

# Annual Report 2018-2019

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New South Wales  
**Law Reform Commission**



## Annual Report 2018-2019

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## The year in review

This has been a year of continuing steady work, following a year in which three references were completed by delivery of reports to the Attorney General. Two references were underway at the beginning of the year, and led to publication of consultation papers. A new reference was added early in 2019, and work is now underway on that.

In March 2018, the Commission received a reference to review the laws around access to digital assets upon death or incapacity. The Hon Dr Annabelle Bennett AC SC was appointed to the Commission to lead that reference. A consultation paper was published in October 2018, and workshops held with stakeholders. Draft proposals have been published and are now being refined with a view to a report by the end of calendar 2019.

The Hon Justice Carolyn Simpson AO is leading the reference on consent in relation to sexual offences received in May 2018. We received numerous preliminary submissions following the announcement of the reference and further submissions following publication of a consultation paper also in October 2018. Again, the report is expected to be completed this calendar year.

The Attorney sent us a new reference in February 2019 with respect to open justice, which involves both the regime concerning suppression orders around court proceedings, and access to information held on court files. Preliminary submissions were sought by the end of May 2019, and we look forward to progressing this review in the coming year. The Chairperson is leading this review.

As always, I am grateful for the energy, service and expertise displayed by the Commission staff. I take this opportunity as well to acknowledge the contribution of our Deputy Chair, the Hon Justice Paul Brereton AM RFD, newly appointed to the Court of Appeal, and to congratulate Dr Bennett on her appointment as a Companion of the Order of Australia, and Justice Simpson on her appointment as an Officer in the Order.

**Alan Cameron AO**

**Chairperson**

## NSW Law Reform Commission: profile

### **Roles and responsibilities**

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

### **Services and activities**

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

In undertaking this work, we:

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

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

## Commissioners

As at 30 June 2019, the Commission comprised a chairperson, a deputy chairperson and two commissioners.



### **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 is also a company director.



### **Deputy Chair Hon Justice Paul Brereton AM, RFD**

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



### **Commissioner Acting Justice Carolyn Simpson AO**

Justice Simpson was appointed as a part-time Commissioner of the NSW Law Reform Commission in May 2018. Justice Simpson served on the NSW Court of Appeal from 2015 to 2018, having been a Supreme Court judge since 1994. In 1999, she was one of the three judges who formed the first all-female bench to sit in an Australian court. Before this, Justice Simpson was appointed Queen's Counsel in 1989 and was admitted as a barrister in 1976. She was appointed a Member of the Order of Australia (General Division) in 2019.



**Commissioner Dr Annabelle Bennett AC, SC**

Dr Bennett was appointed as a part-time Commissioner of the NSW Law Reform Commission in August 2018. She is currently practising as a Senior Counsel specialising in advice and alternative dispute resolution and has served as part-time President of the NSW Anti-Discrimination Board since 2017. She served as a Judge of the Federal Court from 2003-2016, having been appointed as Senior Counsel in 1994. She has also served as President of the Copyright Tribunal of Australia and as a Deputy President of the Administrative Appeals Tribunal. She is also currently Chair of the World Intellectual Property Organisation Advisory Group of Judges, an Arbitrator with the Court of Arbitration for Sport, and Chancellor of Bond University. Dr Bennett was appointed a Companion of the Order of Australia (General Division) in 2019.

## Performance for 2018-19

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

Measure	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019 Target	2018-2019 Actual	2019-2020 Target
Number of consultation papers and reports published	11	3	2	9	6	5	2	4
Number of consultation events/meetings held	38	13	10	23	13	15	23	15
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	50%	50%	66%	75%	66%	75%	66%	100%
Law Reform Commission mentions in court decisions	22	35	21	32	32	25	28	25
Number of legislative amendments based on LRC reports	2	0	1	3	4	4	3	4
Email subscribers	204	265	359	475	539	600	504	600
Twitter followers	366	555	1070	1630	2090	2400	2367 <sup>1</sup>	2500
Facebook followers	-	-	-	1035	1176	1500	1574	1700

## Completed references

We did not complete any references in 2018-2019.

1. As at 30 July 2019.



## Engagement

In 2018–19, we continued to build on our community engagement processes.

We increased our social media engagement through Facebook and Twitter, where we regularly post about our projects and other law reform news. Our number of followers on both sites is growing consistently.

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

In 2018–19 we invited members of the community to share their views about two of our reviews through online surveys. This provided an opportunity for the public to engage with our reviews outside of the more formal written submission process.

We conducted two surveys on the topic of accessing a person’s digital assets upon their death or incapacity: one for general members of the public, which received 480 responses, and one for legal practitioners, which received 49 responses. We also created a survey about consent in relation to sexual offences, which received widespread engagement, with 1,851 responses.

On 9 April 2019, Secretariat staff attended the University of Notre Dame Law Society Careers Fair. This provided an opportunity to meet with current law students and share knowledge about the work that we undertake. It also enabled us to promote our Winter Internship Program.

## Conferences

During 2018-2019, our Chairperson spoke about the work of the Commission at a number of meetings and conferences, including:

- in the Toongabbie Legal Centre Seminar Series (13 October 2018)
- at the Blue Mountains Law Society Succession Conference (8 September 2018), and
- at the Australian Guardianship and Administration Council 2019 National Conference (14-15 March 2019).

During 2018-2019, Secretariat staff attended a number of events relevant to our ongoing references. To assist with our review of the law of consent in relation to sexual offences, they attended events including:

- the panel “Sexual Assault and Consent: Narratives, Politics and Law Reform” hosted by Sydney Law School (8 August 2018)
- the panel on NSW sexual consent laws hosted by Sydney University Law Society (9 April 2019)

- the seminar “Rape Law Reform, Policies and Practice: Perspectives from Criminal Barristers in England and Wales” hosted by the UNSW Centre for Crime, Law and Justice (10 April 2019), and
- the talk “Bri Lee: Eggshell Skull” hosted by the Sydney Writers’ Festival (4 May 2019).

To keep informed of recent developments in crime research, Secretariat staff attended the Applied Research in Crime and Justice Conference on 13-14 February 2019. The conference was hosted by the NSW Bureau of Crime Statistics and Research, and Griffith Criminology Institute.

In relation to our review of laws affecting access to digital assets upon death or incapacity, Secretariat staff attended events including:

- the Human Rights and Technology Conference hosted by the Australian Human Rights Commission (24 July 2018), and
- the International Consultation on Big Data-Open Data hosted by the UNSW Australian Human Rights Institute on behalf of the UN Special Rapporteur on the right to privacy (26 July 2018).

Our Chairperson attended the panel “He Who Must Not Be Named: Suppression Law” hosted by the Sydney Writers’ Festival, on 3 May 2019, a topic relevant to our review of the operation of suppression and non-publication orders in NSW.

## Priorities for 2019-20

We have three ongoing references:

- Access to Digital Assets Upon Death or Incapacity
- Consent in Relation to Sexual Offences, and
- Court and Tribunal Information: Access, Disclosure and Publication.

### **Access to digital assets upon death or incapacity**

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

In undertaking this review, our terms of reference require us to consider:

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

To help us identify issues and concerns relevant to the review, we invited preliminary submissions on our terms of reference. We also published some background information to our review on our website. We received 17 preliminary submissions.

In August 2018, we released a consultation paper that provided an overview of the laws affecting access to digital assets in NSW and other jurisdictions, as well as an overview of current practices being used to overcome the legal impediments to access. The paper sought the public’s views about what changes, if any, should be made to laws affecting access to digital assets in NSW. We received 11 submissions in response.

In December 2018, we released an online survey seeking people’s views about what should happen to a person’s digital assets if they die or can no longer manage them. The survey also asked people about what arrangements they currently have, if any, for the management of their own digital assets upon death or incapacity. By July 2019, the survey had received 480 responses.

In April 2019, we released an online survey seeking the views of lawyers who draft wills, enduring guardianship arrangements or enduring power of attorney arrangements. The survey asked them about how, if at all, they draft these legal documents to arrange for the management of a person’s digital assets upon death or incapacity. This survey received 49 responses.

Between November 2018 and May 2019, we conducted five consultation meetings, including two large roundtables, during which we sought the views of succession and probate lawyers, academics, social media companies, government officials and policy organisations on the key issues.

We expect to be able to provide a report with recommendations for reform to the Attorney General by the end of 2019.

### Consent in relation to sexual offences

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

- whether s 61HA should be amended, including how the section could be simplified or modernised
- all relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system
- sexual assault research and expert opinion, and
- the impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other states and territories of Australia, and internationally, on the content and application of s 61HA.

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

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

We also released an online survey, in October 2018, which invited public comment on some key features of the law of consent. By July 2019, we had received around 1,850 responses.

Between February 2019 and June 2019, we conducted 18 consultation meetings, including with victims' advocates, prosecutors, defence lawyers, community legal centres, judges, police, academics, support services and health workers. We travelled interstate to consult with Tasmanian legal practitioners and Victorian County Court judges about the consent laws in those jurisdictions.

We hope to release draft proposals for public comment in September 2019, and complete a report that includes recommendations for reform by the end of 2019.

### Court and tribunal information: access, disclosure and publication.

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

- Any NSW legislation that affects access to, and disclosure and publication of, court and tribunal information, including:
  - *Court Suppression and Non-Publication Orders Act 2010* (NSW);

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

To help us identify issues and concerns relevant to the review, we invited preliminary submissions on our terms of reference. We received 44 preliminary submissions.

Preliminary research into the various review topics has begun. We expect to release consultation documents on the key issues by the end of June 2020.

## Implementation and government responses

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

- The *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2018* implements our recommendations in *Report 95 – The Right to Silence*, that defence lawyers in indictable criminal matters must disclose, prior to the trial: any expert reports that they intend to rely on, whether they intend to challenge the continuity of custody of a

prosecution exhibit, whether they will seek to amend the indictment or make an application for separate trials, and whether they will seek edits to audio or video evidence the prosecutor intends to rely on.

- *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018* implements our recommendations in *Report 138 – People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* that a forensic patient’s limiting term must be paused if they are unlawfully absent from custody, and that forensic materials must be retained if taken from a person found unfit at a special hearing or not guilty by reason of mental illness.
- *Ageing and Disability Commissioner Act 2019* partially implements one of our recommendations in *Report 145 – Review of the Guardianship Act 1987*. We recommended that there should be a new independent statutory office called the Public Advocate, whose function would be to, among other things, advocate for people in need of decision-making assistance, provide decision-making advice and assistance to people who do not have access to formal decision-making support, and investigate cases of potential abuse, neglect and exploitation. The Act establishes a new independent statutory office, called the Ageing and Disability Commissioner. The new Commissioner’s role is more limited than the proposed Public Advocate’s. Its focus is the investigation of cases of potential abuse, neglect and exploitation.

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

- Report 146: *Statutory Provisions on Dispute Resolution*
- Report 144: *Laws Relating to Beneficiaries of Trusts*
- Report 137: *Security for Costs and Associated Orders*
- Report 136: *Jury Directions in Criminal Trials*
- Report 132: *Penalty Notices* (some aspects were implemented as a result of consultations during the preparation of the Report.)
- Report 129: *Complicity*
- Report 124: *Uniform Succession Laws: Administration of Estates of Deceased Persons* (All other aspects of the uniform succession law project have been legislated.)
- Report 121: *Emergency Medical Care and the Restricted Right to Practise.*

## People

### Staff

The Law Reform and Sentencing Council Secretariat, which is part of the Law Reform and Legal Services Division of the Department of Communities and Justice, supports the work of the NSW Law Reform Commission. The following people were staff of the Law Reform and Sentencing Council Secretariat as at 30 June 2019:

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

Mr Dominic Keenan worked part time as a Graduate Policy Officer from 4 September 2018 to 9 November 2018.

### Internships

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

Name	University	Dates
James Hall	University of Sydney	2 July – 27 July 2018
Katharine Tang	University of NSW	2 July – 27 July 2018
Dominic Keenan	University of Sydney	5 July – 21 August 2018