

Annual Report 2021–2022

New South Wales
Law Reform Commission



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The year in review

It is my pleasure to present the Law Reform Commission's Annual Report for 2021–2022.

This is my first annual report as Chairperson of the Commission. I would like to begin by acknowledging the enormous contribution of my predecessor, Alan Cameron AO, who concluded his term on 31 May 2022.

First appointed in 2015, Alan led the Commission as it completed reviews on major issues including open justice, the law of consent relating to sexual offences, access to digital records upon death or incapacity, dispute resolution, guardianship, beneficiaries of trusts and third party claims on insurance money. The Commission is grateful for the leadership, expertise and wisdom that Alan displayed as Chairperson.

I would also like to acknowledge the outstanding work done by the Law Reform Commission and Sentencing Council Secretariat in connection with the references which are summarised in the body of the report. For the Commission to provide proper service to government, it needs staff who are both skilled and highly motivated. The Commission is fortunate to have staff which more than meet these criteria.

The highlight of the reporting period for the Commission was the completion of *Report 149 – Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* on 27 May 2022. With over 150 recommendations for reform, the report is the product of extensive research, legal analysis and consultations conducted by Commissioners and the Secretariat. I commend them for this excellent report.

I look forward to continuing the Commission's work over the next 12 months.



The Hon Tom Bathurst AC KC

Chairperson

The NSW Law Reform Commission

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 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 assessing 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 2022, the Commission comprised a Chairperson, Deputy Chairperson and part-time Commissioner.



Chairperson Hon Tom Bathurst AC KC

Tom Bathurst began his term as Chairperson of the NSW Law Reform Commission on 1 June 2022. Tom served as Chief Justice of New South Wales from 1 June 2011 until his retirement on 5 March 2022. He was called to the bar in 1977 and appointed Queen's Counsel in 1987. He was a member of the Australian Government Takeovers, Mergers and Corporate Reconstructions Panel between 2006 and 2011. He served as President of the Australian Bar Association between 2008 and 2010 and as President of the NSW Bar Association from 2009 to 2011. He was made a Companion of the Order of Australia in 2014 and was elected an Honorary Bencher of the Middle Temple in 2016. In 2019 Tom received an Honorary Doctor of Laws from the University of Sydney. From 2015 to 2022 he was Chair of the Judicial Section of LAWASIA. Tom is also a Member of the Australian Academy of Law.



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 a solicitor from 1982 to 1987, and then a barrister until 2005, when he was appointed a judge of the Supreme Court. He was appointed a Judge of Appeal in 2017. He is also Deputy President of the Defence Force Discipline Appeals Tribunal, and an Assistant Inspector-General of the Australian Defence Force. 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 Hon Justice Anna Mitchelmore

Justice Mitchelmore was appointed as a part-time Commissioner of the NSW Law Reform Commission on 1 September 2021. Justice Mitchelmore was appointed to the NSW Court of Appeal in March 2022. She was admitted as a solicitor in 2000 and commenced at the private bar in 2006; she was appointed Senior Counsel in 2018, practising predominantly in the areas of administrative law, constitutional law, criminal law, and planning and environment law.

Performance for 2021 – 2022

Measure	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021 - 2022
Number of consultation papers and reports published	3	2	9	6	2	2	4	2
Number of consultation events/meetings held	13	10	23	13	23	10	37	13
Law Reform Commission mentions in court decisions	35	21	32	32	28	23	31	46
Number of legislative amendments based on LRC reports	0	1	3	4	3	5	0	1
Email subscribers	265	359	475	539	504	1101	1143	1067
Twitter followers	555	1070	1630	2090	2367	2526	2709	2888
Facebook followers	-	-	1035	1176	1574	1946	2608	2640

Completed references

The Commission completed one reference in 2021–2022.

Court and Tribunal Information: Access, Disclosure and Publication

The Commission transmitted *Report 149 – Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* to the Attorney General on 27 May 2022. The report was tabled in NSW Parliament on 12 July 2022.

The report made over 150 recommendations for reform to provide a more consistent approach to open justice in NSW. This included recommendations for a new Act setting out a legislative framework for access to records on the court file, and general powers to make orders.

Terms of reference

In February 2019, the Attorney General asked the Commission to review the operation of suppression and non-publication orders and the laws governing access to information held in NSW courts and tribunals. The terms of reference required consideration of:

- 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.

The review process

To help identify issues and concerns relevant to the review, the Commission invited preliminary submissions on the terms of reference. The Commission received 45 preliminary submissions.

Between October and November 2020, the Commission undertook 17 preliminary consultations with a range of people and agencies.

On 16 December 2020, the Commission released a consultation paper for public comment. Submissions closed on 19 February 2021. The Commission received 33 submissions on this paper.

Between January and August 2021, the Commission conducted 21 consultations with a wide range of people and groups. These included judicial officers, court and tribunal administrative staff, legal practitioners, government representatives, journalists, community organisations and academics.

In March 2021, the Commission published an online survey to encourage people who otherwise might not participate in the law reform process to have their say about issues relating to open justice. There were 189 responses.

On 28 June 2021, the Commission published a proposals paper and invited public responses. The paper gave people the opportunity to consider the proposals for reform, as well as the appropriateness of existing provisions proposed to be retained. There were 29 submissions in response.

Between September and November 2021, the Commission consulted with members of the Supreme Court, the Land and Environment Court, the Drug Court, the Local Court, the Children’s Court, the NSW Civil and Administrative Tribunal, the Mental Health Review Tribunal, and the Courts, Tribunals and Service Delivery Division of the Department of Communities and Justice.

These consultations helped to resolve issues that had been identified with the draft proposals and assisted with the development of the final recommendations.

Implementation and government responses

The NSW Parliament passed the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) on 23 November 2021. The Amendment Act implemented recommendations from *Report 148 – Consent in Relation to Sexual Offences*.

As at 30 June 2022, implementation action or responses were outstanding on the following reports (completed within the last three years):

- *Report 149 – Open Justice: Court and Tribunal Information: Access, Disclosure and Publication*
- *Report 147 – Access to Digital Records upon Death or Incapacity*.

Participants at the November 2021 Meeting of Attorneys-General agreed that the work program priorities for 2022 would include an access scheme for digital records after death or incapacity.

Engagement

In 2021–2022, the impact of the COVID-19 pandemic limited the Commission’s community engagement activities.

The Commission continued its social media engagement through Facebook and Twitter, posting about projects and other news. The Commission also continued to send out a periodic email newsletter, with updates about its work.

The Chairperson and Secretariat staff had few opportunities to attend and present at events due to the COVID-19 pandemic. However:

- Anna Williams attended the ALLA (Australian Law Librarians Association) Conference, “Past Present Future”, which was conducted virtually due to COVID-19 restrictions on 23–24 September 2021.
- Emma Holloway attended an event hosted by Macquarie University Law School on “Alternative Pathways with a Law Degree” on 3 May 2022.

People

Staff

The Law Reform Commission and Sentencing Council Secretariat supports the Commission. The Secretariat is part of the Law Reform and Legal Services Division of the Department of Communities and Justice.

The following people worked within the Secretariat over the reporting period:

Ms Alexandra Sprouster	Policy Manager
Dr Jackie Hartley	Policy Manager (from April 2022)
Mr Joseph Waugh PSM	Senior Policy Officer
Ms Emma Holloway	Senior Policy Officer (until June 2022)
Ms Kathryn Birtwistle	Policy Officer (until April 2022)
Ms Arizona Hart	Policy Officer (until November 2021)
Ms Ya'el Frisch	Policy Officer (until December 2021)
Ms Aelish White	Policy Officer (from February 2022)
Ms Anna Williams	Research Support and Librarian

Internships

Student interns are engaged directly on references and make significant contributions to research and writing.

The student internship is a paid position. The internship program takes place during the winter vacation.

The following people were interns during the reporting period:

- Ms Nina Dillon Britton, University of Sydney
- Mr Benjamin Nicols, University of New South Wales
- Ms Isabella Satz, University of New South Wales
- Mr Alan Zheng, University of Sydney

