration given to extending its use for other references.

The Commission has also had experience of working with the ALRC using e-newsletters, online forums, a family violence blog, twitter and on-line submissions. This experience will also be evaluated for future references.

## Implementation

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During 2009/10 legislation was passed or introduced relating to four of the Commission's reports:

- The *Jury Amendment Act 2010* implemented recommendations of Report 117: *Jury Selection* (2007).
- The *Privacy and Government Information Legislation Amendment Bill 2010* was introduced to implement the main recommendations of Report 125, *The Offices of the Information and Privacy Commissioners* (2009), as well as some recommendations of Report 126, *Access to Personal Information* (2010).
- The *Court Information Act 2010* implemented recommendations of Report 100, *Contempt by Publication* (2003).
- The *Relationships Register Act 2010* implemented recommendations in Report 113, *Relationships* (2006).
- The *Adoption Amendment Bill 2010* was introduced to implement a recommendation of Report 81, *Review of the Adoption of Children Act 1965 (NSW)* (1997) and Report 113, *Relationships* (2006).

## Priorities for 2009/10

### References

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The first and most important priority for the Commission is to deliver on our references. Subject to resources, we expect to deliver reports in at least 5 of our 6 current references (though not necessarily on all aspects of each reference). The reports will build on the tradition of excellence in scholarship and policy analysis for which the Commission is known, and be based on full consultation with stakeholders and the broader community.

An overview of the NSW Law Reform Commission's six current references and our expected progress in 2010/11 is detailed in this section.

#### Family Violence – National frameworks

**Commissioners:** the Hon James Wood AO QC, Professor Hilary Astor, his Honour Judge Kevin O'Connor.

Reference received: July 2009.

Consultation paper issued: April 2010.

Following release of the Consultation Paper in April 2010, and concerns from numerous stakeholders about the short timeframe for making submissions to the Inquiry, the Commonwealth Attorney General agreed to extend the reporting deadline. This permitted the Commissions to extend the timeframe for the receipt of submissions to 25 June 2010. At the time of writing, 238 submissions were received.

At year end, the Commissions were in the process of reviewing and analysing all the submissions that had been received, and all the consultations that had been conducted, and were working closely together to develop agreed recommendations for reform of the law to improve safety outcomes for women and children affected by family violence. The current reporting deadline is October 2010, and the Commissions expect to meet that deadline with a major report.

#### Complicity

**Commissioners:** The Hon James Wood AO QC, The Hon Gregory James QC, Mr Timothy Game SC, The Hon Roderick Howie QC.

**Expert Academic Advisers:** Professor Luke McNamara (University of Wollongong), Dr Arlie Laughlan (University of Sydney), Professor Simon Bronitt (Griffith University).

Reference received: July 2007.

Consultation paper issued: January 2008.

The Commission's inquiry originated in a letter received on 3 July 2007 from the then acting Attorney General, the Hon John Watkins MP, requesting a review of the common law of complicity.

In undertaking this inquiry, the Commission was asked to have regard to:



- Arguments for and against codification of this area of the law;
- Developments in other Australian and international jurisdictions, including those of the Model Criminal Code;
- The desirability of a uniform legislative approach in Australia;
- Issues raised by the High Court and the Court of Criminal Appeal decisions in *R v Taufahema* [2007] NSW CCA 33; (2007) 228 CLR 232; and
- Any other related matter.

In response, the Commission published Consultation Paper 2 (CP2), *Complicity*, in January 2008.

Following the publication of CP2, the Commission decided that the scope of the reference should widen to encompass other legal manifestations of group criminal activity, beyond its core review of the common law of joint criminal enterprise and extended joint criminal enterprise. As a consequence, the common law principles concerned with the several forms of accessorial liability that exist have been examined with a view to their possible reform along with the common law inchoate offences of incitement and conspiracy. Consideration has also been given to the offence of felony or constructive murder, and in particular to the potential extension of that form of murder to a person who is an accessory to the offence committed by the co-offender, in the course of the commission of which an unintended death occurs.

This area of law is extraordinarily complex and unclear. 2009/10 saw a period of intense work on this very difficult subject. We have assembled a small group of expert academic advisers to assist in this task. In 2010/11, this is a high priority reference for the Commission, and we expect to produce a report before the end of 2010, following consultation with key stakeholders.

## Jury directions

**Commissioners:** the Hon James Wood AO QC, Professor Jane Goodman-Delahunty, the Hon Roderick Howie QC.

Reference received: February 2007.

Consultation paper issued: December 2008.

This reference is about the instructions that a judge gives to a jury in a criminal trial. It arises in the context of a growing concern in Australia and overseas about the problems associated with jury directions. The Victorian and Queensland Law Reform Commissions are undertaking similar projects. These Australian law reform inquiries have been prompted, in part, by the Standing Committee of Attorneys General's recent consideration of "the feasibility of a review of jury directions and warnings, including areas for improved consistency".

The reference requires the Commission to consider

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);

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- the ability of jurors to comprehend and apply the instructions given to them by a judge;
- whether other assistance should be provided to jurors to supplement the oral summing up;
- any other related matter.

This reference has been largely on hold in 2009/10 while other references have taken priority. In 2010/11, subject to resources and priorities the Commission expects to publish a report on at least some aspects of this reference.

## People with mental health and cognitive impairments in the criminal justice system

**Commissioners:** the Hon James Wood AO QC, Professor Hilary Astor, the Hon Hal Sperling QC, The Hon Gregory James QC.

Reference received: September 2007; expanded July 2008.

Consultation papers issued: May 2010.

As noted above, the Commission has released 4 consultation papers, and has underway an additional consultation paper on young people with cognitive and mental health impairments in the criminal justice system. This is a significant reference with a broad scope. It will be a high priority reference for the Commission in 2010/11.

In 2010-11 the Commission intends to:

- release an additional consultation paper addressing issues particular to young people;
- form an expert advisory panel to provide advice to Commissioners and staff during the consultation process and in the formulation of recommendations;
- examine and evaluate submissions made to the Commission;
- develop a consultation strategy and consult widely with stakeholders, including facilitated consultation with consumers of the forensic mental health system;
- re-examine scope and priorities in light of further research and feedback received in submissions and during consultations;
- produce one or more reports addressing the terms of reference.

## Penalty Notices

**Commissioners:** the Hon James Wood AO QC, Professor Hilary Astor, the Hon Greg James QC.

Reference received: December 2008.

There are around 7,000 offences that can be dealt with by penalty notices in New South Wales. In the six-year period from 2003 - 2009, more than 16 million penalty notices were issued, with a face value of approximately \$2.4 billion.

The penalty notices reference asks the Commission to consider:

- whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
- the consistency of current penalty amounts for the same or similar offences;
- the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
- the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
- whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional "good behaviour" period following a write-off of their fines; and (c) whether the licence sanction scheme under the *Fines Act 1996* should apply to children and young people;
- whether penalty notices should be issued to people with an intellectual disability or cognitive impairment.

In undertaking this reference, the Commission will consult with agencies that issue and enforce penalty notices. While the Commission may consider penalty notice offences under road transport legislation administered by the Minister for Roads, the Commission need not consider any potential amendments to these offences as these offences have already been subject to an extensive review.

The Commission expects to publish a Consultation paper in September looking at question such as:

- Should principles and guidelines be established for assessing which offences may be enforced by penalty notice and the level of the penalty amount?
- Should penalty notices be issued to vulnerable individuals, such as children and young people and those with an intellectual disability or cognitive impairment? If so, what safeguards should be in place to minimise the adverse effects of penalty notices on vulnerable individuals?

Following the publication of the paper, the Commission will undertake consultations with government agencies that issue penalty notices, non-government organisations that advocate for vulnerable individuals adversely affected by penalty notices, and the general community.

The Commission expects to publish a report during the second half of the 2010-11.

## Security for Costs

**Commissioners:** The Hon James Wood AO QC, His Honour Judge Peter Johnstone, Professor Hilary Astor.

Reference received: December 2009.

The Security for Costs reference asks the Commission to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation.

The Commission is currently undertaking scoping work and preparing a Consultation paper for release in 2010.

## Other priorities

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In 2010/11, the Commission will focus on some key systems and capacities to underpin and better deliver its work on references:

- **Project management:** The Commission will implement a new project management framework to underpin project plans for all references. Plans will clearly spell out the scope of the reference and the roles and responsibilities of participants and set deliverables and timetables. This framework will allow us to better manage projects and deliver in a timely way.
- **Stakeholder and community engagement:** the Commission will establish a new engagement framework that uses a mix of publications, the internet and face-to-face interaction. The Commission will establish partnerships with our key stakeholder and the community. While publications and papers are a key part of our processes, we must recognise that they are not enough to properly engage all sectors of the community effectively. We must also recognise a responsibility to provide feedback to stakeholders and form strong partnerships. As part of this work we expect to redevelop our web presence and develop new ways of interacting with the community through technology.

# People

## Commissioners

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### Chairperson

#### ***The Hon James Wood AO QC (January 2006- present)***

Mr Wood commenced his term as chairperson in January 2006, having previously been a full-time Commissioner with the NSW Law Reform Commission in 1982-1984. He was Chief Judge at Common Law, 1998-2005, having been appointed a Supreme Court Judge in 1984. He was Commissioner of the Royal Commission into Police Corruption, 1994-1997 and Commissioner of the Special Commission of Inquiry into Child Protection Services in NSW, 2007-2008. He has previously been the Chairperson, Sentencing Council of NSW, 2006-2009, and is currently the deputy chairperson, and the Inspector, Police Integrity Commission (2005-2006).

### Full-time Commissioners

#### ***Professor Michael Tilbury (July 2002- February 2010)***

Professor Tilbury has a distinguished career in academia and in law reform. He served as a full-time Commissioner of the NSW Law Reform Commission from 1994-1996 and then as a Part-time Commissioner from 1996 – 2000. He was the Inaugural Director of the Centre for Commercial Law in the University of Zimbabwe (2000 - 2002), and the Edward Jenks Professor of Law at the University of Melbourne (1996 - 2004). While holding his most recent post as full-time Commissioner he was concurrently a NSW academic and law reform Professional Fellow at the University of Melbourne. On leaving the Commission, Professor Tilbury was appointed the Kerry Holdings Professor in Private Law at the University of Hong Kong.

#### ***Emeritus Professor Hilary Astor (March 2010- present)***

Professor Astor commenced as full-time Commissioner in March 2010. She was previously a part-time Commissioner from 1999-2006. Professor Astor joined the Faculty of Law at the University of Sydney in 1986 and most recently held the position of Professor of Dispute Resolution. Her areas of interest are dispute resolution, especially mediation, and family law. She is the co-author, with Professor Christine Chinkin, of *Dispute Resolution in Australia* (2nd edition, Butterworths, Sydney, 2002). She was the inaugural Chairperson of the National Alternative Dispute Resolution Advisory Council and is currently a member of the Council of the Australasian Institute of Judicial Administration.

### Part-time Commissioners

#### ***Professor Jane Goodman-Delahunty (May 2002-present)***

Professor Goodman-Delahunty, who was appointed to the Commission in May 2002, is a professor in the Australian Graduate School of Policing at the Charles

Sturt University. She was previously Director of the Forensic Psychology Postgraduate Program at the University of New South Wales (2001-2009) and is also editor of *Psychology, Public Policy, & Law*, a Member of the NSW Administrative Decisions Tribunal Community Services Division, and a Mediator for the NSW Office of Fair Trading Mediation Services Unit.

***The Hon Justice David Hodgson AO (January 1994-December 2009)***

Justice Hodgson is currently a Judge of the NSW Court of Appeal (2001-current), having previously been Chief Judge in Equity of the NSW Supreme Court (1997-2001), and a Judge of the NSW Supreme Court since 1983.

***His Honour Judge Kevin O'Connor AM (March 2008-present)***

Judge O'Connor, who was appointed to the Commission in March 2008, has been President of the Administrative Decisions Tribunal of New South Wales since 1998 and a District Court Judge since 1998. He was previously Chair of the Fair Trading Tribunal, 1999-2001, of the Commercial Tribunal, 1997-1999, and of the Public Interest Advocacy Centre (PIAC), 1997-1998. He was also Federal Privacy Commissioner, 1989-1996.

***His Honour Judge Ken Taylor AM RFD (April 2008-June 2010)***

Judge Taylor is the NSW Privacy Commissioner (since 2008) and concurrently a Judge of the NSW District Court (since 1991). Judge Taylor has served as a Deputy Chairperson of the Medical Tribunal 1998-2010, and served as the Commissioner of the Health Care Complaints Commission (2004-2005). He was commissioned in the Naval Reserve in 1966, and served as a Deputy Judge Advocate General - Navy.

***The Hon Gregory James QC (January 1999-present)***

Mr James is currently the President of the Mental Health Review tribunal. A retired Supreme Court Judge and former leading criminal barrister, he was appointed to the Commission in January 1999, having previously been a part-time Commissioner in 1985-1989.

***The Hon Hal Sperling QC (January 2005 –present)***

Mr Sperling was a Judge of the Supreme Court, 1995-2004. He was previously a part-time Commissioner from 1981-1996 and a Deputy Chairperson of the Commission in 1996.

***The Hon David Hunt AO QC (July 2008- June 2010)***

Mr Hunt has a lengthy judicial career in NSW and in international tribunals. Mr Hunt was an Acting Judge of Appeal of the NSW Supreme Court (2005-2007) Chief Judge of the Common Law Division in the NSW Supreme Court (1991-1998) and a Judge of the NSW Supreme Court (1979-1991). He has also served as Judge of the Appeals Chambers of the Yugoslavia and Rwanda Tribunals (2001-2003), President Judge of UN International Criminal Tribunal for the former Yugoslavia

Trial Chamber II (2000-2001), and Judge of UN International Criminal Tribunal for the former Yugoslavia (1998-2000). Mr Hunt was also Royal Commissioner for the Inquiry into the Centenary House Lease (2004), and has served previously as a Part-time Commissioner of the NSW Law Reform Commission (1992-1999).

***Mr Timothy Game SC (July 2009-present)***

Mr Game was admitted to the NSW Bar in 1985 and was appointed Senior Counsel in 1996. He is a member of the NSW Bar Association's Criminal Law Committee. He is also a member of the Law Council of Australia's Anti-Money Laundering Working Group and Co-chair of the National Criminal Law Liaison Committee.

***The Hon Rod Howie QC (April 2010-present)***

The Hon Rod Howie was appointed to the Commission in April 2010. He recently retired as a Judge of the Supreme Court, having been appointed in 2000. Previously he held the positions as: Director of the Criminal Law Review Division of the Attorney General's Department, 1984-1987; Deputy Director of Public Prosecutions 1987-1993; Crown Advocate, 1993-1996 and District Court Judge 1996-2000. He has co-authored Butterworths Criminal Practice and Procedure in New South Wales and has been a major contributor to the section of Halsbury's Laws of Australia on Sentencing and Criminal Procedure.

## Staff

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### *The Staff of the Commission as at 30 June 2010*

Paul McKnight	Executive Director
Jenny Davis	Library Assistant ( <i>attached to the LRC from Library Services</i> )
Francesca Di Benedetto	Legal Officer
Ani Luzung	Legal Officer
Rebecca Kang	Legal Officer (long term leave)
Robyn Johansson	Legal Officer (long term leave)
Maree Marsden	Executive Assistant
Suzanna Mishhawi	Administrative Assistant
Bridget O'Keefe	Law Reform Project Officer
Abi Paramaguru	Law Reform Project Officer
Terry Stewart	Publications Officer (long term leave)
Joseph Waugh	Legal Officer
Anna Williams	Librarian

### **Staff movements during the year**

Deborah Sharp, who held the position of Acting Executive Director from the beginning of 2009, left the Commission in October 2009. Paul McKnight joined the Commission as Executive Director in January 2010.

The Commission was pleased to welcome Abi Paramaguru, Bridget O'Keefe, and Maree Marsden to the staff.

The Commission records its thanks to the following staff who departed during the year for their substantial contribution in many cases over a long period of time: Catherine Gray, Donna Hayward, Judy Maynard, Alison Merridrew, Sharminie Niles, and Wendy Stokoe.

The Commission also records its thanks to Lisa Alonso Love and to the Department of Human Services for their assistance with the Family Violence reference.



## Student Placements

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The work of the Commission is greatly assisted by student interns who work at the Commission principally as a means of furthering their education, through University placements, and through the Commissions own program during the long summer vacation.

Student interns contribute directly to references and have made significant contribution to Commission research and writing, including our publications.

The following students had placements at the Commission in 2009-2010:

<b>Name</b>	<b>University</b>	<b>Period</b>	<b>References</b>
Alicia Back	UTS	In term 2009	People with cognitive and mental health impairments in the criminal justice system, Special research (Human rights)
Liam Boyle	UTS	Summer 09/10	Privacy
Megan Caristo	Sydney	Summer 09/10	Privacy
Emily Cukalevski	Wollongong	Summer 09/10	People with cognitive and mental health impairments in the criminal justice system, Complicity.
Yarran Hominh	Sydney	Summer 09/10	Privacy
Bella Khabbaz	UNSW	In term 2009	Family Violence
Alice Lam	Sydney	Summer 09/10	Privacy
Fiona Lam	UTS	Summer 09/10	Penalty notices, Family violence
Joshua O'Rahilly-Hadley	UNSW	In Term 2009	Special research (Consultation projects)
Steven Ren	Sydney	Summer 09/10	Jury Directions, Penalty notices
Richard Sawyer	Sydney	Summer 09/10	Complicity
Simon Ward	UNSW	In Term 2010	Conspiracy, Special Research (Law Reform processes)

## Presentations, Papers and Publications

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### *The Hon James Wood AO QC*

- Children Caught in Conflict Conference, Halifax, Canada, August 2009.
- “An Overview of the Human Rights Protections in the Australian Criminal Justice System”, Vietnam-Australia Human Rights Technical Co-Operation Program Human Rights In Criminal Justice Seminars, March 2010.

### *Professor Michael Tilbury*

- “Privacy Law Reform and the Media”, Centre for Media and Communications Law, the University of Melbourne, Sydney, 8 September 2009.
- “Privacy Law Reforms”, Administrative Decisions Tribunal, Annual Conference, Sydney, 5 November 2009.
- “Some Enforcement Issues in Australian Privacy Law and Its Reform”, Symposium on the Review of the Personal Data (Privacy) Ordinance, Law and Technology Centre, University of Hong Kong, 16 November 2009.
- “Remedies for Breach of Confidence in Privacy Contexts”, Workshop on the Future of Breach of Confidence, Centre for Media and Communications Law, the University of Melbourne, Melbourne, 2 December 2009.

### *Professor Hilary Astor*

- Presentation to the National Alternative Dispute Resolution Advisory Committee on Family Violence, 20 May 2010.
- “Family Violence and Family Dispute Resolution” Australian Dispute Resolution Association Seminar, Sydney, 27 May 2010.
- “Reforming Law on Violence: Implications for Family Dispute Resolution” Australian and New Zealand Association of Psychiatry, Psychology and Law, Sydney 28 June 2010.

### *Alison Merridew*

- “People with cognitive and mental health impairments in the criminal justice system”, Australian Community Services Organisations (ACSO) Disability and Justice conference, Melbourne, 15-17 July 2009.

### *Abi Paramaguru*

- Presentations to the NSW FOI/Privacy Practitioners' Network on 11 November 2009 and 18 May 2010.
- Presentation to the NSW Public Guardian on people with a mental health and cognitive impairment in the criminal justice system, 16 June 2010.

- Presentation to the Public interest Advocacy Centre, Mental Health in Prisons Network on people with a mental health and cognitive impairment in the criminal justice system, 25 June 2010.

***Assistance to Overseas Delegations/Agencies***

- Korean delegation re: regulation of the legal profession: *Prof Kuk-Woon Lee, Handong University; Prof Do-Hyun Kim, Dongguk University; Prof Jong-Cheol Kim, Yonsei University.*
- Iraqi Human Rights delegation AusAid-funded Human Rights Training Program, Thursday, 18 February 2010 – *presentation by the Hon James Wood, AO QC.*