



New South Wales  
Law Reform Commission

**2015-16**

**Annual Report**

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## Annual Report 2015-2016

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## The year in review

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The NSW Law Reform Commission has now been operating for around 50 years, and has developed an excellent reputation for delivering thorough research, detailed analysis, and high quality policy advice to government. Having regard to this history, I was honoured to be appointed as Chairperson to the Commission in November 2015.

In stepping into the role, I recognise the importance of giving high quality advice to the government on issues of law reform. The Commission works to address and rectify inefficiencies and inequities in the law, as well as areas of the law that are not operating as intended. To this end, our services are essential to maintaining a safe and just place for the community of NSW.

My objective as Chairperson is to ensure that the Commission continues to provide independent, high quality and timely advice to the Attorney General.

This past year has been characterised by growth, change, and rejuvenation for the Commission as we pursue our work in legal policy development. As of July 2016, the Commission has three ongoing references into areas of guardianship law, insurance law, and alternative dispute resolution. In the coming year our major priorities will be to complete these references.

We will continue to build strong relationships with stakeholders and the community. Law reform is a process requiring that we hear from a broad range of voices so that our recommendations are informed by the experience of the community and stakeholders. I would like to take this opportunity to thank all of those who have provided us with their views and information – this is the most needed ingredient for law reform.

The terms of two Commissioners expired this year. I would like to record my appreciation for the Hon Justice Peter Johnson for his service as Deputy Chairperson and Commissioner over the past five years. Justice Johnson made significant contributions to the Commission, which included his work on important references relating to sentencing, criminal appeals, and encouraging appropriate early guilty pleas.

I would also like to record my appreciation for the long service of the Hon Harold Sperling QC. Hal Sperling was a member of the Commission in 1982-1996 and 2005-2015, and was Deputy Chairperson in 1996. During a total span of almost 25 years, Hal Sperling contributed to an array of references, including accident compensation, limitations of actions for personal injury claims, bail and parole.

Two new Commissioners were appointed during the financial year. Supreme Court judge, the Hon Justice Paul Brereton AM, RFD has been appointed Deputy Chairperson, while the CEO of the NSW Council of Social Service, Tracy Howe, has been appointed Commissioner. Both serve on a part time basis.

Justice Brereton was a barrister from 1987 to 2005 when he was appointed as a Supreme Court judge. Tracy Howe has previously worked as the CEO of Domestic Violence NSW and at the DVNSW Domestic Violence Service.

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 a productive and successful year.

Alan Cameron

**Chairperson**

## NSW Law 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). 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 2016, 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 2015-16

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

Measure	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016 Target	2015-2016 Actual	2016-2017 Target
Number of consultation papers and reports published	14	14	10	11	3	3	2	10
Number of consultation events/meetings held	73	37	36	38	13	20	10	20
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	71%	100%	75%	50%	50%	75%	66%	75%
Law Reform Commission mentions in court decisions	17	23	15	22	35	20	21	20
Number of legislative amendments based on LRC reports	1	0	4	2	0	4	1	4
Email subscribers	-	-	107	204	265	350	359	500
Twitter followers	-	-	113	366	555	800	1070	1400

## Completed references

We did not complete any references in 2015-16.

## Engagement

On 13 August 2015, Senior Policy Officer, Joseph Waugh, attended Tranby Aboriginal College and spoke to the students of Legal Advocacy Diploma course about the process of law reform.

On 24 May 2016, staff members attended the Sydney University Law Society Publicly Interested Careers Fair. The event allowed us to meet with current law students at Sydney University and share knowledge about the work that we undertake at the Commission. 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.

In 2015-16 we 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.

We also produce a periodic email newsletter that has seen a steady growth in distribution in 2015-16. 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.

In 2015-16 we continued to build on our community engagement processes and develop new ways of interacting with the community through technology. For example, for our review of the *Guardianship Act 1987*, we are using online surveys as an additional way for community members to share their views about the issues the review raises, and making short videos that we publish on our website, which provide an overview of the review and how to contribute.

## Conferences

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On 2-4 March 2016, the Chairperson and Secretariat staff attended the Australasian Law Reform Agencies Conference in Melbourne hosted by the Victorian Law Reform Commission. Both Australian and international law reform bodies were represented, including the Solomon Islands Law Reform Commission, the Kenya Law Reform Commission, the New Zealand Law Commission, the Papua New Guinea Law Reform Commission and the Samoa Law Reform Commission.

The theme of the 2016 conference was 'Law reform – survival and growth'. Sessions included talks on the challenges of demonstrating value and producing high quality work with limited resources. Our Chairperson, Alan Cameron AO, who had only recently been appointed to the role, delivered a presentation on his initial impressions of the law reform environment. Most valuable was the opportunity the conference provided for Secretariat staff to make connections with other attendees and share ideas and approaches, as well as their passion for law reform.

## Priorities for 2016-17

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We have three ongoing references, which are:

- review of the *Guardianship Act 1987* (NSW)
- review of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), and
- statutory provisions for alternative dispute resolution.

## 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.

To help us identify issues and concerns relevant to the review, we invited preliminary 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. Preliminary submissions closed in March 2016. We received 54 written submissions, indicating the significant level of engagement within the community on the topic of guardianship law.

Additionally, we conducted 10 preliminary consultations with the following stakeholders:

- NSW Trustee and Guardian
- NSW Public Guardian
- Rodney Lewis
- NSW Civil and Administrative Tribunal
- Law Society of NSW, Elder Law and Succession Committee
- Australian Law Reform Commission
- Nick O'Neill (President of the NSW Guardianship Tribunal from 1994 – 2004)
- Roger West (President of the NSW Guardianship Tribunal from 1989 – 1994)
- Carers Advisory Council
- Consultative Forum of the Guardianship Division of NCAT

On 30 June 2016 we released a Background Paper that provides an overview of guardianship law in NSW, describes the changing landscape in which the laws operate, and outlines the approach we intend to take in conducting our review. The Background

Paper is the first in a series of papers that we will be releasing on various issues relating to guardianship law in NSW.

Like all of the papers we will be producing as a part of the review, the Background Paper is 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.

On 30 June 2016, we released a survey that corresponds with the Background Paper. The survey is a means for members of the community to express their opinions about guardianship arrangements in NSW without making a formal submission.

## Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946

On 22 February 2016 the Attorney General asked us to review s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). Section 6 deals with a situation where there is:

- a plaintiff
- a defendant who is insured against liability to the plaintiff (“the insured”), and
- the defendant’s insurer – and the plaintiff is unable to recover damages or compensation from the defendant. The section provides the plaintiff with an avenue to recover the proceeds of the insurance directly from the defendant’s insurer.

This provision provides a mechanism enabling third parties to assert and enforce a statutory charge over insurance moneys payable to an insured person in circumstances where the insured’s solvency is in question.

We have been asked to consider whether the section should be repealed or amended, and in this context consider whether the policy objectives remain valid and, if so, whether those objectives could be better achieved.

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

1. all relevant issues relating to the uncertain practical application of s 6
2. 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 overseas
3. the impact of any repeal of s 6 on protections for third party claimants seeking to recover the proceeds of a liability insurance policy to which they are entitled
4. whether any repeal or amendment of s 6 should apply to contracts already in force, and
5. any other matters we consider relevant to the terms of reference.

On 19 April 2016, we released a Consultation Paper (CP 17) and invited submissions. The Consultation Paper provided an overview of the law relating to s 6 and set out a number of options for reform. Submissions closed in May 2015 and we received 13 written submissions.

## 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 are to review the statutory provisions 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 have been 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 will not be 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. We are scheduled to resume working on this reference in 2016-2017.

## Implementation and Government responses

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

- *Privacy and Personal Information Protection Amendment (Exemptions Consolidation) 2015* (NSW) implements recommendation 7.9 from Report 127: *Protecting privacy in New South Wales*.

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

- Report 140: *Criminal appeals*
- Report 139: *Sentencing*
- 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

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### 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 2016:

Erin Gough	Policy Manager
Joseph Waugh PSM	Senior Policy Officer
James Hume	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	Date
Elise Rutherford	Monash	Guardianship	1 June 2016 – 26 June 2016



**Justice**  
Law Reform  
Commission

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