

Annual Report 2019-2020

New South Wales
Law Reform Commission



Annual Report 2019-2020

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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 0816 4525 (Annual Report)

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The year in review

This has been a year of continuing steady work on three references received from the Attorney General in previous years.

In March 2018, the Commission had 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, workshops held with stakeholders, and draft proposals published. The Report was tabled in Parliament in March 2020.

The Hon Justice Carolyn Simpson AO is leading the reference on consent in relation to sexual offences received in May 2018. We received numerous submissions, held workshops and consultations in Sydney, regional NSW and interstate, and published draft proposals late in 2019. The Report is expected to be completed shortly.

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 making progress on 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, Dr Bennett, whose term on the Commission expired in August 2020, and Justice Simpson for her extraordinary contribution to the consent reference.

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 2020, the Commission comprised a chairperson, a deputy chairperson and two commissioners.



Chairperson Alan Cameron AO FAAL FAICD*Life*

Alan Cameron was appointed Chairperson of the NSW Law Reform Commission on 26 November 2015. Alan has occupied a range of senior roles in both the private and public sectors, including Chairman of the Australian Securities and Investments Commission from 1993 to 2000, Commonwealth and Defence Force Ombudsman, Principal Solicitor of the NSW Aboriginal Legal Service in the mid-1970s and first national managing partner of Blake Dawson Waldron (now known as Ashurst Australia) from 1989 to 1991. 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 an Officer 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 2019-20

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

Measure	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020 Target	2019-2020 Actual	2020-2021 Target
Number of consultation papers and reports published	3	2	9	6	2	4	2	2
Number of consultation events/meetings held	13	10	23	13	23	15	10	15
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	50%	66%	75%	66%	66%	100%	66%	100%
Law Reform Commission mentions in court decisions	35	21	32	32	28	25	23	25
Number of legislative amendments based on LRC reports	0	1	3	4	3	4	5	4
Email subscribers	265	359	475	539	504	600	1101	1200
Twitter followers	555	1070	1630	2090	2367	2500	2526	2700
Facebook followers	-	-	1035	1176	1574	1700	1946	2300

Completed references

We completed one reference in 2019–2020: Access to digital assets and records upon death or incapacity.

Access to digital assets and records upon death or incapacity

On 26 March 2018, the Attorney General asked us to investigate the legal problems that can arise in managing the digital assets of people who have died or become incapacitated. “Digital assets” has no standard legal meaning but may include such digital content as digital photographs and videos, emails, online bank accounts, cryptocurrency, domain names, blogs, social media profiles and accounts, and online gaming accounts. They 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 required 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).

During the course of our review, it became clear that the term “digital assets” did not accurately reflect the breadth of the problem. In other contexts, “asset” is understood to mean “property”. However, access issues related to a broader category of digital content, including items that the user has created, or that relate to the user, but that the user does not necessarily own as their property. For this reason, we decided to employ the term “digital records” in our final report.

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 12 submissions in response.

Between December 2018 and October 2019, we carried out two online surveys.

One survey, *What should happen to your social media when you die?* was conducted among members of the public. We asked people about their use of social media and other online accounts, and what they would like to happen to their accounts if something happened to them. We received 488 responses to this survey.

We conducted a second survey, *Access to Digital Assets and Records after Death or Incapacity*, among NSW legal practitioners. We asked lawyers who provide advice on estate planning and administration, and/or guardianship and power of attorney arrangements, about their experiences in dealing with digital assets and records in these contexts. We received 74 responses.

Between November 2018 and July 2019, we conducted seven consultations, including a large roundtable, during which we sought the views of succession and probate lawyers, academics, social media companies, government officials and policy organisations on the key issues.

In response to the feedback we received, we released draft proposals to interested stakeholders. The additional comments helped us formulate our recommendations for reform.

On 23 December 2019, we transmitted our final report to the Attorney General. We recommended a new statutory scheme for NSW that allows access to a deceased or incapacitated person's digital records in limited circumstances.

Such circumstances include when a deceased or incapacitated person has nominated someone to manage their digital records and, in the absence of a nomination, when access is necessary to administer their estate or manage their affairs.

The recommended scheme would allow an "authorised person" to access and deal with particular digital records of a deceased or incapacitated person. A statutory hierarchy would determine who the authorised person is in most circumstances.

We intend the hierarchy to give effect to the wishes of the deceased or incapacitated person where possible. For example, if a deceased user nominated a person in a will to manage their digital records, that person would generally be the authorised person ahead of anyone else.

The authorised person's right to access digital records would be subject to any limitations set out in the instrument appointing the person. In the absence of any

appointment in an instrument, the scheme would authorise access only for the purpose of administering the user's estate or managing their affairs.

The authorised person's right would be subject to applicable fiduciary duties. The scheme would also forbid them from improperly disclosing information they have obtained in accessing the digital records.

Custodians would be obliged to grant access within 30 days to a person who is able to prove their authority. The scheme would protect from liability custodians who grant access in good faith and in compliance with the scheme.

The scheme seeks to balance the wishes of the deceased or incapacitated person, the needs of estate administrators and managers to fulfil their obligations, privacy and security of information concerns, and the commercial imperatives of the digital landscape.

The report was tabled in Parliament on 5 March 2020.

Engagement

In 2019–20, 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. Subscribers to the newsletter substantially increased during the reporting period.

We attended and participated in a number of conferences where the subjects discussed were relevant to our active references.

Our Chairperson spoke about the work of the Commission at the following events:

- The Law Society of NSW's Specialist Accreditation Conference 2019 (Wills & Estates) on "The inheritance of digital assets" (10 August 2019)
- A meeting with members of the Law Society of China held at the Judicial Commission of New South Wales, about the work of the Law Reform Commission (17 September 2019)
- A meeting with a judicial delegation from Taiwan held at the Judicial Commission of New South Wales, about the work of the Law Reform Commission (10 October 2019), and
- A video meeting with the Fort St High School HSC Legal studies class, about the work of the Law Reform Commission (6 April 2020).

Mr Cameron also attended the Australian Law Reform Commission's "The Future of Law Reform" Report Launch at the Commonwealth Law Courts building in Brisbane on 2 December 2019.

Policy Manager Erin Gough spoke about our review of the law of consent in relation to sexual offences at the Domestic Violence NSW Conference: Imagining a World Without Gendered Violence, NSW Teachers' Federation (6 September 2019).

Senior Policy Officer Jackie Hartley spoke about our review of the law of consent in relation to sexual offences at the Macquarie University Research Centre for Agency, Values and Ethics: "Sex and Consent in the Age of #MeToo" workshop, Macquarie University city campus (7 November 2019).

During 2019-2020, Secretariat staff attended a number of events relevant to our ongoing references, including:

- Women's Legal Service NSW event, "Legal responses to intimate partner violence: unintended consequences", Colin Biggers & Paisley offices (21 August 2019)
- The BAD Sydney Crime Writers Festival: "Who's on trial here? Justice and prosecutions for sexual assault", State Library of NSW (6 September 2019), and
- Sydney University Law Society's panel on "Rape, bad sex and everything in-between", University of Sydney (25 September 2019).

Priorities for 2020-21

We have two ongoing references:

- Consent in Relation to Sexual Offences, and
- Court and Tribunal Information: Access, Disclosure and Publication.

Consent in relation to sexual offences

On 3 May 2018, the Attorney General asked us to review s 61HA of the *Crimes Act 1900* (NSW) (now s 61HE), which deals with consent in relation to sexual offences. In undertaking this review, our terms of reference 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 conducted an online survey, from October 2018 to October 2019, which invited public comment on some key features of the law of consent. In total, 3858 people accessed the survey. About half of the participants (1904 people) completed at least one substantive question. Just under a third of participants (1078 people) completed all the substantive questions.

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

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

We expect to release our report with final recommendations in late 2020.

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, and
- 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 2020.

Implementation and government responses

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

- *Ageing and Disability Commissioner Act 2019* implements Recommendation 13.1 of **Report 145 - Review of the Guardianship Act 1987** for a new statutory office, the Public Advocate, to carry out advocacy and investigative functions by establishing a statutory office, the Ageing and Disability Commissioner
- *Privacy and Personal Information Protection Amendment (State Owned Corporations) Act 2019* implements Recommendation 2.1 of **Report 127 - Protecting**

Privacy in NSW by including State owned corporations in the definition of “public sector agency” in the *Privacy and Personal Information Protection Act 1998* (NSW)

- *Justice Legislation Amendment Act (No 2) 2019* implements Recommendation 2.1 of **Report 144 - Laws relating to the beneficiaries of trusts** (2018) by amending the law relating to the personal liability of beneficiaries of trusts, and
- *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* implements parts of **Report 135 – People with cognitive and mental health impairments in the criminal justice system: Diversion** and **Report 138 – People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences**.

1.1 As at 30 June 2020, implementation action or responses are outstanding on the following recent reports:

- Report 147 – *Access to digital records upon death or incapacity*
- Report 146 – *Statutory provisions on dispute resolution*
- 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 2020:

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

Internships

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

Name	Dates
Henry Robinson	16 July – 23 August 2019
Hwei-See Kay	22 July – 19 August 2019
Alexander Roussos	23 July – 4 September 2019

