



The Minister Responsible for the Law Commission,  
Parliament Buildings,  
WELLINGTON.

**President**  
*Douglas White*

**Commissioners**  
*Donna Buckingham*  
*Belinda Clark QSO*  
*Helen McQueen*

## Briefing for the Incoming Minister – 6 November 2017

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### Functions, process and current work

1. The Law Commission is established by Parliament under the Law Commission Act 1985 as an independent law reform agency. Its primary statutory function is to keep the law of New Zealand under review in a systematic way.
2. Currently, the Commission does this in large part through law reform references it receives from the responsible Minister who, as required by a Cabinet Office Circular, consults Cabinet colleagues in selecting the Government's references to the Commission. The references the Commission receives may range in size from reviews of relatively narrowly focussed areas of the law such as strangulation, which was able to be completed within a year, to extensive reviews of general areas of the law such as the Commission's original reviews of evidence and trusts, and our current review of the Property (Relationships) Act 1976, which take several years to complete, especially when extensive consultation is warranted.
3. The Commission currently has five active references in its law reform programme. One is from Parliament: the second statutory review of the Evidence Act 2006, which must be completed by February 2019. The other four are from its previous Minister: reviews of the Property (Relationships) Act 1976, the Criminal Investigations (Bodily Samples) Act 1995, Trust Law Reform – Stage 2 (Statutory and Corporate Trustees), and Class Actions and Litigation Funding. A sixth Ministerial reference is currently on hold due to resourcing constraints: a review of the Declaratory Judgments Act 1908.

4. In addressing its law reform references, the Commission typically follows a process which involves scoping the project, settling terms of reference (in consultation with the Ministry of Justice and with the Minister's approval), in depth research of the relevant current law, appointing advisory groups of experts and interested parties, preparation of an issues paper, appropriate consultation and provision of a final report to the Minister with recommendations for reform. The Commission works closely with the Office of Parliamentary Counsel and, where appropriate, may include draft legislation in its report.
5. The Commission completed two reports in the 2016-2017 year: one relating to the reform of the law of contempt of court (with a draft Bill) and the other a joint report with the Ministry of Justice as required by Parliament reviewing the Search and Surveillance Act 2012. The previous Minister has tabled the Contempt of Court Report in Parliament and the Government's initial response to it was tabled on 17 August. The Search and Surveillance Act report has yet to be tabled in terms of s 357(3) of that Act.
6. Brief executive summaries are attached showing progress on the Commission's second Evidence Act review and the reviews of the Property (Relationships) Act and the Criminal Investigations (Bodily Samples) Act.
7. The reviews of Trust Law Reform (Stage 2) and Class Actions and Litigation Funding are new references received from the previous Minister in August this year. The Commission is in the process of scoping these projects and developing their terms of reference with the Ministry of Justice. Our preliminary view is that these two new references will take several years to complete.
8. Brief executive summaries are also attached showing progress on these two new references.
9. Once the Commission's reports are delivered to the Minister it is for the Government to decide whether the law reform recommendations in the reports should be implemented in whole or in part and for Parliament to enact any resulting legislation. Since 1985 the Commission has completed some 116 reports. It is understood that over time many of

the recommendations in those reports have been, or are in the process of being, implemented in whole or in part. The Commission is frequently called on by the Government to provide further advice in connection with the implementation of its reports.

10. The Commission has initiated discussions with officials in the Ministry of Justice and the Department of Prime Minister and Cabinet about improvements in the processes for keeping the law of New Zealand under systematic review. The Commission is hopeful these discussions will result in greater collaboration with other Ministries and Departments in the public sector and timely selection and evaluation of possible Commission law reform projects for consideration by the Government.
11. The Commission maintains close relationships with all those who have an interest in its law reform work, including its Minister, the Ministry of Justice, the Office of Parliamentary Counsel, the Judiciary, its Māori Liaison Committee, the Crown Law Office, the Law Societies, Te Hunga Rōia Māori o Aotearoa, the Universities, and other bodies such as community law centres.

#### **Compliance with the Crown Entities Act 2004**

12. In addition to its statutory law reform functions and responsibilities under its own Act, the Commission is an independent Crown entity under the Crown Entities Act 2004 and subject to the onerous reporting and monitoring obligations imposed by that legislation, which are disproportionate to the small size of the Commission and the unique nature of its work. This results in an imbalance between the productive and administrative staff employed by the Commission.
13. One of the significant obligations under the Crown Entities Act is the obligation on the Commission to assess its own performance. The Commission has decided this year to change the way in which it complies with this obligation. Instead of measuring its performance by reference to the implementation rate of its reports, which is outside its control, the Commission proposed to report on the timeliness of the completion of its issues papers and reports and to obtain feedback on the quality of those documents.

14. The Commission's new approach to its performance assessment was accepted by the previous Minister responsible for the Commission, Hon Amy Adams, in the Commission's Statement of Intent for 2017-2021 and Statement of Performance Expectations for 2017-2018. The previous Minister also proposed to assess whether the Commission's performance expectations have been met or exceeded on a 1-10 scale.
15. For the 2016-2017 year, the Commission is able to report that it completed two reports on time (Contempt and Search and Surveillance) and that feedback on its Contempt Report has to-date been positive (averaging 8.5 on a 1-10 scale). Feedback has not been sought on the Search and Surveillance Report because it was a joint report with the Ministry of Justice.

### **Budget and resourcing**

16. The Commission's law reform work is currently carried out by four Commissioners and a staff of 15 legal and policy advisers (13.89 FTEs), with one short-term secondment from the Office of Parliamentary Counsel. The law reform work is supported by 8 administrative staff (6.5 FTEs). The Commission's current annual budget is \$3.993 million.
17. The four Commissioners are Douglas White (retired Court of Appeal Judge), Donna Buckingham (former University Associate Professor), Belinda Clark QSO (former Secretary for Justice) and Helen McQueen (former partner of Chapman Tripp). Commissioners are appointed on five year warrants from the Governor-General acting on the Government's recommendation. The terms of current Commissioners are not due to expire until 2021 and 2022.
18. Douglas White is the President of the Commission, Chairman of the Board and Chief Executive, as well as one of the certifiers for the legislation revision programme.
19. The Commission employs a General Manager who currently has responsibility for the day to day management of the Commission, as well as assisting with the Commission's compliance with its reporting and monitoring obligations. With the recent resignation of the General Manager, the Commission has appointed an interim General Manager on

a fixed term contract to take us through the period of moving our premises in April 2018.

20. Commissioner remuneration, which comprises 33.1% of the annual budget, is determined by the Remuneration Authority. This significant element of the Commission's budget is therefore outside its control.
21. The Government has power under the Law Commission Act to appoint up to six Commissioners. The Commission has not had its full complement since May 2008. The Commission has previously recommended to the Government that a further Commissioner knowledgeable in tikanga Māori, together with further legal and policy advisers, should be appointed to enable the Commission to discharge its statutory obligation to take into account te ao Māori when making its law reform recommendations. The appointment of a Māori Commissioner is strongly endorsed by the Commission's Māori Liaison Committee, chaired by the Hon Justice Joe Williams. The Commission would seek the opportunity to be involved again in the appointment process for any new Commissioner.
22. The Commission is fortunate to be able to recruit high quality lawyers as its legal and policy advisers. Resourcing constraints, however, limit the number and seniority of advisers the Commission is able to employ. Efficient use of Commission resources favours an increase in the number of legal and policy advisers irrespective of the appointment of a fifth Commissioner and accompanying advisers.
23. The Commission's administrative staff comprises the interim General Manager, a Communications and Publications Adviser, an IT Adviser, a part-time Records Management Adviser, two part-time Information Advisers and two Personal Assistants. The number of administration staff assisting the Commission to comply with its various statutory and Governmental reporting and monitoring obligations is the bare minimum.
24. The Commission's budget of \$3.993 million has remained relatively static for the past eight years. [REDACTED]

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27. The President, Douglas White, would welcome the opportunity to meet with the Commission's incoming Minister to discuss this briefing further.

## **Second Review of the Evidence Act 2006**

1. The second review of the Evidence Act 2006 is a statutory review required by Parliament under s 202 of the Evidence Act. The Commission is required to review the operation of the provisions of the Act every five years.
2. The second review commenced in February 2017 when the terms of reference were agreed with the previous Minister.
3. As required by s 202 of the Act, as amended, the review must be completed by February 2019.
4. The Commission is currently working on a draft Issues Paper which is to be discussed with the Commission's Advisory Group and the Chief Justice's Judicial Advisory Committee on 4 and 5 December 2017 respectively. Guidance will also be sought from the Commission's Māori Liaison Committee.
5. After taking into account the comments from the Advisory Group and these Committees, the Commission plans to release its Issues Paper for wider consultation in February 2018.
6. The Commission will then analyse the submissions and comments it receives on the Issues Paper and draft its report for the Minister. The draft report will be referred to the Advisory Group and the Judicial Advisory Committee for further consideration.
7. The Commission will then settle the terms of its recommendations and complete its final report in time for submission to the Minister in February 2019.
8. Two Commissioners (Douglas White and Donna Buckingham) and six staff members, including one seconded from the Office of Parliamentary Counsel, are currently working on this project. Assistance is also being provided by Professor Elisabeth McDonald of Canterbury University.
9. In the course of this project the Commission has met with District Court Judges Kiernan and Harvey to discuss evidence issues arising from the District Court Sexual Violence Court Pilot being conducted in Auckland and Whangarei.
10. Commission staff have attended conferences held to mark a decade of experience with the Evidence Act organised by the Legal Research Foundation and Professor Elisabeth McDonald.

## **Review of the Property (Relationships) Act 1976**

1. The review of the Property (Relationships) Act 1976 (PRA) commenced in May 2016 when the Terms of Reference were published. The PRA is social legislation which affects almost every New Zealander over their lifetime.
2. Helen McQueen is the lead Commissioner on the project and five legal and policy advisers are working with her.
3. Under the Terms of Reference, the Final Report is to be completed in November 2018.
4. Since the commencement of the reference, the Law Commission has carried out extensive legal and social research, as well as preliminary consultation with practitioners, academics and community groups. The Law Commission was invited to participate in the Otago University Law School Symposium to mark 40 years of the PRA, held in December 2106.
5. In June 2017, the Law Commission met with its Expert Advisory Group and sought guidance from the Commission's Maori Liaison Committee.
6. On 16 October 2017, the Law Commission published its Issues Paper and an accompanying Study Paper which discusses the social change which has occurred in New Zealand since 1976. For the first time, the Commission created and launched a bespoke website to enable online consultation and submissions. Helen McQueen presented on the Issues Paper to the biannual NZLS Family Law Conference in Rotorua on 20 October 2017.
7. The consultation period runs until 7 February 2018. We are holding 18 public meetings in towns and cities around New Zealand. We are also meeting with practitioners in the places we are visiting and talking with a variety of community groups. There has been considerable media interest in the reference, including over 25,000 views of the Breakfast TV interview with Helen McQueen.
8. The Law Commission will analyse and consider the submissions and comments it receives on the Issues Paper and then prepare its report of the Minister. We will refer the draft Report to the Expert Advisory Group for further consideration and discuss it with our Maori Liaison Committee.
9. The Law Commission will then settle the terms of its recommendations and complete its final report for submission to the Minister in November 2018.



## **Review of the Criminal Investigations (Bodily Samples) Act 1995**

1. This review considers the powers the Act confers on police to collect, retain and use DNA in criminal investigations. It also evaluates the Act's provisions for the maintenance of DNA profile databanks managed by the Institute of Environmental Science and Research (ESR).
2. The review commenced at the end of July 2016. It considers whether the current legislation is fit for purpose and whether it is keeping pace with developments in forensic science, international best practice and public attitudes. It will also consider whether human rights and tikanga Māori are being appropriately recognised.
3. The legislation was substantially amended in 2003 and 2009. As part of the review, the Commission will also consider how to simplify its provisions and how to improve its accessibility.
4. The Commission has held several meetings with its Advisory Group and with its Officials Group (including Police and ESR) to establish its analytical framework, identify the operational issues, and test possible options for inclusion in an Issues Paper.
5. Given that the review raises issues of importance to particular ethnic groups, particularly Māori, the Commission has sought guidance from Māori members of its Advisory Group, the Commission's Maori Liaison Committee, Māori academics and experts in tikanga.
6. A website to educate the wider community on the issues that arise from the Act's operation was launched in October 2017. It contains four scenarios that highlight particular issues and has been constructed in consultation with ESR and Police. It invites members of the public to register their interest or provide preliminary feedback.
7. The Issues Paper is planned for publication in April 2018 and the Commission intends to complete its final report late in 2018.

## Review of the Law of Trusts: Stage 2 – Statutory & Corporate Trustees

1. In August 2017 the then-Minister responsible for the Law Commission, Hon Amy Adams, asked the Commission to review the law relating to statutory and corporate trustees.<sup>1</sup>
2. The Commission conducted the first stage of a review of the law of trusts between 2009 and 2013, which resulted in the Trusts Bill that is currently before Parliament. That review did not consider issues relating to charitable trusts, or to statutory and corporate trustees. The Commission indicated it could look at those issues in two subsequent stages to complete a comprehensive review of trusts law.
3. The Commission is in the early stages of scoping this project. Due to commitments on other projects, it does not plan to formally commence this review until early 2018.
4. The Commission's initial research suggests the main area that may benefit from review is the application of insolvency law where a company acts as trustee. We are not yet aware of any significant problems with the laws governing statutory trustees.
5. The areas we have identified for possible inclusion in this review so far are:
  - a. the adequacy of oversight and accountability mechanisms applying to statutory trustees (although we are not yet aware of any specific problems in this area);
  - b. opportunities to modernise and rationalise the legislation governing statutory trustees, some of which is quite old;
  - c. whether the current law and proposed changes in the Trusts Bill 2017 provide adequate protection for creditors dealing with corporate trustees and for beneficiaries of trusts with corporate trustees;
  - d. the relationship between trusts law and insolvency law, including the application of insolvent transaction rules to trust assets and the priority of claims between creditors and beneficiaries;
  - e. delegation to sole co-trustees that are corporations and the appointment of corporations as custodian trustees.

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<sup>1</sup> **Statutory trustees** refers to the Public Trust and Māori Trustee, which are Crown entities, and the non-governmental trustee companies with powers under the Trustee Companies Act 1967. Statutory trustees can be appointed as a trustee for any trust and have various additional powers, such as the ability to administer small estates. Some are also licensed supervisors under the Financial Markets Supervisors Act 2011.

**Corporate trustees** refers to any company that acts as a trustee. This includes companies established by law firms to act as a trustee for clients' trusts and companies set up to manage a single trading trust. The company structure is generally used to limit the liability of the directors to beneficiaries and creditors, compared to if the directors personally acted as trustees.

## Review of Class Actions and Litigation Funding

1. In August 2017 the then-Minister responsible for the Law Commission, Hon Amy Adams, asked the Commission to conduct a review of class actions and litigation funding.<sup>2</sup> The Commission had suggested this reference based in part on discussions with the New Zealand Law Society.
2. The Commission is in the early stages of scoping this work and does not intend to formally commence the review until the first half of 2018. A symposium on class actions is being arranged by an academic at the University of Auckland in March 2018, which may assist us identifying further issues for consideration.
3. Both class actions and litigation funding (which are often used in combination) may help to improve access to justice for plaintiffs who would otherwise be unable or unwilling to pursue a claim. Class actions also have the potential to increase the efficiency of court proceedings by allowing what would otherwise be multiple individual claims to be determined collectively.
4. Class actions and litigation funding are not specifically regulated in New Zealand, in contrast to most comparable jurisdictions. While “representative” proceedings are possible under the High Court Rules,<sup>3</sup> there is no fixed procedure for conducting them. Litigation funding was historically considered objectionable at common law, but there is now case law supporting its use within certain parameters.
5. Members of the judiciary, practitioners and academics have called for the enactment of legislation to enable class actions and litigation funding. The absence of clear laws is said to limit the use of these mechanisms (and hence limit access to justice) and lead to inefficient and expensive proceedings involving numerous interlocutory hearings.
6. The Rules Committee prepared a draft Class Actions Bill in 2009 and provided it to the then-Minister of Justice, Hon Simon Power, but it was not progressed. Since 2009, the law has moved on in New Zealand and other jurisdictions. New Zealand case law has developed significantly, the United Kingdom has passed new legislation and the Law Commissions of Victoria and Ontario are currently reviewing class actions laws.
7. In this review the Law Commission could consider afresh, in light of those developments, whether law reform is desirable and, if so, what kind of regime is appropriate for New Zealand.

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<sup>2</sup> In a **class action**, a group of plaintiffs with a common interest in a proceeding is represented collectively by one or more members of the group. **Litigation funding** is when a third party (often a specialist litigation funding company) pays a party’s litigation costs and in exchange receives a proportion of the proceeds if that party is successful.

<sup>3</sup> Two examples of representative proceedings currently before the courts are the Southern Response litigation (concerning unresolved insurance claims following the Canterbury earthquakes) and the Kiwifruit claim (in which kiwifruit growers allege the Ministry for Primary Industries was negligent in failing to halt the PSA virus). In both cases the plaintiffs’ costs are being paid by a litigation funding company.